



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

Date: **APR 30 2013** Office: CALIFORNIA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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,

Michael T. Kelly
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.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a preschool and early childhood center with 24 employees, established in 2001. It seeks to employ the beneficiary in what it designates as a preschool and childcare education administrator and to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation. On appeal, counsel for the petitioner contends that the director's findings were erroneous and submits a brief and additional evidence in support of this contention.

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 petitioner's response to the RFE; (4) the director's notice of decision; and (5) the petitioner's Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director's decision 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.

The AAO notes at the outset that the petition must also be denied for an additional reason, not identified by the director in her decision, due to the petitioner's failure to provide a certified Labor Condition Application (LCA) that corresponds to the petition.

Beyond the decision of the director, the petition must also be denied due to the petitioner's failure to provide a certified Labor Condition Application (LCA) that corresponds to the petition. Counsel points out, and the AAO concurs, that this is a position comprised of two distinct occupations: an assistant director for a preschool, and a special education teacher. The AAO notes that where a petitioner seeks to employ an H-1B beneficiary in what amounts to two distinct occupational categories, the petitioner must pay the wages commensurate with the higher paying occupation. *See generally* 8 C.F.R. § 214.2(h); *DOL, Employment and Training Administration's Prevailing Wage Determination Policy Guidance (Revised Nov. 2009)*. The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate and, also, in this case, that it would pay the wages of the *lesser* occupational category.

Specifically, although the job title on the LCA submitted with the petition reads "Assistant Director," and was certified for SOC (O*NET-OES) Code 11-9031 or "Education Administrators, Preschool and Childcare," the job as described by the petitioner, should have been classified under SOC (O*NET-OES) Code 25-2041 or "Special Education Teachers, Preschool, Kindergarten, and Elementary School," because that is the occupational code for the

higher paying occupation. As will be discussed, the petitioner was required to provide at the time of filing an LCA certified for SOC (O*NET-OES) Code 25-2041, not SOC (O*NET-OES) Code 11-9031, in order for it to be found to correspond to the petition.

DOL provides clear guidance for selecting the most relevant O*NET occupational code classification.¹ The "Prevailing Wage Determination Policy Guidance" states the following:

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

The AAO observes that the prevailing wage for the position "Special Education Teachers, Preschool, Kindergarten, and Elementary School" with the SOC (O*NET-OES) Code of 25-2041 at a Level II wage is significantly higher at \$50, 243 per year than the Level II wage of \$37, 669 for "Education Administrators, Preschool and Childcare." Thus, according to DOL guidance, because the petitioner believed its position was appropriately described in "Special Education Teachers, Preschool, Kindergarten, and Elementary School" and was a combination of "Special Education Teachers, Preschool, Kindergarten, and Elementary School" and "Education Administrators, Preschool and Childcare," it should have chosen the relevant occupational code for the highest paying occupation, in this case "Special Education Teachers, Preschool, Kindergarten, and Elementary School." However, the petitioner chose the occupational category for the lower paying occupation for the proffered position on the LCA.

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

¹ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA that a petitioner submits to USCIS for an H-1B specialty occupation petition actually corresponds to that petition. As here the petitioner has failed in this regard, the petition must be denied for this additional reason.

Next, the AAO turns to the specialty occupation issue which is the basis of the director's decision to deny this petition.

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)(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 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.

The AAO acknowledges that on appeal counsel correctly notes that "preponderance of the evidence" is the standard of proof governing this matter. However, upon review of the entire record of proceeding, including all of the submissions on appeal, the AAO does not concur with counsel's contention that the petitioner has satisfied that standard with regard to the specialty occupation issue.

With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

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

* * *

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

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

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

The AAO conducts its own separate, independent, and *de novo* review of the records of proceeding pertaining to the matters before it.² In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its independent, *de novo* review of the totality of the evidence in the entire record of proceeding, from the filing of the Form I-129 and its allied documents through the submission of the Form I-290B and its allied documents on appeal, the AAO finds that the preponderance of the evidence in the record of proceeding does not indicate that the proffered position is "more likely than not" or "probably" a specialty occupation position. Accordingly, the appeal will be dismissed, and the appeal will be denied.

