



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **APR 30 2013** OFFICE: VERMONT 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,

*Ron Rosenberg*  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner<sup>1</sup> submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on February 10, 2011. On the Form I-129 visa petition, the petitioner describes itself as a school system<sup>2</sup> established in 1980. In order to continue to employ the beneficiary in what it designates as a lead teacher position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on September 27, 2011, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner submitted an appeal of the decision on October 28, 2011. On appeal, the petitioner implies, but does not specifically state, that the director's basis for denial of the petition on the specialty occupation issue was erroneous. In support of this position, the petitioner submitted a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice of decision; and (5) the Form I-290B, Notice of Appeal, and supporting materials. 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.

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a lead teacher to work on a full-time basis at a salary of \$23,660 per year. The petitioner submitted the following information regarding the proposed duties of the proffered position at Section 1 of page 8 of the Form I-129 Supplement H:

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<sup>1</sup> The AAO notes that the petitioner's FEIN number is associated with the [REDACTED] and not with the name the petitioner listed on the petition. The petitioner provided no explanation for this discrepancy.

<sup>2</sup> In the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement, on page 17, at Part A, section 6, the petitioner lists the North American Industry Classification System (NAICS) Code as "624410" which corresponds to "Child Day Care Services." According to the NAICS Internet site (<http://www.census.gov/cgi-bin/sssd/naics/naicsrch>), "[t]his industry comprises establishments primarily engaged in providing day care of infants or children. These establishments generally care for preschool children, but may care for older children when they are not in school and may also offer pre-kindergarten educational programs."

Design, implement and evaluate lesson plans which allow for individual learning.  
Develop long-range goals and objectives for each student.

In support of the petition, the petitioner submitted a credential evaluation, dated January 11, 2010, by World Education Services (WES Credential Evaluation), stating that the beneficiary has the U.S. equivalency of a bachelor's degree in elementary education, a master's degree in education administration and supervision, and one semester of undergraduate study in preschool education.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the petitioner listed the job title for the proffered position on the LCA as "lead teacher," and listed the occupational classification as "Teachers and Instructors, All Other" – SOC (ONET/OES Code) 25-3099.00, at a Level I wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 21, 2011. The petitioner was asked to submit additional documentation to establish that a specialty occupation position exists for the beneficiary. Additionally, the petitioner was asked to submit evidence that shows that the beneficiary qualifies for a specialty occupation. The director outlined the specific evidence to be submitted.

Counsel for the petitioner responded to the RFE on August 5, 2011. In the RFE response letter, dated July 22, 2011, counsel asserts that "[t]he position requires the expertise of a baccalaureate degree holder in order to design, implement and evaluate lesson plans which allow for individual learning."

In the RFE response letter, counsel submitted a revised description for the proffered position, transcribed verbatim, as follows:

Teaches one or more subjects to students: Instructs students, using various teaching methods, such as lecture and demonstration and uses audiovisual aids and other materials to supplement presentations. Prepares course objectives and outline for course of study following curriculum guidelines or requirements of state and school. Assigns lessons and corrects homework. Administers tests to evaluate progress, records results and issues reports to inform parents of progress. Participates in faculty and professional meetings, educational conferences and teacher training workshops. Performs related duties, such as sponsoring one or more activities or student organizations, assisting pupils in selecting course of study and counseling student in adjusting and academic problems.

In the RFE response letter, counsel also asserts that the petitioner is a private school. Counsel submitted an excerpt from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* for the occupational classification of "Teachers – Kindergarten, Elementary, Middle, and Secondary" that states that "[p]rivate school teaches [sic] do not have to be licensed but still need a bachelor's degree."<sup>3</sup>

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<sup>3</sup> The AAO notes that counsel has misquoted the cited phrase in the *Handbook* for the occupational

Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on September 27, 2011. The petitioner filed a timely appeal of the denial of the H-1B petition.

