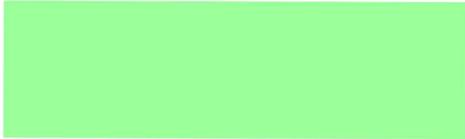




U.S. Citizenship
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Services

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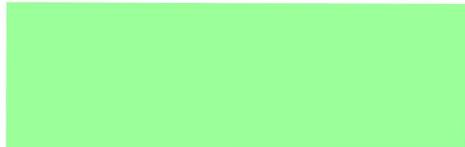


DATE: **JAN 11 2013** OFFICE: VERMONT SERVICE CENTER. FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Michael T. Kelly
for Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner, through counsel, submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on September 6, 2011. On the Form I-129 visa petition, the petitioner describes itself as a preschool¹ as part of a religious institution established in 1951. In order to employ the beneficiary in what it designates as a preschool 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 December 19, 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, through counsel, submitted an appeal of the decision on January 19, 2012. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition on the specialty occupation issue was erroneous and contends that (1) "the Director . . . failed to properly consider the documentary evidence and misapplied information the Director obtained from an ex parte internet search[;]" and (2) "the Petitioner had no prior opportunity to discuss or provide counter arguments to the[] alleged negative information the Director obtained from the [I]nternet." In support of these contentions, counsel for the petitioner submitted a brief and supporting documentation.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice of decision; and (5) the petitioner's Form I-290B and supporting 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 preschool teacher to work on a part-time basis at a salary of \$514.60 per week.

In the "Team Member Job Description," submitted along with the Form I-129 filing, the petitioner provided the following information regarding the proposed duties of the proffered position:

¹ In the statement in support of the petition, submitted with the Form I-129 filing, the petitioner states the following: "[redacted] a Jewish synagogue [,] . . . provides a full menu of religious services and related activities expected in the Jewish community. Among these activities, it operates a non-sectarian preschool for children between the ages of 2 and 5 years of age. The Preschool operates a variety of program options including a morning preschool, a lunch program and an afternoon enrichment program." In this same document, the petitioner goes on to state that it is "a private school" and "relatively small preschool."

- To always use developmentally appropriate practice.
- To work within the teaching team to design and implement a program with clear goals and to design a learning environment and curriculum to meet these goals. The educational program must reflect an emergent curriculum model which reflects the needs and interests of the developing child and be coherent when viewed from a weekly, monthly and year-round perspective. All curriculum [sic] is based on the Department of Education standards.
- To monitor, adapt approaches and materials to meet the needs of individual children in a group setting through a solid knowledge of early childhood educational theory and practice.
- To plan and implement a day-to-day program that matches the needs, interests and abilities of the group and each individual child in the group.
- To participate as a classroom observer and recorder to document progress and goals for the class and for individual children.
- To organize and maintain a classroom that provides a clean, safe, and orderly environment: maintaining supplies within a classroom, keeping weekly attendance records, planning curriculum and fulfilling other responsibilities as requested by the Director or detailed in the staff handbook.
- To work cooperatively with team members to design a developmentally appropriate learning environment with appropriately challenging equipment and materials. To regularly rotate children's books, manipulatives [sic], and other classroom materials to match the evolving needs of the children. To rotate materials in the block and dramatic play areas, the large motor and group area, the science area and other activity centers and classroom areas to match the evolving needs of the children and curricular goals and themes.
- To participate in the shared staff responsibilities as assigned by the director.
- To maintain a high standard of professional confidentiality in regards to information concerning children, families and colleagues.
- To implement the Preschool Nutritional Policy, the Health and Safety Policy and other policies stated in the staff handbook.
- To understand and implement [the petitioner's] philosophy and to seek support and clarification when needed.

In the statement in support of the petition, submitted with the Form I-129 filing, the petitioner provided the following information regarding the proffered position:

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The position we seek to fill is that of a preschool teacher who can effectively develop and implement a program of effective age-appropriate instruction. She will have a great deal of autonomy, but will report directly to the Director of the Preschool. . . . Since we are a private school, no license from the Commonwealth of Massachusetts is required for a preschool teacher.