In this matter, the Form I-129 and its supporting documentation indicated that the petitioner filed this petition to seek the beneficiary's services in a position to which it applied the title Assistant Director but which it claimed would also include serving as a special education teacher.

² The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In its support letter, dated November 15, 2011, the petitioner provided the following description of the proffered position (verbatim):

Under the guidance of the Executive Director, the Assistant Director will be responsible for all aspects of the early childhood center including the development of children, curriculum implementation, budget development, accreditation and licensing standards. More specifically, she will: Provide a personalized instructional program that is compatible with the abilities, needs and learning environment that is characterized by the consistent application of sound mental health and educational psychology practices; Follow prescribed curriculum, instructional methods and materials; Employ creative methods of instruction and utilize a variety of materials within the structure of the designated curriculum; Become acquainted with the characteristics, needs, abilities and problems of each child through personal interaction and by seeking information from psycho-educational reports, hearing and vision reports, staffing notes, end-of-the year student status reports, etc.; Maintain up-to-date lesson plans; Use the designated methods of reporting student progress to parents; Attend specified in-service meetings and conferences with the building principal; Develop a close relationship with each student's parents or guardians; and Perform such other professional duties as may be assigned by the Director. She will also work with special needs students where she will develop and adapt conventional teaching methods to meet their individual needs; use special equipment and facilities, such as audiovisual materials and computers to stimulate interest in learning, collaborate with the classroom teacher to define short-term learning difficulties and working with colleagues to identify each student's special needs, Liaise with other professionals, such as social workers, speech and language therapists, physiotherapists and educational psychologists; Assist in special needs students' personal care/medical needs, which may involve reviewing statements of special education needs; Receive in-service training and behavior management.

In addition, the petitioner claims that the position is a professional position within the petitioner's organization. Further, the petitioner claimed that the proffered position entails the theoretical and practical application of a body of highly specialized knowledge, requiring at least a Master's degree in Education, or a Master's degree in Education – Early Childhood with Special Education Endorsement.

As previously noted, the petitioner also submitted a certified Labor Condition Application (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 of "Education Administrators, Preschool and Childcare" – SOC (ONET/OES Code) 11-9031.00, at a Level II wage. The LCA indicates that the beneficiary would work for the petitioner in Skokie, IL and in Chicago, IL, two cities within Cook County.

Counsel for the petitioner responded to the RFE and submitted the petitioner's response letter dated June 3, 2012 and additional evidence. In an exhibit submitted in response to the RFE, the

petitioner provided a revised description of the duties of the proffered position, along with the percentage of time that the beneficiary would spend performing each of the duties. In addition to providing the same narrative as presented at the time of the initial filing, the petitioner provided the following supplemental description of the duties of the proffered position:

Assistant Director (50%)

1. To participate in the hiring of all teachers and staff in the building.
2. To secure substitute teachers.
3. To supervise and evaluate teachers and all other staff in the building.
4. To correspond with parents and other entities inquiring about the school or its program. Most schools publish handbooks and periodic newsletters.
5. To prioritize requisitions that come in for equipment and supplies.
6. To work with the parent organization to facilitate their activities.
7. To discipline and issue citations for disturbances.
8. To work with Pupil Appraisal Contact Persons and other agency personnel.
9. To supervise lunchrooms and coordinate and monitor drop offs and pickup periods.
10. To communicate regularly with teachers and help them with problems they have with their students, parents, other teachers or the curriculum.
11. Administrators will promote a positive attitude and actively lead the school in a focused effort to develop and implement an inclusive education program.
12. Administrators will assist in problem solving, especially with logistical issues. (Example: Providing time for collaboration between special and general educators.)
13. Administrators should provide the assurance for every parent that their child is welcome in the school and participating in an inclusive educational setting.
14. To promote a positive attitude and actively lead the school system in a focused effort to develop an implement an inclusive education program.
15. To assist the schools in problem solving, and ensure that support and resources are available to the schools to implement inclusion.