On appeal, counsel for the petitioner submitted (1) a letter, dated October 11, 2011, from [REDACTED], Executive Director for the petitioner (Petitioner's Letter); (2) a revised description of the proffered position; (3) a copy of the WES Credential Evaluation, previously submitted with the petition; and (4) a copy of the beneficiary's Child Development Associate (CDA) credential, dated September 1, 2011.<sup>4</sup>

As noted above, on appeal, the petitioner, through counsel, submitted a revised description of the proffered position. However, on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Therefore, the AAO's analysis of the proffered position will be based on the job description submitted with the initial petition and in response to the RFE.

In the Petitioner's Letter, Ms. [REDACTED] states that as the petitioner is accredited by the National Association [for] the Education of Young Children (NAEYC), the petitioner "is required to employ candidates with a minimum of a bachelor's degree. . . . Effective 2010, [t]he Child Development Associate credential (CDA) will no longer qualify you to be a teacher in an accredited child development center." However, the petitioner did not submit any evidence from the NAEYC corroborating this information. 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)).

Moreover, in the RFE, the director specifically requested "[e]vidence showing that in your company . . . , a baccalaureate degree in a specific field of study is a standard minimum requirement for the

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classification of "Teachers – Kindergarten, Elementary, Middle, and Secondary," which actually states "private school teachers do not have to be licensed but *may* still need a bachelor's degree." (Emphasis added.) Furthermore, this excerpt from the *Handbook* appears inapplicable to the instant case as, according to the NAICS code listed by the petitioner, the petitioner appears to be an establishment that "care[s] for preschool children, but may care for older children when they are not in school and may also offer pre-kindergarten educational programs."

<sup>4</sup> The AAO notes that the beneficiary's CDA credential was received approximately seven months after the filing of the instant petition.

job offered.” The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's RFE. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted for the first time on appeal.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

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.

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

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

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

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>5</sup> However, the AAO notes there are occupational categories, which are not covered in detail by the *Handbook*, as well as occupations for which the *Handbook* does not provide any information.<sup>6</sup> As previously discussed, the petitioner

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<sup>5</sup> 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.

<sup>6</sup> The *Handbook* states the following about these occupations:

**Data for Occupations Not Covered in Detail**

Employment for the hundreds of occupations covered in detail in the *Handbook* accounts for more than 121 million, or 85 percent of all, jobs in the economy. This page presents summary data on 162 additional occupations for which employment projections are prepared but detailed occupational information is not developed. These occupations account for about 11 percent of all jobs. For each occupation, the Occupational Information Network (O\*NET) code, the occupational definition, 2010 employment, the May 2010 median annual wage, the projected employment change and growth rate from 2010 to 2020, and education and training categories are presented. For guidelines on interpreting the descriptions of projected employment change, refer to the section titled "Occupational Information Included in the OOH."

asserts in the LCA that the proffered position falls under the job title "lead teacher" and the SOC (ONET/OES Code) occupational classification for "Teachers and Instructors, All Other," which is an occupation for which the *Handbook* does not provide data.<sup>7</sup> Upon review of the record, however, and based on the petitioner's NAICS code classification as "child day care services" and the job duties specified by the petitioner, the AAO finds that the evidence in the record most closely corresponds to the occupational classification of "Preschool Teachers."

The AAO reviewed the information in the *Handbook* regarding the occupational category "Preschool Teachers." However, 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 Teacher" states the following about this occupational category:

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

#### **Education**

In childcare centers, preschool teachers generally are required to have at least a high school diploma and a certification in early childhood education. However, employers may prefer to hire workers with at least some postsecondary education in early childhood education.

Preschool teachers in Head Start programs must have at least an associate's degree. However, by 2013, at least 50 percent of preschool teachers in Head Start programs nationwide must have a bachelor's degree in early childhood education or a related field. As a result, Head Start programs may prefer to hire workers with a bachelor's degree. Those with a degree in a related field must have experience teaching preschool-age children.

