U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: FEB 2 2 2013 OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on June 22, 2011. In the Form I-129 visa petition, the petitioner describes itself as a learning center established in 2008. In order 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 March 2, 2012, 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. On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

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

As a preliminary matter, the AAO notes that even if the petitioner were to overcome the basis for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought. That is, upon review of the review of the record of proceeding, the AAO notes that the petitioner failed to submit a certified Labor Condition Application (LCA) that properly corresponds to the petition. More specifically, each LCA has a unique identification number. On page 4 of the Form I-129, the petitioner reported that the corresponding LCA for the petition was LCA Case [redacted] A review of the Foreign Labor Certification (FLC) Data Center website indicates that the LCA referenced on the Form I-129 was submitted to the U.S. Department of Labor (DOL) on March 29, 2011, but thereafter was withdrawn.[1]

The AAO notes that the petitioner did not provide the LCA referenced on the Form I-129 petition in its H-1B submission. Instead, the petitioner submitted an LCA with the Case Number [redacted] Thus, the LCA submitted to support the petition contains a different identification number than the LCA referenced on the Form I-129 (page 4).

While DOL is the agency that certifies LCA applications before they are submitted to U.S. Citizenship and Immigration Services (USCIS), DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department

[1] The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at http://www.bls.gov/oes/ (last visited February 13, 2013). The OES All Industries Database is available at the Foreign Labor Certification Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at http://www.flcdatacenter.com/.

responsible for determining whether an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

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

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the LCA referenced on the Form I-129 petition was withdrawn. While the Service Center did not identify this issue, the AAO is not controlled by service center decisions. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 at 3 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001). The AAO conducts appellate review on a *de novo* basis, and it was in the exercise of this function that the AAO identified this additional ground for dismissing the petition. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Thus, for this reason as well, the petition cannot be approved.

The appeal must be dismissed, thus rendering the remaining issues in this proceeding moot. However, the AAO will note that, in any event it reviewed the record of proceeding and, based upon that review, hereby endorses the director's decision. That is, the AAO agrees with director's 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. Accordingly, the director's decision will not be disturbed.

With the Form I-129 petition, the petitioner submitted a letter dated May 9, 2011, which included a description of the duties of the proffered position. Specifically, the petitioner stated that the beneficiary would perform the following duties:

- Responsible for running the classroom and supervising and mentoring other teachers in the areas of curriculum and professional development.
- Works closely with the Center Director to establish and maintain a strong, highly functional team and successful center operations.
- Plans and implements activities to promote the social, physical, and intellectual growth of children.
- Assists teachers in developing routines and daily schedules that produce positive school readiness outcomes for children.
- Assists in creating literacy-rich learning environments in assigned classrooms.

- Establishes mentoring relationships with teachers that will result in further improvement of early literacy teaching skills.

- Teaches students using various teaching methods, assign[s] lessons and corrects homework.

- Administer[s] testing and prepares course objectives and outlines for course of study following curriculum guidelines and requirements of the state and school.

- Keep[s] parents informed by posting information, maintain and sharing records or child's progress and behavior.

The AAO observes that the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. That is, the petitioner failed to specify which tasks were major functions of the proffered position, and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

In the letter of support, the petitioner stated the minimum educational requirement for the proffered position as "a Bachelor or higher degree in education or related field." The petitioner noted that the beneficiary holds a bachelor's degree in elementary education. With the petition, the petitioner submitted a copy of the beneficiary's foreign diploma, transcript, and professional credentials, as well as a credential evaluation report from [redacted] The evaluation states that the beneficiary's qualifications are equivalent to a "Bachelor's degree in elementary education from a regionally accredited institution."

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

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on September 23, 2011. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director included examples of the type of evidence to be submitted, including a "detailed description of the proffered position, to include approximate percentages of the time for each duty the beneficiary will perform." The director outlined the specific evidence to be submitted.

On October 31, 2011, counsel for the petitioner responded to the RFE by submitting additional evidence. Specifically, counsel submitted (1) a document entitled "List of Teachers/Employees holding a Bachelor's Degree"; (2) a printout of the petitioner's website; and (3) several job postings. The AAO observes that the petitioner elected not to provide a detailed description of the duties the beneficiary would perform. Additionally, the petitioner did not provide any further information

regarding the importance and/or frequency of occurrence with which the beneficiary would perform the functions and tasks of the proffered position.