Also, in the statement in support of the petition, the petitioner stated that the beneficiary is “well qualified for the position” and summarized her education, as follows:

[The beneficiary] earned her Bachelor’s of Education degree from the [redacted] [redacted] in Israel in 2001 and in December, 2007, a Master’s Degree in Special Education from the [redacted] (London, UK), which maintains a satellite campus in Israel.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of “Preschool Teachers, Except Special Education” – SOC (ONET/OES Code) 25-2011.00, at a Level III wage.²

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a RFE on December 3, 2011. The petitioner was asked to submit additional documentation to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted. The petitioner, through counsel, responded to the RFE on December 12, 2011 and submitted a letter, dated December 9, 2011, and additional evidence.

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 December 19, 2011. The petitioner, through counsel, filed a timely appeal of the denial of the H-1B petition.

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.

² In the statement in support of the petition, submitted with the Form I-129 filing, the petitioner states that “[t]he prevailing wage for a Level 3 preschool teacher is \$16.63 per hour. We will be paying \$25.73 per hour. There are several preschools, both completely secular and those affiliated or part of the numerous religious institutions located within the general vicinity of the Temple. In order to obtain and retain teachers, we therefore must pay a premium. Our wage is 155% of the prevailing wage per the [Foreign Labor Certification Data Center Online Wage Library].”

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)(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 that is the subject of the petition.

The petitioner stated that the beneficiary would be employed in a preschool 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.

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The AAO recognizes the U.S. Department of Labor's (DOL) *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 previously discussed, the petitioner asserts in the LCA that the proffered position falls under the job title "preschool teacher" and the SOC (ONET/OES) code for "Preschool Teachers, Except Special Education."

The petitioner, through counsel, submitted an excerpt from a prior edition of the *Handbook* for the occupational category "Teachers – Preschool, Except Special Education." The AAO reviewed the information submitted by the petitioner, as well as the information in the current edition of the *Handbook* regarding the occupational category "Preschool Teachers." However, both of these editions of the *Handbook* do 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 2012 – 2013 edition of the *Handbook* entitled "How to Become a Preschool Teacher" states the following about this occupational category:

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

Education

In childcare centers, preschool teachers generally are required to have a[t] 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

³ 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.

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.

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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> (last visited December 26, 2012).

Furthermore, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is normally the minimum requirement for entry into this occupation in private preschools. The *Handbook* summary data provides "education and training categories" for occupations. The occupational category "Preschool Teachers" 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. Moreover, the *Handbook* indicates that "[i]n public schools, preschool teachers must be licensed to teach early childhood education . . . [and] [r]equirements [can] vary by state, . . . [and] generally require a bachelor's degree and passing an exam to demonstrate competency." However, as counsel for the petitioner acknowledged in its RFE response letter, dated December 9, 2011, there is no such licensing requirement for private preschool teachers in Massachusetts. Thus, the *Handbook* does not support the claim that the proffered position falls within an occupational group for which entry normally requires attainment of at least a bachelor's degree, or the equivalent, in a specific specialty.

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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO notes that in the letter in response to the RFE, dated December 9, 2011, counsel for the petitioner states that the *Foreign Labor Certification Data Center Online Wage Library* places Preschool Teachers, Except Special Education under a designation of "O*NET JobZone 3"⁴ and "Education & Training Code: No Level Set." Counsel for the petitioner appears to believe that these designations indicate that the proffered position is a specialty occupation. However, the O*NET information is insufficient to establish that the position qualifies as a specialty occupation normally requiring at least a bachelor's degree in a specific specialty or its equivalent. The O*NET information does not demonstrate that a bachelor's degree in any *specific specialty* is required, and does not, therefore, demonstrate that a position in a designated O*NET JobZone qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Therefore, despite counsel's implication to the contrary, the O*NET information is not probative of the proffered position qualifying as a specialty occupation.

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. 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).

⁴ JobZone Three: Medium Preparation Needed

Experience: Previous work-related skill, knowledge, or experience is required for these occupations. For example, an electrician must have completed three or four years of apprenticeship or several years of vocational training, and often must have passed a licensing exam in order to perform the job.

Education: Most occupations in this zone require training in vocational schools, on-the-job experience, or an associate's degree. Some may require a bachelor's degree.

Job Training: Employees in these occupations usually need one or two years of training involving both on-the-job experience and informal training with experienced workers.

Examples: These occupations usually involve using communication and organizational skills to coordinate, supervise, manage, or train others to accomplish goals. Examples include funeral directors, electricians, forest and conservation technicians, legal secretaries, interviewers, and insurance sales agents.