16. To provide in-service training that addresses the identified needs of schools and teachers.
17. To provide teachers the opportunity to attend workshops and conferences so that they continue to grow and gain the necessary skills to implement inclusion successfully in their schools.
18. To provide opportunities for teachers and para-educators from different schools to visit other schools to share experiences and find solutions to mutual challenges.
19. Staff should have an ongoing role in the successful implementation of inclusion and provide continuity from year to year.
20. To participate in the hiring of teachers, para-educators and professional staff.
21. To serve as a liaison among building directors, teachers, and staff representatives.
22. To handle reports, grants, requisitions, and plan budgets.
23. To help teachers understand district policy and procedures.
24. To sit on Individual Education Plan meetings, take notes and give input as needed. To attend problem meetings, facilitate due process or go to court when necessary.
25. To coordinate with agencies that participate in student meetings (e.g., developmental disability case managers).
26. To correspond with other districts and individuals requesting information about programs or desiring tours.
27. To problem solve with parents and teachers.

Special Educator (40%)

1. Serve as case managers and be responsible for the development, implementation, and evaluation of the designated [students].
2. Provide the necessary information to the classroom teacher prior to the child entering the class regarding the student's disability, medical concerns, and/or equipment operation (ways to meet unique needs).
3. Collaborate with the regular education teacher in adapting the curriculum,

providing appropriate modifications, ensuring the implementation of modifications, and assessing overall progress of the child.

4. Develop schedules and supervise plans for teachers.
5. Complete and maintain all assigned student's records (i.e., ESY, documentation, progress report, behavior plan, etc.).
6. Maintain contact with the assigned student's parents or family.
7. Assist with other students who are in need of assistance.
8. Monitor student progress, which is then conveyed in the progress report.
9. Gather data useful for planning instructional programs, modifying existing programs, and communicating with others.
10. Have excellent skills in the area of public relations in order to maintain goodwill with general educators.
11. May team teach lessons, either small group or whole class.
12. Assist in the development of classroom weekly lesson plans.
13. Assist in the development of learning centers.
14. Assist in the development of enrichment materials.
15. Assist in the completion of student records.
16. The special education teacher may assist in daily routines such as taking roll and lunch count.
17. With the general education teacher, develop and supervise plan for paraprofessional duties.
18. With the general education teacher, teach identified lesson. Individual student and classroom needs must be considered when planning co-teaching activities.
19. Provide direct and indirect instructional support to students in a positive environment.
20. Employ special educational strategies and techniques during instruction to improve the development of sensory- and perceptual-motor skills, language, cognition, and memory.

21. Instruct students in academic subjects using a variety of techniques such as phonetics, multi-sensory learning, and repetition to reinforce learning and to meet students' varying needs and interests.
 - Teach socially acceptable behavior, as determined by the students' individualized education programs by employing techniques in an overall positive behavioral support system.
 - Modify the general education curriculum for students with disabilities based upon a variety of instructional techniques and technologies.
 - Plan and conduct activities for a balanced program of instruction, demonstration, and work time that provides students with opportunities to observe, question, and investigate.
 - Establish and enforce rules for behavior and procedures for maintaining an environment conducive to learning for all students.
 - Meet with parents to discuss their children's progress and to determine priorities for their children and their individualized education needs.
 - Confer with parents, administrators, testing specialists, social workers, and other professionals to develop individualized education programs designed to promote students' educational, physical, and social/emotional development.
 - Maintain accurate and complete student records and prepare reports on children and activities, as required by laws, district policies, and administrative regulations.
 - Establish clear objectives for all lessons, units, and projects and communicate those objectives to students.
 - Develop plans for effective communication, monitoring, and follow-up of students in inclusive classroom settings.
 - Provide crisis intervention, as needed, for students and those in inclusive classrooms.
 - Assist in collection of data for providing appropriate classroom interventions.
 - Serve as a member of a multidisciplinary team as appropriate.
 - Assist in preparation of data for local, state and federal reports.