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 March 2, 2012. The petitioner submitted an appeal of the denial of the H-1B petition. In support of its Form I-290B, the petitioner submitted a brief and additional evidence.[2]

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

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

On appeal, in a letter dated March 15, 2012, the petitioner presents a revised list of duties for the proffered position that differs substantially from the original description of the proffered position. Specifically, the petitioner included, in part, the following duties:

> [The beneficiary] will spend approximately 75% of her time performing the following duties

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[2] With regard to the documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. 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 request for evidence 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 Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not and does not consider the sufficiency of such evidence submitted for the first time on appeal.

as lead VPK [Voluntary Pre-Kindergarten] teacher:

- 15% - Coordinating with [the petitioner's director] and developing VPK class curriculum, consistent with the State of Florida's VPL Education Standards and benchmarks and with other Improvement Plan. In doing so, the beneficiary will apply her academic background – Bachelor's degree in Elementary Education, and will also implement coaching recommendations from the and the VPK teacher Toolkit. Beneficiary will also participate in VPK-related training programs;

- 30% - Implementing curriculum and providing classroom instruction through activities designed to promote social, physical and intellectual growth needed [for] elementary school. She will provide [a] variety of materials and resources for children to explore, manipulate and use, both in learning activities and in imaginary play. She will organize and lead activities designed to promote physical, mental and social development. In doing so, [the beneficiary] will apply teaching strategies and techniques she learned while pursuing he[r] bachelor's degree in Elementary Education;

- 15% - Working one-on-one with the class' special needs students;

- 15% - Observing and evaluating children's performance, behavior, social development and physical health. Completing VPK portfolios for students. Meeting with parents, guardians and therapists to discuss their children's progress and needs, determine their priorities for their children and suggest ways that they can promote learning and development.

[The beneficiary] will spend the remaining 25% (approximate) of her time performing the following duties:

- [25%] – As a teacher/tutor for kindergarten-elementary-aged children (K-4) on our after school program; providing one-on-one tutoring (primarily as a remedial reading specialist), and assisting students in other subject areas as well as with their homework assignments.

The AAO observes that on appeal the petitioner submitted new duties, which had not previously been mentioned in the job description. For example, the petitioner indicated *for the first time* on appeal that the proffered position includes such duties as working with special needs students. The petitioner did not acknowledge or provide any explanation for failing to previously provide this information. The AAO finds it questionable that the petitioner's job description has been significantly revised to include job duties that were not included in the initial petition.

The AAO further notes that the LCA submitted in support of the instant petition does not correspond to the position described by the petitioner on appeal. As previously mentioned, the petitioner designated the proffered position as falling under the occupational category "Preschool

Teachers, Except Special Education" – SOC (ONET/OES Code) 25-2011, at a Level I wage in the LCA. This occupational category involves "[i]nstruct[ing] children (normally up to 5 years of age) in activities" and specifically excludes duties related to teaching students with special education needs.

In the appeal, the petitioner states in its March 15, 2012 letter that the beneficiary will spend 15% of her time working one-on-one with special needs students. The petitioner further reports that the beneficiary "will be responsible for working closely" with special needs or "at risk" students, as well as coordinating with their families and therapists. In addition, she will devote 25% of her time "to teaching kindergarten/elementary school-age children (up to 4th Grade) in [the petitioner's] after-care program."

Notably, the portion of the beneficiary's duties that relate to providing special education instruction and educational instruction for students in grades K-4 are not encompassed by the duties associated with "Preschool Teachers, Except Special Education." As previously discussed, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations 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.

Moreover, the AAO notes that on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change 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).

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

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), 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 at 147 (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 now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

The AAO recognizes DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[3] As discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Preschool Teachers, Except Special Education."

The AAO reviewed the chapter of the *Handbook* entitled "Preschool Teachers," including the sections regarding the typical duties and requirements for this occupational category.[4] However, the

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

[4] For additional information on the occupational category "Preschool Teachers," *see* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Preschool Teachers, on the Internet at http://www.bls.gov/ooh/education-training-and-library/preschool-teachers.htm#tab-1 (last visited February 13, 2013).