In public schools, preschool teachers are generally required to have at least a bachelor's degree in early childhood education or a related field. Bachelor's degree programs teach students about children's development, strategies to teach young children, and how to observe and document children's progress.

#### **Certification**

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Approximately 5 percent of all employment is not covered either in the detailed occupational profiles or in the summary data given here. The 5 percent includes categories such as "all other managers," for which little meaningful information could be developed.

<sup>7</sup> The AAO notes that the O\*NET Code Connector states that "All Other" titles represent occupations with a wide range of characteristics which do not fit into one of the detailed O\*NET-SOC occupations. O\*NET data is not available for this type of title. See <http://www.onetcodeconnector.org/ccreport/25-3099.00>.

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

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. For more information about the CCP, contact the National Early Childhood Program Accreditation.

### **Work Experience**

Some states require preschool teachers to have some work experience in a childcare setting. The amount of experience necessary varies by state. Preschool teachers often start out as childcare workers or teacher assistants. For more information, see the profiles on childcare workers or teacher assistants.

### **Licenses**

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

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

### **Advancement**

Preschool teachers can work their way up from assistant teacher to teacher to lead teacher (who may be responsible for the instruction of several classes) to director of the preschool. For more information, see the profile on preschool and childcare center directors. Those with a bachelor's degree frequently are qualified to teach kindergarten through grade 3, in addition to preschool. Teaching positions at these higher grades typically pay more.

### **Important Qualities**

**Communication skills.** Preschool teachers need good communication skills to tell parents and colleagues about students' progress. They need good writing and speaking skills to convey this information effectively.

**Creativity.** Preschool teachers must plan lessons that engage young students. In addition, they need to adapt their lessons to suit different learning styles.

**Instructional skills.** Preschool teachers need to be organized and able to explain difficult concepts in terms young children can understand.

**Patience.** Working with children can be frustrating, and preschool teachers should be able to respond calmly to overwhelming and difficult situations.

**People skills.** Preschool teachers must understand children's emotional needs and be able to develop good relationships with parents, children, and colleagues.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Preschool Teachers, available on the Internet at <http://www.bls.gov/ooh/education-training-and-library/preschool-teachers.htm#tab-4> (last visited April 18, 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 I (entry level) position on the LCA.<sup>8</sup> This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.<sup>9</sup> That is, in accordance with the relevant DOL explanatory information on wage

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<sup>8</sup> 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.

<sup>9</sup> The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

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

levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation, and this wage rate also carries expectations that the beneficiary would perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results.

Furthermore, the *Handbook* indicates that a bachelor's or higher degree in a specific specialty is not normally the minimum requirement for entry into this occupation. The *Handbook* summary data provides "education and training categories" for occupations. The occupational category "Preschool Teachers" (in childcare centers) falls into the group of occupations for which a high school diploma and a certification in early childhood education is the typical entry-level education. Thus, this passage of the *Handbook* reports that a high school diploma is sufficient for entry into this occupation. The *Handbook* does not indicate that normally the minimum requirement for entry into these positions is at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the *Handbook* does not support the claim that the proffered position falls within an occupational group that generally qualifies as a specialty occupation.

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 satisfies 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

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 an occupational category 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 occupation. 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)(I).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R.

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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](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

§ 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.

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)).

In the letter in response to the RFE, counsel for the petitioner contends that "[j]ob postings in other school systems for the position of a Lead Teacher also requires [sic] a Bachelor's Degree as an industry standard for the petition," but counsel did not provide any supporting evidence. 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).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference its previous discussion on the matter. The AAO notes that the record of proceeding does not contain any submissions from professional associations, individuals or similar private schools in the petitioner's industry attesting that a degree requirement is common to the industry for individuals employed in positions parallel to the proffered position.

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).