- Maintain professional competence by participating in staff development activities, curriculum development meetings, and other professional opportunities.
- Perform related work as required.

Pupil Appraisal (10%)

1. To evaluate as a member of the multidisciplinary team and in accordance with the guidelines and the regulations for those pupils suspected as being in need of special education services.
2. To interpret assessment findings to parents, teachers, directors, and other professional staff.
3. To complete reevaluations.
4. Attend meetings on initial and reevaluation cases and assist teachers with the implementation of the evaluation/reevaluation results.
5. To provide teachers with consultative services regarding modifications, interventions, teaching/behavior management strategies.
6. To assist contact school with the implementation of inclusion by providing assistance regarding scheduling, grading, and appropriate placements for exceptional students.
7. To assist with the Success-For-All reading program (i.e., screening, testing, placement, gathering data, behavioral observations/modifications, etc.)
8. To participate and serve as a member of the School Wide Assistance Team.
9. To provide screenings and support services to contact schools.
10. To participate in special education eligibility determination and staffings.
11. To attend staff, professional, and interagency meetings.
12. Increased intervention with families, helping parents to understand developmental levels and set realistic expectations for their children.
13. Increase time for collaborative problem-solving with regular education teachers.
14. Increase time for collaborative problem-solving with regular education teachers.

15. Increase participation in curriculum adaptation to meet the needs of included students.
16. Assist families to understand how specific disabilities impact student ability to succeed in targeted curricular areas.
17. To be vigilant that students with disabilities are included appropriately, in order to ensure that all students in a regular classroom have equal opportunities to benefit from the instructional program.
18. Monitor ongoing programs.
19. Increase time devoted to staff development of the needs of students with low incidence disabilities who are to be included, such as multi-needs, autism, medically fragile, consultations as requested.

Counsel maintains in her RFE response letter that the National Association for the Education of Young Children (NAEYC), that a bachelor's degree in early childhood education is an appropriate degree for positions with duties similar to those associated with the proffered position, as indicated in its July 2009 position statement regarding the standards for early childhood professional preparation programs.

Counsel maintains that the position requires a master's in education, with an endorsement in early childhood education. In support of its claim, counsel cited the occupational classification section on "Special Education Teachers" in the 2012-2013 edition of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter referred to as the *Handbook*).³ In pertinent part, the section cited by the petitioner states, "Private schools typically seek teachers who have at least a bachelor's degree in special education." In further support that the position is a specialty occupation, counsel submitted the following evidence: (1) job vacancy announcements claimed to be for positions that are the same or similar to the proffered position; (2) an opinion letter from [REDACTED] Ed.D., a professor from the Department of Educational Theory and Practice, [REDACTED] (3) job vacancy announcements placed by the petitioner for the proffered position in various media outlets; (4) job vacancy announcements placed by the petitioner for the proffered position; and (5) information about the petitioner from its Internet website.

On October 9, 2012, the director denied the petition. 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. Counsel for the petitioner submitted a timely appeal of the denial of the H-1B petition.

³ The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.

On appeal, counsel asserts that the Service abused its discretion and failed to apply the preponderance of the evidence standard. More specifically, counsel claims that the proffered position meets at least one of the regulatory criteria.

To prove that a job requires the theoretical and practical application of a body of highly 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 or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position.

The petitioner stated that the beneficiary would be employed in an assistant director position that has special education teacher duties. 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 will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), 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 that is the subject of the petition.