Handbook does not indicate that "Preschool Teachers" comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "How to Become a Preschool Teacher" states, in pertinent part, the following about this occupation:

> Education and training requirements vary based on settings and state regulations. They range from a high school diploma and certification to a college degree.
>
> **Education**
> In childcare centers, preschool teachers generally are required to have a least a high school diploma and a certification in early childhood education. However, employers may prefer to hire workers with at least some postsecondary education in early childhood education.
>
> Preschool teachers in Head Start programs must have at least an associate's degree. However, by 2013, at least 50 percent of preschool teachers in Head Start programs nationwide must have a bachelor's degree in early childhood education or a related field. As a result, Head Start programs may prefer to hire workers with a bachelor's degree. Those with a degree in a related field must have experience teaching preschool-age children.
>
> In public schools, preschool teachers are generally required to have at least a bachelor's degree in early childhood education or a related field. Bachelor's degree programs teach students about children's development, strategies to teach young children, and how to observe and document children's progress.
>
> **Certification**
> Some states and employers require preschool teachers to have a nationally recognized certification such as the Child Development Associate (CDA) offered by the Council for Professional Recognition. Requirements to earn the CDA include a high school diploma, experience in the field, and coursework.
>
> Some states recognize the Child Care Professional (CCP) designation offered by the National Early Childhood Program Accreditation. Requirements to earn the CCP include a high school diploma, experience in the field, and continuing education courses.

Handbook, 2012-13 ed., Preschool Teachers, on the Internet at http://www.bls.gov/ooh/education-training-and-library/preschool-teachers.htm#tab-4 (last visited February 13, 2013).

The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Rather, the *Handbook* states that although there is a range of acceptable credentials, most preschool teachers

are required to have a high school diploma. The *Handbook* further indicates that some employers *prefer* to hire workers with some postsecondary education in early childhood education. Obviously, a *preference* for a particular level of education does not indicate a requirement.

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

The AAO notes that the *Handbook* indicates that the minimum educational requirements for preschool teachers may vary by state. The AAO here observes that the minimum educational requirements proscribed by the State of Florida do not require a bachelor's degree in a specific specialty for such positions. A "prekindergarten instructor" at a private prekindergarten provider in Florida participating in the VPK school-year program must hold either (1) one of two possible credentials; or (2) one of several possible degrees, including an associate's degree. Fla. Stat. § 1002.55(3)(c), (4) (2011). Thus, there is no state statute that requires the beneficiary to hold a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation.

When reviewing the *Handbook*, the AAO also notes that the petitioner designated the proffered position as a Level I position on the LCA. Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

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.[5] 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.

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[5] A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1"or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described 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.

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.

Thus, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within 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 and carries expectations that the beneficiary 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.

Thus, although the *Handbook* indicates that a range of degrees are acceptable for entry into the occupation, the Level I wage designated by the petitioner suggests that the necessary education required to perform the duties of the proffered position lies at the less advanced end of the spectrum.

It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers 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. As previously mentioned, 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that at least a

bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties of the proffered position as described in the record of proceeding by the petitioner do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively 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. at 1102).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. The record of proceeding also does not contain any evidence from an industry professional association to indicate that a degree is a minimum entry requirement.

In support of the petitioner's assertion that the proffered position is a specialty occupation position, the record of proceeding contains several job announcements and an opinion letter from an individual in the industry. However, upon review of the evidence, the AAO finds that the petitioner's reliance on the job announcements and letter is misplaced.

In the Form I-129, the petitioner stated that it is a learning center with seven employees. The petitioner reported its gross annual income as approximately $288,000 million and failed to report its net annual income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 611110.[6] The AAO notes that this NAICS code is designated for "Elementary and Secondary Schools." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

> This industry comprises establishments primarily engaged in furnishing academic courses and associated course work that comprise a basic preparatory education. A

[6] According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity, each establishment is classified to an industry according to the primary business activity taking place there. *See* http://www.census.gov/eos/www/naics/ (last viewed February 13, 2013).

> basic preparatory education ordinarily constitutes kindergarten through 12th grade. This industry includes school boards and school districts.

U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 611110-Elementary and Secondary Schools, on the Internet at http://www.census.gov/cgi-bin/sssd/naics/naicsrch (last viewed February 13, 2013).

Based on a complete review of the evidence of record, including the printouts of the petitioner's website submitted in response to the RFE, the AAO finds that the petitioner's business operations are more appropriately designated under NAICS code 621110 – "Child Day Care Services," which is described as the following:

> This 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 prekindergarten educational programs.

U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 621110-Child Day Care Services, on the Internet at http://www.census.gov/cgi-bin/sssd/naics/naicsrch (last viewed February 13, 2013).

