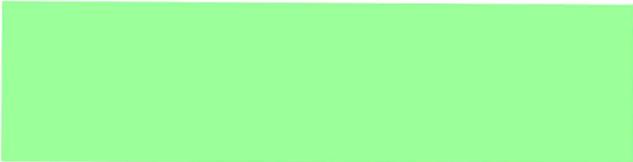




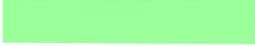
U.S. Citizenship
and Immigration
Services

(b)(6)

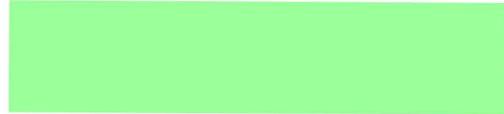


DATE: JAN 25 2013

OFFICE: CALIFORNIA SERVICE CENTER

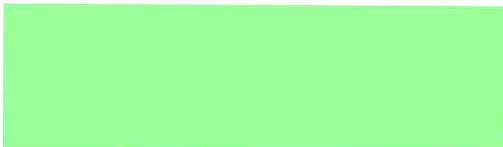
FILE: 

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a 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 a Nonimmigrant Worker (Form I-129) to the California Service Center on September 12, 2011. In the Form I-129, the petitioner describes itself as a school established in 1994, with five employees. 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 October 31, 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. On appeal, counsel for the petitioner asserts that the director's basis for the denial of the petition was erroneous and submits a brief and supporting documentation in support of this contention.

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

In this matter, the petitioner indicated on the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a lead teacher to work on a part-time basis at a salary of \$11.50 per hour (\$230 per week). The petitioner submitted, *inter alia*, the following documents with the Form I-129: (1) a certified Labor Condition Application for Nonimmigrant Workers, ETA Form 9035 & 9035E (LCA); (2) the petitioner's letter of support, dated September 8, 2011; (3) a copy of the beneficiary's "Degree of Bachelor of Education" awarded by [REDACTED], dated January 8, 2000; (4) a copy of the beneficiary's "Montessori Diploma" awarded by the Association Montessori Internationale, dated March 24, 2007; (5) a copy of the evaluation of the beneficiary's foreign education; and (6) a print-out from [REDACTED] indicating that the petitioner is an independent private school and offers a toddler program, preschool program and kindergarten program.

In its letter of support, dated September 8, 2011, the petitioner stated the following regarding the proffered position:

[W]e are in need of a Lead Teacher (also known as Directress in the Montessori system of teaching) for our Preschool Program who has been trained and certified in the Montessori teaching method. The Lead Teacher will be responsible for the daily activities and work in the classroom for the preschool class and will coordinate and supervise the activities of the other assistant teachers according to the Montessori teaching method.

In its letter of support, dated September 8, 2011, the petitioner stated that the beneficiary's job duties will be as follows:

- Instruct students individually and in groups, based on their needs and interests.
- Plan and teach all individual and group lessons including art, music, movement, practical life, sensorial, language, math, science, cultural and pre-writing activities. Group lessons can include multiage groups from three to six years old.
- Prepare the classroom and other indoor and outdoor spaces each day prior to students' arrival.
- Prepare the daily and monthly lesson plans for the class and all necessary teaching materials and supplies.
- Establish and enforce rules for behavior to maintain order and ensure a safe learning environment.
- Train, supervise, and mentor all assistant teachers.
- Organize all parent-teacher conferences and meetings.
- Communicate with parents or guardians about the progress of their children along with identifying any developmental, emotional, behavioral, or health-related concerns.
- Organize and coordinate all field trips.
- Track progress of students on an individual level as well as the class as a whole in order to meet children's' [sic] varying needs and interests.
- Report to the Head of School about the progress of the students along with evaluations of the performance of the assistant teachers.

The petitioner also stated the following in its letter of support, dated September 8, 2011:

A state license is not required for this position but in order to perform the functions of this position, the minimum requirement is a Bachelor's degree in Education and Montessori Certification.

[The beneficiary] earned a Bachelor of Education degree from the [REDACTED] which has been found to be equivalent to a U.S. bachelor's degree. She has also completed the Diploma Course in Early Childhood Education from the [REDACTED], [REDACTED] which is a training center accredited by the Association Montessori Internationale and is a certified Montessori teacher.

On September 26, 2011, the director issued an RFE requesting the petitioner to submit, *inter alia*, the following: (1) a more detailed job description including specific job duties; (2) an explanation of why the work to be performed requires the services of a person who has a bachelor's degree or its equivalent in the occupational field; and (3) a copy of the organizational chart showing the petitioner's hierarchy and staffing levels, listing all divisions, identifying the proffered position, listing the names and job titles for the individuals whose work will come

under the control of the proffered position, and indicating the name and job title of the individual who will direct the beneficiary.

On October 18, 2011, in response to the director's RFE, the petitioner, through counsel, submitted, *inter alia*, the following: (1) the petitioner's current and proposed organizational charts; (2) articles about the Montessori teaching method; (3) copies of 16 job postings for Montessori teachers; and (4) a copy of the Bachelor's degree, a copy of the Montessori certificate, a copy of the resume, and a copy of the 2009 W-2 and payroll check summary for an individual that allegedly previously held the proffered position.