At the outset, the AAO will address the opinion letter from [REDACTED] Professor in the Department of Educational Theory and Practice, [REDACTED]

[REDACTED] While counsel and the petitioner seem to place considerable reliance upon that letter, the AAO finds that, for the reasons and deficiencies to be discussed below, the letter merits no probative value towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In this letter dated May 29, 2012, [REDACTED] states that the proffered position is a specialty occupation and, therefore, requires a bachelor's degree in early childhood education or a related field. In addition, [REDACTED] relates that positions that are similar to the proffered position is a typical job placement for students who complete a bachelor's degree from the [REDACTED]. In addition, she states that in her observation, employers with Assistant Director vacancies at day care centers that recruit on campus at [REDACTED] always seek graduates with a minimum of a bachelor degree-level education.

[REDACTED] provided a summary of her education and experience and attached a copy of her curriculum vitae. She described her qualifications, including her educational credentials and professional experience, as well as provided a list of the publications she has written. Based upon a complete review of [REDACTED] letter and curriculum vitae, the AAO notes that, while

may, in fact, be a recognized authority on various topics, she has failed to provide sufficient information regarding the basis of her claimed expertise on early childhood education. As she explains in her letter, her areas of expertise are in educational subspecialties of language of teaching and learning with technology, distance/online education, media literacy, and electronic literacy. claims that she is qualified to comment on the proffered position of Assistant Director because of the position she holds at

However, without further clarification, it is unclear how her position as a professor of Educational Theory and Practice directly translates to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of small, private, early childhood day care learning centers servicing families with special education needs.

opinion letter and curriculum vitae do not cite specific instances in which her past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that she has published any work or conducted any research or studies pertinent to the educational requirements for combined positions of assistant director/special education teachers in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that she is an authority on those specific requirements. The opinion letter contains no evidence that it was based on scholarly research conducted by in the specific area upon which she is opining. In reaching this determination, provides no documentary support for her ultimate conclusion regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies). asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement.

does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's organization. Her opinion does not relate her conclusion to specific, concrete aspects of this petitioner's operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. There is no evidence that has visited the petitioner's organization, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. provides general conclusory statements regarding assistant director positions but she does not provide a substantive, analytical basis for her opinion and ultimate conclusions.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the advisory opinion rendered by is not probative evidence that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) qualifies as a specialty occupation. The conclusions reached by lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which she reached such conclusions. There is an inadequate factual foundation established to support the opinion and the AAO finds that the opinion is not in accord with other information in the record.

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter*

of *Caron International*, 19 I&N Dec. 791 (Comm'r 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 each of the bases in this decision for dismissing the appeal.

As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Education Administrators, Preschool and Childcare." The AAO reviewed the information in the *Handbook* on "Preschool and Childcare Center Directors," the closest corresponding occupational title, regarding this occupational category and finds that the *Handbook* does not indicate that these positions comprise an occupational group 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 and Childcare Center Director" states the following about this occupational category:

Education and training requirements vary by state. Requirements range from a high school diploma to a college degree.

Education

Most states require preschool and childcare center directors to have at least a high school diploma, but some require an associate's or bachelor's degree in early childhood education. These degree programs teach students about child development, strategies to teach young children, and how to observe and document children's progress. Employers may prefer candidates who have a degree in early childhood education or at least some postsecondary education in early childhood education.

Work Experience

Some states require preschool and childcare center directors to have experience in early childhood education. The amount of necessary experience varies by state.

Certification

Some states and employers require preschool and childcare center directors to have nationally recognized certification. Most states require the Child Development Associate (CDA) certification 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.

Licenses

Many states require childcare facilities to be licensed. To meet licensure requirements, the facility's staff, including the director, must meet certain requirements: they must pass a background check, have the right immunizations, and meet a minimum training requirement.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, "Preschool and Childcare Center Directors," available on the Internet at <http://www.bls.gov/ooh/management/preschool-and-childcare-center-directors.htm#tab-4> (last visited March 15, 2013).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the prevailing wage for the proffered position as wage for a Level II (qualified level) position on the LCA.⁴ This designation is indicative of a comparatively low position relative to others within the occupation.⁵ That is, in accordance with the relevant DOL explanatory information on wage

⁴ 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.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) 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. 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.