For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

The AAO reviewed the job advertisements submitted by the petitioner in response to the RFE. Notably, the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documents, the AAO finds that, contrary to the purpose for which the advertisements were submitted, some of the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For instance, the petitioner submitted a job posting for a preschool teacher at [redacted] in Richfield, Minnesota. The posting states the "Qualifications Preferred" by the advertising employer – which includes a bachelor's degree in a related field. Obviously, a *preference* for such a degree is not an indication of a *requirement* for the advertised position.

Similarly, the job posting for a toddler or preschool teacher at in Holden, Massachusetts indicates that the position requires *either* a bachelor's degree or enrollment in a degree program from an accredited college or university. Thus, the employer does not require that a candidate have obtained at least a bachelor's degree in a specific specialty, or its equivalent, for the position. The advertising employer will accept a candidate who is *enrolled* in a degree program.

Additionally, the petitioner has not established that all of the job postings are for organizations similar to the petitioner. For instance, the petitioner submitted a job posting for a lead teacher at which does not contain any information about the advertising organization, and the petitioner failed to provide any additional information to establish the similarities between it and the advertising organization. Consequently, the record is devoid of sufficient information regarding the advertising organization to conduct a legitimate comparison of the organization to the petitioner. Further, the posting does not contain any description of duties such that the AAO can ascertain if the advertised position is parallel to the proffered position. The petitioner also submitted a job posting for a science school preschool teacher at the It does not appear that the advertising organization is similar to the petitioner and in the same industry. The petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organization.

The AAO reviewed all of the advertisements submitted by the petitioner with the initial petition and in response to the RFE. However, as the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

The job advertisements do not 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. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.[7]

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[7] According to the *Handbook*'s detailed statistics on this occupation, there were approximately 456,800 persons employed as preschool teachers in 2010. *Handbook*, 2012-13 ed., available at http://www.bls.gov/ooh/education-training-and-library/preschool-teachers.htm#tab-6 (last accessed February 13, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the industry. *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

In support of the assertion that the proffered position qualifies as a specialty occupation, on appeal the petitioner submitted a letter from (hereinafter "the writer") of the The letter is dated June 15, 2009 and some information has been redacted from the first page. The AAO notes that the letter is addressed to the Premium Processing Unit, and observes that the instant case was not adjudicated through the Premium Processing Unit. Additionally, the instant petition was submitted to USCIS on June 22, 2011 (approximately two years after the writer prepared the letter.) The letter makes no reference to the instant petition.

The writer states, "Several studies of state-supported pre-school programs have found that the quality is higher in programs where more teachers have at least a four-year college degree. In addition, such degreed teachers are better able to teach students with special needs." Although it may be desirable to hire preschool teachers with four-year degrees, as the writer suggests, the relevant standard for the granting of an H-1B petition whether the proffered position "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." 8 C.F.R. § 214.2(h)(4)(ii) (Emphasis added.) It is clear from a reading of the *Handbook*, the Florida statutes, and the evidence in the record of proceeding, that such a degree is not required for entry into the occupation of preschool teacher. In her letter, the writer continues by describing Florida's Voluntary Pre-Kindergarten Program, the goals of the program, and various policy considerations. The writer also describes the educational requirements for the Summer VPK program.[8]

Moreover, upon review of the opinion letter, there is no indication that the writer possesses any particular knowledge of the petitioner's proffered position and its business operations. The writer does not demonstrate or assert in-depth knowledge of the petitioner's specific center or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. There is no evidence that the writer has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. The writer has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty, or its equivalent.

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estimates of error").

As such, even if the job announcements supported the finding that organizations similar to the petitioner in its industry commonly require, for positions parallel to the one here proffered, at least a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

[8] The petitioner does not claim in its letter of support that it has a VPK summer program. Furthermore, the AAO notes that the Provider Improvement Plans submitted on appeal indicate that the petitioner has a VPK school-year program, not a summer program. The Florida statute indicates that a bachelor's degree is not required for school-year VPK teachers. *See* Fla. Stat. § 1002.55(3)(c), (4) (2011).