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 letter in response to the RFE, counsel for the petitioner asserts the following:

[T]he job requirements for the position of a Lead Teacher represent the actual minimum requirements for the job opportunity and because of the complexity of the job, it is not feasible to hire workers, nor has the company previously hired workers with less training and experience than what is required of the job offer. The position

requires the expertise of a baccalaureate degree holder in order to design, implement and evaluate lesson plans which allow for individual learning.

The AAO reviewed the record in its entirety and finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. Moreover, counsel states that "nor has the [petitioner] previously hired workers with less training and experience than what is required of the job offer," but does not provide any documentary evidence regarding the educational credentials of other teachers that the petitioner has previously hired. 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. at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

More specifically, the petitioner failed to demonstrate how the lead teacher position, as described, requires the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree directly related to the occupation and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While a few courses may be beneficial in performing certain duties of a lead teacher position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The AAO finds that, as reflected in its previous discussion of the LCA, the wage level specified therein (Level I) is materially inconsistent with the petitioner's "Lead Teacher" designation. Again, the LCA indicates a Level I (entry level) wage. This designation is appropriate for positions for which the petitioner expects the beneficiary to have a basic understanding of the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

By way of comparison, the AAO notes that a position classified at a Level IV (fully competent) position is designated by the DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." Thus, the wage level designated by the petitioner in the LCA for the proffered position is not consistent with claims that the position would entail any particularly complex or unique duties or that the position itself would be so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty. The evidence of record does not establish that this position is significantly different from other "Preschool Teachers" such that it refutes the *Handbook's* findings that such positions do not normally require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry

into the occupation. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

Consequently, as the petitioner fails to demonstrate how the proffered position of lead teacher is so complex or unique relative to other positions that can be performed by a person without at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States, the petitioner has not 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 merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the position.

In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent. As previously mentioned, in the letter in response to the RFE, counsel states, ". . . nor has the company previously hired workers with less training and experience than what is required of the job offer," but the petitioner and counsel did not provide any documentary evidence to corroborate this statement. 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).

Upon review of the record, the petitioner has not provided any evidence that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Therefore, there is no evidentiary basis for the AAO to find that the petitioner has 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.

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. Moreover, upon review of the record of proceeding, there is insufficient evidence to establish that the duties of the proffered position require the theoretical and practical application of at least a bachelor's degree level of a body of

highly specialized knowledge in a specific specialty. The AAO notes that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

Further, the AAO here incorporates into this analysis its earlier comments and findings with regard to the implication of the Level I wage-rate designation (the lowest of four possible wage-levels) in the LCA. That is, that the proffered position's Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, the DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation."

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.

Additionally, the petitioner and counsel should note that if the evidence of record had established the proffered position as a specialty occupation preschool teacher – which, of course, is not the case here – the petition still could not be approved because, as earlier noted in this decision, the LCA submitted in support of the petition was not certified for, and therefore does not correspond to or support, a petition for any of those occupations. As noted earlier, the LCA submitted to support this petition was certified for the occupational classification of "Teachers and Instructors, All Other," a distinctly separate occupational group.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor

that the petitioner has filed a labor condition application with the Secretary.” Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of an LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). 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).

The U.S. Department of Labor (DOL) has clearly stated that its LCA certification process is cursory, that it does not involve substantive review, and that it makes the petitioner responsible for the accuracy of the information entered in the LCA.

With regard to LCA certification, the regulation at 20 C.F.R. § 655.715 states the following:

*Certification* means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Likewise, the regulation at 20 C.F.R. § 655.735(b) states, in pertinent part, that “[i]t is the employer’s responsibility to ensure that ETA [(the DOL’s Employment and Training Administration)] receives a complete and accurate LCA.”

Further, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) also makes clear that certification of an LCA does not constitute a determination that a position qualifies for classification as a specialty occupation:

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

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether 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.*

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The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit an LCA that corresponds to any occupation except “Teachers and Instructors, All Others.”

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.