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.

⁵ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level II wage rate is describes as follows:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

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.

levels, this Level II wage rate is only appropriate for a position in which the beneficiary is only required to have a good understanding of the occupation and would be expected to perform moderately complex tasks that require a limited exercise of judgment. This wage rate also indicates that the beneficiary would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would not utilize independent judgment. Considering that the actual position is an assistant director, it also likely means that she would receive specific instructions on required tasks and expected results.

The *Handbook* does not state that a baccalaureate or higher degree, in a specific specialty, or its equivalent is normally the minimum requirement for entry into preschool and childcare director positions. This passage of the *Handbook* reports that preschool and childcare center directors have educational backgrounds ranging from a high school diploma to a college degree in early childhood education. The *Handbook* indicates that some states and employers require preschool and childcare center directors to have nationally recognized certification. According to the petitioner, the proffered position requires a special education endorsement. Notably, neither counsel nor the petitioner have explained the organization responsible for the endorsement, or the requirements for the endorsement, or provided sufficient contextual information about this endorsement.⁶ Moreover, there is no evidence within the record of proceeding that would support the claim that the proffered position requires a special education endorsement. 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)).

On appeal, counsel submits the *Handbook* materials regarding the occupational classification for "Special Education Teachers." The subchapter of the *Handbook* entitled "How to Become a Special Education Teacher" states the following about this occupational category, in pertinent part:

Public school teachers are required to have a least a bachelor's degree and a state-issued certification or license. Private schools typically require teachers to have a bachelor's degree. Teachers in private schools are not required to be licensed or certified, but private schools may prefer to hire teachers who have a license.

Education

All states require public special education teachers to have at least a bachelor's degree. Some of these teachers major in elementary education or a content area, such as math or chemistry, and minor in special education. Others get a degree specifically in special education.

In a program leading to a bachelor's degree in special education, prospective teachers learn about the different types of disabilities and how to present

⁶ Within counsel's RFE response letter dated June 3, 2012, counsel might have attempted to provide context for the beneficiary's special endorsement; the organizational body that confers the endorsement; and the particular education and training that would lead to an endorsement, but the discussion ceased mid-sentence on page two of the RFE response letter.

information so that special education students will understand. These programs typically include fieldwork, such as student teaching.

Some states require special education teachers to earn a master's degree in special education after earning their teaching certification.

Teachers in private schools do not need to meet state requirements. However, private schools typically seek teachers who have at least a bachelor's degree in special education.

Licenses

All states require teachers in public schools to be licensed. A license is frequently referred to as a certification. Those who teach in private schools are not required to be licensed.

Requirements for certification vary by state. However, all states require at least a bachelor's degree. They also require completing a teacher preparation program and supervised experience in teaching, which is typically gained through student teaching. Some states require a minimum grade point average.

Many states offer general special education licenses that allow teachers to work with students across a variety of disability categories. Others license different specialties within special education.

Teachers are often required to complete annual professional development classes to keep their license. Most states require teachers to pass a background check. Some states require teachers to complete a master's degree after receiving their certification.

Some states allow special education teachers to transfer their licenses from another state. However, some states require even an experienced teacher to pass their own licensing requirements.

All states offer an alternative route to certification for people who already have a bachelor's degree but lack the education courses required for certification. Some alternative certification programs allow candidates to begin teaching immediately, under the close supervision of an experienced teacher.

These alternative programs cover teaching methods and child development. When they finish the program, candidates are awarded full certification. Other programs require students to take classes in education before they can start to teach. Students may be awarded a master's degree after completing either type of program. For more information about alternative certification programs, contact the National Center for Alternative Certification

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, "Special Education Teachers," available on the Internet at <http://www.bls.gov/ooh/education-training-and-library/special-education-teachers.htm#tab-4> (last visited March 15, 2013).