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

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

With the appeal, the petitioner submitted several documents regarding the VPK program. Contrary to the purpose for which the documentation was submitted, the evidence indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is not required for preschool teachers. For example, the petitioner submitted an article by [redacted] that states "fewer than half of all early education teachers hold a four-year degree, and many have no college education." [redacted] continues by stating, "In most states, a high school diploma is all a person needs to teach in a licensed child care center." The petitioner also provided an article by [redacted] regarding the VPK program and reports that "[i]nstructors must only have a child development associate certificate, which requires 120 hours of study, to teach during the school-year." Additionally, the aspirational goal is that "one VPK teacher in each class would have an associate's degree or higher in early education." The petitioner also provided a printout entitled "General Information about VPK Teacher and Director Requirements." The document indicates that a prekindergarten instructor may hold one of various credentials, including an associate's degree. The petitioner has not submitted sufficient probative evidence to support its assertion that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory requirements.

Thus, based upon a complete review of the record, the petitioner has not established 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. 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 support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted printouts of pages from its website and a list of three of the petitioner's employees who hold bachelor's degrees. On appeal, the petitioner submitted additional documentation including provider agreements with the [redacted] Florida; documentation from the State of Florida on license renewal; documentation regarding special needs students; and VPK provider improvement plan documents. Upon review of the record, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of lead teacher. That is, the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. The petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."[9]

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

Moreover, the petitioner fails to demonstrate how the duties of the lead teacher as described in the

[9] For additional information regarding wage levels as defined by DOL, *see* Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

description require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. While related courses may be beneficial, or even required, in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here.

The AAO observes that the description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. The petitioner has not credibly demonstrated that this position, which the petitioner characterized in the LCA as an entry-level position, is so complex or unique that it can be performed only by an individual with at least a baccalaureate degree in a specific specialty, or its equivalent.

In the instant case, the petitioner has indicated that the beneficiary's educational background and experience as a teacher will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner failed to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To satisfy this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement,

whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

The petitioner states in the Form I-129 petition that it was established in 2008 and has seven employees. The petitioner did not state the total number of individuals who currently or in the past have served in the proffered position. In response to the RFE, the petitioner submitted a document entitled "List of Teachers/Employees holding a Bachelor's Degree." The petitioner listed three individuals, a director and two teachers.[10] However, the AAO notes that the petitioner's list represent a claim regarding the individuals educational credentials, rather than evidence to support that claim. Notably, the petitioner did not submit probative evidence establishing the teachers are employed by the petitioner (e.g., pay records, wage reports) and documentation regarding their academic credentials (e.g., transcripts) as requested in the RFE. Moreover, the petitioner has not provided any evidence to substantiate that the teachers possess degrees in fields of study or disciplines directly related to the duties and responsibilities of the position.

Moreover, the petitioner failed to provide the job duties and day-to-day responsibilities of the positions that it claims are the same or similar as the proffered position. The petitioner did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, aside from the general job title "teacher," it is unclear whether the duties and responsibilities of these individuals are the same or related to the proffered position. The AAO observes that the petitioner did not submit any documentation regarding its recruiting practices. Thus, the submission is not probative in establishing this criterion of the regulations.

In its appeal brief, the petitioner states that it did not hire degreed individuals for the proffered position until 2009, when it was designated a "Low Performing Provider" of Florida's VPK program. The petitioner states that since that designation, it reevaluated its policies and now requires a bachelor's degree in education for the teacher of the VPK class. Thus, the petitioner indicates that it now prefers degreed individuals. As described above, an employer preference for a degreed individual is not sufficient to establish that the proffered position is a specialty occupation. Further, as the Provider Improvements Plans submitted by the petitioner indicate, the petitioner clearly employs individuals who do not have bachelor's degrees for its preschool teacher positions.

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

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[10] The AAO notes that a copy of a diploma, transcripts, and an evaluation of educational credentials in the name of the director were provided on appeal. However, there is no indication that the duties of the director of the petitioner's facility are the same or related to the duties of the proffered position.

its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The AAO acknowledges that the petitioner may believe that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. However, the AAO reviewed the documentation submitted by the petitioner but finds that it fails to support the assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

In support of the petition, the petitioner submitted various documents, including evidence regarding its business operations such as printouts of pages from its website and information regarding a few of its employees. On appeal, the petitioner submitted additional documentation including provider agreements with the [redacted] documentation from the State of Florida on license renewal; documentation regarding special needs students; VPK provider improvement plan documents; and various articles and related materials. The AAO reviewed all of the evidence in the record; however, it did not find that this evidence establishes that nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The AAO here reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Preschool Teachers," and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, as previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

As previously mentioned, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1043, *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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

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

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