SVP Range: 6.0 < 7.0

Foreign Labor Certification Data Center Online Wage Library, O*Net Job Zones, available on the Internet at <http://www.flcdatacenter.com/JobZone.aspx#3> (last visited December 26, 2012).

Next, the AAO will address the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This first alternative prong calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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, dated December 9, 2011, counsel for the petitioner states that the petitioner is accredited by the National Association for the Education of Young Children (NAEYC). Counsel goes on to state that "[NAEYC] has stricter standards for accreditation than . . . the licensing requirements of the Commonwealth of Massachusetts[.] [NAEYC], over the next ten years, is phasing in a mandatory requirement of a bachelor's degree for members of a teaching staff." In the brief submitted on appeal, counsel states that "NAEYC requires at least 75% of teacher's hold at least a bachelor's degree or equivalent in a school the size of the Petitioner. See specifically: Section 6.A.05."⁵

The AAO reviewed the information on the NAEYC's Internet site regarding the educational requirements for teachers. The NAEYC's "Criterion 6.A.05 for Teachers" states the following:

All teachers have a minimum of an associate's degree or equivalent. At least 75% of teachers have a minimum of a baccalaureate degree or equivalent in early childhood education, child development, elementary education, or early childhood special education, and this training encompasses child development and learning of children birth through kindergarten; family and community relationships; observing, documenting, and assessing young children; teaching and learning; and professional practices and development.

Note: Criterion 6.A.05 is always assessed but is **not a required criterion**. This criterion will be phased in between 2006 and 2020, with variations by program size. Refer to the Time Line for Meeting Teacher Qualifications.

National Association for the Education of Young Children, Criteria Related To Staff Qualifications,

⁵ The AAO notes that in the Form I-290B, Notice of Appeal, counsel contended that, among other errors, "the Director . . . misapplied [the NAEYC] information [that] the Director obtained from an ex parte [I]nternet search." The AAO further notes that in the brief on appeal, counsel for the petitioner now cites the exact criterion referenced on the NAEYC website that the Director cited in the notice denying the petition, dated December 19, 2011. Specifically, in the denial notice, the director stated that "[a]ccording to the NAEYC website, under the section "Criteria Related to Staff Qualifications[.]" [c]riterion 6.A.05 for Teachers . . . , "All teachers have a minimum of an associate's degree or equivalent."

available on the Internet at <http://www.naeyc.org/academy/pursuing/edquals/criteria> (last visited December 26, 2012) (emphasis in original).

A review of the aforementioned Criterion 6.A.05 for Teachers and the explanatory “note” therein, does not support counsel’s implication that a baccalaureate degree or the equivalent in a specific specialty is normally the minimum requirement for entry into the occupation. Also, the explanatory note indicates that while Criterion 6.A.05 for Teachers is assessed, it is not currently a required criterion for NAEYC accreditation. In addition, this is clarified further by the “Time Line for Meeting Teacher Qualifications,” which does not indicate that a baccalaureate degree or equivalent in a specific specialty is currently required for teachers in order for a preschool (of any size) to be accredited by the NAEYC during the 2010 – 2014 period.⁶ Thus, contrary to the purpose for which the NAEYC information was provided, the AAO finds that preschool teachers do not have to have a bachelor’s degree in order for a preschool to earn NAEYC accreditation. Consequently, there is no evidence in the record indicating that it is the industry standard to require a bachelor’s degree or equivalent in a specific specialty for the proffered position.

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 preschools 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.

Upon review of the record of proceeding, the AAO finds that the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of teacher. That is, 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

⁶ National Association for the Education of Young Children, Time Line for Meeting Teacher Qualifications, 2006-2020 (Criterion 6.A.05), available on the Internet at http://www.naeyc.org/files/academy/file/Time%20Line%20for%20Meeting%206_A_05.pdf (last visited December 26, 2012).

be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.

More specifically, the petitioner failed to demonstrate how the preschool 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 some courses may be beneficial in performing certain duties of a preschool 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.

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 preschool 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.

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").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner stated in the Form I-129 petition that it has 10 employees and that it was established in 1951. In the letter in response to the RFE, dated December 9, 2011, counsel for the petitioner asserts the following:

When the School was created at the Temple, the Temple required that all teachers hold at least a bachelor's degree in education or had been awarded a bachelor's degree and had prior experience teaching. (Emphasis in original.)