The *Handbook* does not state that a baccalaureate or higher degree, in a specific specialty, or its equivalent is normally the minimum requirement for entry into special education teacher positions in private school settings. This passage of the *Handbook* reports that all *public school* teachers must a bachelor's degrees, but it does not state a specific specialty. As counsel points out, the *Handbook* further states that special education teachers in private schools "typically seek" teachers who have at least a bachelor's degree in special education. This passage supports a finding that a bachelor's degree is mandatory for *public* school special education teachers, albeit in a variety of educational fields (emphasis added). Here, the position is in a private school. The *Handbook* essentially states a prevailing preference, but not a requirement, for teachers to have earned a special education degree for entry into special education teacher positions.

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfy the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. 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." 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO here incorporates by reference and reaffirms its earlier finding that the opinion letter from [REDACTED] claiming that a bachelor's degree in early childhood education is required, is without merit.

Upon review of the totality of the evidence in the entire record of proceeding, the AAO concludes that the petitioner has not established that the proffered position falls under occupational categories for which the *Handbook*, or other authoritative source, indicates that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the occupations. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition 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 first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This first alternative prong calls for a petitioner to establish that a requirement of a bachelor's or higher 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.

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

The petitioner and counsel submitted the following documents to support the assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations: (1) a copy of a 2009 position statement of the National Association for the Education of Young Children (NAEYC), entitled, "NAEYC Standards for Early Childhood Professional Preparation Programs;" (2) copies of twelve job vacancy announcements; and (3) the aforementioned letter from [REDACTED]

The NAEYC position statement submitted on appeal states in the introduction that its position statement specifically focuses on the programs that prepare professionals working in the field, and that it represents a sustained vision for the early childhood field. In other words, it is not an attestation as to presently enforced educational standards for determining whether a person can enter the early childhood education field, or serve as assistant director of a preschool with special education teaching duties. For this reason, the AAO finds that the professional association's position statement is not on point: it is intended to espouse and advocate a position, but not to attest to an authoritative industry-wide standard for entry into such occupations among similar organizations. Rather, this position statement articulates a vision stemming from the aspirational standards of the NAEYC.

Despite counsel's claim that this document indicates a bachelor's degree in early childhood education is appropriate for one charged with the responsibilities similar to the proffered position in similar organizations, the AAO finds that counsel's reliance on this document is misplaced. Of particular importance to this decision, the AAO notes that there is nothing within the document to suggest that the NAEYC standards are required for entry into the profession. On page three of the document, it states that the core standards are student performance standards. On page four of the document, it states that there are multiple professional pathways for early childhood professionals. On page seven, as highlighted by counsel, the statement asserts that "[educational] programs will be best prepared to meet the NAEYC standards when...faculty hold graduate degrees in early childhood education/child development or substantive early childhood coursework at the graduate level and have demonstrated competence in each filed of specialization that they teach." Taken as a whole, the document states that faculty with advanced degrees in early childhood education will be best situated to meet the NAEYC professional guidelines of excellence, which are aspirational standards. For all of the related reasons, this document is not credible evidence that meets the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In support of the assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner and counsel submitted copies of

twelve job vacancy advertisements. The advertisements provided, however, establish that a bachelor's degree is generally required by the advertising employers for most of the advertised positions, but a bachelor's degree or the equivalent in a *specific specialty* is not. In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that the submitted advertisements are relevant, as the record does not indicate that the posted job announcements are for parallel positions in similar organizations in the same industry.

Specifically, none of the twelve advertisements indicate that a bachelor's degree in a specific specialty is a requirement for entry into those positions. Furthermore, as not one of the aforementioned advertising entities offered a position that was both an assistant director and a special education teacher, they cannot be found to be parallel positions. Thus, for the reasons discussed above, the petitioner's reliance on the job vacancy advertisements is misplaced. As a result, the petitioner has not established that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.⁷

Finally, on appeal, petitioner and counsel submitted an opinion letter from [REDACTED] in support of the proposition that the degree requirement is common to the industry in parallel positions among similar organizations. The letter from [REDACTED] attached *curriculum vitae* do not provide sufficient information to establish that [REDACTED] has expertise in early childhood education. The AAO hereby incorporates its earlier comments, analysis, and findings regarding the deficiencies and lack of probative value in the opinion letter from [REDACTED]. The AAO may, in its discretion, use as an advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791. Therefore, the AAO finds that the letter from [REDACTED] does not establish a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, that 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.