Along with the RFE response letter, and in support of the petitioner's contention that it has a history of requiring a bachelor's degree in its prior recruiting and hiring for the position, counsel for the petitioner enclosed copies of the resumes of seven individuals that counsel claims are employed as teachers at the school, and began employment at various dates between 1999⁷ - 2009. In this same RFE response letter, counsel further states the following:

Please note every one of the teachers holds at least a bachelor's degree, including

⁷ In the letter in response to the RFE, dated December 9, 2011, counsel stated that [REDACTED] began employment with the petitioner in 1998. However, the AAO notes that the copy of the resume for Ms. [REDACTED], which was submitted in response to the RFE, states that she began her employment with the petitioner in 1999.

the office administrator. If the awarded degree was not directly related to childhood education, then there was teaching or child care program experience prior to joining the teaching staff at the Temple. (Emphasis in original.)

Upon review of the seven resumes that were submitted, the AAO notes that the educational information on the resumes indicates that the petitioner's preschool teachers have degrees in various fields of study. Thus, contrary to the purpose for which the resumes were submitted, the resumes do not indicate that the petitioner requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position.

In the brief submitted on appeal, counsel for the petitioner states that the "Temple . . . has always required its teachers in the Preschool to hold at least a bachelor's degree with prior childhood teaching experience." Counsel acknowledges that there is no documentary evidence of this requirement, when he states:

In retrospect it probably would have been more probative if that requirement appeared in print in the information submitted with the documentation to the Response to the RFE. But it has always been that policy even if not articulated beyond: "Our staff is chosen based upon their background in early childhood education . . ."

In addition, in further support of the petitioner's contention that it has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position, in the brief submitted on appeal, counsel states that "[t]he petitioner has found four resumes from former teachers at the school" and attached such resumes as an exhibit to the brief on appeal. The AAO notes that the petitioner was put on notice of this required evidence in the RFE⁸ and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Because these four resumes fall within a type of evidence requested in the RFE, but were not provided as part of the response to the RFE, they will not be considered. The USCIS regulations governing the RFE process preclude the consideration of evidence requested in an RFE but not submitted as part of a timely response to the RFE. See 8 C.F.R. §§ 103.2(b)(11) and (b)(14). Further, as in the present matter, where 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); *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 the documents in response to the RFE. (The AAO notes, however, that the four resumes would not have made a difference in the outcome of this appeal anyway, as the assertions in the resumes are not substantiated by documentary evidence and as such, even if considered with the other evidence in the record, these four resumes still would not establish the

⁸ In the RFE, dated December 3, 2011, the director stated, "[i]f you have previously employed individuals in the position of Preschool Teacher, submit documentary evidence such as W-2 Forms and copies of degrees and transcripts to verify: [t]he number of individuals you have employed in this position in the past; [t]he level of education held by each individual[;] and the field of study in which the degree was earned."

requisite history of exclusively hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.)

Thus, in the instant case, the record does not establish a prior history, since the petitioner was established in 1951, of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent. Other than the assertions of counsel that, since its inception, the petitioner has always required that teachers hold at least a bachelor's degree, there is no evidence in the record to confirm this assertion. Moreover, the record contains the resumes of seven individuals that counsel claims are employed by the petitioner as teachers, but the petitioner did not submit substantiating evidence of the information contained in the resumes, which could include, *inter alia*, copies of the individuals' degrees to corroborate their education, the recruitment ads (if any) for the positions indicating the educational requirements for the positions, and documentary evidence of such individuals' employment, such as copies of their paystubs and Form W-2, Wage and Tax Statements. 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. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, the record of proceeding does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

Upon review of the record, the petitioner has not provided evidence that establishes that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. The AAO acknowledges that the petitioner believes its proffered position involves specialized and complex duties.⁹ However, there is insufficient evidence in the record to establish that the duties of the preschool teacher 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. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered

⁹ In the brief submitted on appeal, counsel for the petitioner asserts that "[o]ne gets the impression that the Director was under the misguided impression that the Petitioner's Preschool is nothing more than a glorified babysitting enterprise. To the contrary, age appropriate language development as well as physical activities are only a part of the instruction mode. Teaching values, socialization and exploring Judaism are also part of the curriculum. The interaction between the Preschool and parents as their children develop also requires unique skills that require a firm education background in different disciplines. Because of these various skill-based activities, no single, specific field of study would satisfy the educational needs of the Preschool. Because the school requires different disciplines, it has hired teachers with a wide range of skill sets."

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.

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.

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.