Thus, 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 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).

⁷ Further, 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 just twelve job vacancy announcements with regard to determining the common educational requirements for entry into parallel positions in similar 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").

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 provided numerous duties for the proffered position of assistant director. However, the petitioner failed to demonstrate how the assistant director duties described require the theoretical and practical application of a body of highly specialized knowledge such that a person with at least a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. While the courses listed on the copy of the beneficiary's transcript for the Master of Education in Instructional Leadership from the [REDACTED] may be beneficial in performing certain duties of an assistant director position with special education teacher duties, the petitioner has failed to demonstrate how an established curriculum of such courses culminating in the attainment of a baccalaureate (or higher) degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates a wage level based upon the occupational classification "Education Administrators, Preschool and Childcare" at a Level II (qualified level) wage.

Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique 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 the equivalent, for the position.

Of course, the AAO will necessarily review and consider whatever evidence the petitioner may have submitted with regard to its history of recruiting and hiring for the proffered position and with regard to the educational credentials of the persons who have held the proffered position in the past.

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 or its equivalent as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. To interpret the regulation 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 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.

Within the record of proceeding, counsel provided a copy of job vacancy announcements placed by the petitioner in different media outlets in March 2012. At the outset, the AAO notes that these advertisements post-date the filing of the instant petition, and for this reason, these job vacancy announcements do not establish a history of recruiting that would be necessary to satisfy that the position actually requires the theoretical and practical application of knowledge. In addition, counsel and the petitioner assert in both the RFE response and on appeal that the petitioner has a history of hiring teachers and directors to have, at a minimum, a bachelor's degree in education. Although counsel lists employees and the respective educational backgrounds, there is no evidence in the record establishing that: (1) the individuals have earned the stated educational credentials; and (2) the petitioner employs or has employed these individuals. As previously noted, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Moreover, the AAO notes that there is nothing in the record to indicate that these individuals held the proffered position of an assistant director with special education teacher duties. Thus, the record of proceeding does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

The record of proceeding does not establish the prior history of recruiting and hiring required to satisfy this particular criterion. Therefore, 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 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.

On appeal, counsel argues in her brief that the nature of the duties are managerial in nature, and that it is a crucial role within the petitioner's business. Specifically, counsel contends that the incumbent in the position must analyze relevant information, make pertinent recommendations, and use independent judgment when implementing measures that impact the students, teachers, and supporting staff. Additionally, counsel and the petitioner point to the following duties as having a nature that is sufficiently specialized and complex: developing and implementing an education program, and complementing its growth momentum; providing the petitioner with a competitive advantage; conceptualizing, analyzing, and implementing the educational curriculum; improving performance and training personnel. As such, counsel and the petitioner opine, the appropriate professional must possess a bachelor's degree in education, early childhood education, or a related field, along with a strong background in education leadership, as these fields impart skills necessary for the position.

The AAO finds, however, that the requisite level of specialization and complexity is not self-evident in even the full combination of the duties identified in the record of this proceeding. Further, the AAO finds, the petitioner has not supplemented the duties with probative evidence documenting that their nature is in fact such that their performance requires the application of knowledge usually associated with the attainment of at least a bachelor's degree, or the equivalent, in a specific specialty.

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). Again, the AAO acknowledges that the record of proceeding contains an opinion letter from [REDACTED]. However, as previously discussed, the AAO finds that the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has submitted insufficient 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 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.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to establish that it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, the beneficiary's qualifications to serve in a specific specialty occupation are not relevant. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (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.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 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.