Also, the petitioner submitted a letter in response to the RFE, dated October 10, 2011, in which it provides a revised description of the proffered position, as follows:

The Lead Teacher will be responsible for the daily activities and work in the classroom for the students in the Preschool Program and will also share responsibility for combined group activities for its 3-6 year olds two times a day with the Kindergarten Lead Teacher. Following the Montessori teaching method, the [petitioner] has both individual and group activities for its students. We have combined group activities for its [sic] 3-6 year olds two times a day. Even though [the beneficiary] is the Preschool Lead Teacher she will also be teaching Kindergarten students (ages 5-6) during those combined group activity times due to the nature of our program. [The petitioner] **only allows Montessori-certified teachers to introduce new lessons and materials during these group activities.** [Emphasis in original] **No assistant teacher is permitted to introduce new materials** because the curriculum is specifically designed to follow the Montessori teaching method. [Emphasis in original] The Lead Teacher teaches the assistant teachers how to implement these activities. [The beneficiary] will also be responsible for coordinating, supervising, and training the assistant teachers according to the Montessori teaching method.

In addition, in the aforementioned letter in response to the RFE, the petitioner states that "[t]he minimum requirement is a Bachelor's degree because it is the prerequisite for full Montessori Certification" and provides the following revised description of the daily duties for the position:

- Instruct and guide students individually based on their developmental needs and interests (7.5 hrs/week)[;]
- Instruct students in planned group activities (ages 3-6 including Kindergarten students (5 hrs/week)[;]
- Prepare the daily and monthly lesson plans for the class and all necessary teaching materials and supplies. This includes preparing all individual and group lessons including art, music, movement, practical, life, sensorial, language, math, science, cultural and pre-writing activities (5+ hrs of individual preparation time (Varies))[;]
- Prepare the classroom and other indoor and outdoor spaces each day prior to the student's arrival (2.5 hrs/week)[;]

- Establish and enforce rules for behavior to maintain order and ensure a safe learning environment (At all times)[;]
- Train, supervisor, [sic] and mentor all assistant teachers (During school hrs & after hours (2.5 hrs/week))[;]
- Organize all parent-teacher conferences and meetings (1 time a quarter)[;]
- Communicate with parents or guardians about the progress of their children along with identify[ing] any developmental, emotional, behavioral, or health-related concerns (Daily basis as parents come in for questions (Time varies))[;]
- Track progress of students on an individual level as well as the group as a whole in order to meet children's varying needs and interests (Daily basis (Time varies))[;]
- Report to the Head of School about the progress of students along with evaluations of the performance of the assistant teachers (1 hr)[;]
- Attend teachers' meetings (1 time per month (2 hrs))[;]
- Organize and coordinate all field trips (Several times a year)[;] [and]
- Supervise all lunch and playtimes (2.5 hrs).

The director denied the petition on October 31, 2011, finding that the proffered position is not a specialty occupation. On appeal, counsel for the petitioner contends that the proffered position qualifies as a specialty occupation. Counsel for the petitioner claims that “[U.S. Citizenship and Immigration Services (USCIS)] construes the evidence in such a way as to ignore the specialized training and knowledge required of Montessori teachers that is clearly evident in the requirement for Montessori certification.”

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. 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. Accordingly, the appeal will be dismissed, and the petition will be denied.

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 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 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)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The petitioner stated that the beneficiary would be employed in a 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 a specific specialty as the minimum for entry into the occupation, as required by the Act.

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.¹ The petitioner asserts in the LCA that the proffered position falls under the job title "lead teacher" and the occupational title, "Preschool Teachers, Except Special Education" – SOC (ONET/OES) code 25-2011.

The AAO reviewed the information in the *Handbook* regarding the occupational category "Preschool Teachers, Except Special Education." However, the *Handbook* does not indicate that these positions comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

¹ 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.

The subchapter of the *Handbook* entitled “How to Become a Preschool Teacher” states the following about this occupational category:

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

Education

In childcare centers, preschool teachers generally are required to have 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

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

Some states recognize the Child Care Professional (CCP) designation offered by the National Early Childhood Program Accreditation. Requirements to earn the CCP include a high school diploma, experience in the field, and continuing education courses. For more information about the CCP, contact the National Early Childhood Program Accreditation.

Work Experience

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

Licenses

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

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

Advancement

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

Important Qualities

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

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

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

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

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

U.S. Dept. 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 January 9, 2013).

The *Handbook* does not state that a baccalaureate or higher degree or its equivalent, in a specific specialty, is normally the minimum requirement for entry into the proffered position. While private schools may seek preschool teachers with a bachelor's degree in early childhood

education or in education, such a specialty degree is not required for entry into this particular occupation. Because the *Handbook* indicates that entry into the preschool teaching occupation at private schools does not normally require a degree in a specific specialty, the *Handbook* does not support the proffered position as being a specialty occupation.

As the evidence of record does not establish that the particular position proffered here is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied 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 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)).

Here, and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide entry 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.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner, through counsel, provided, *inter alia*, the following: (1) a letter from [REDACTED], Manager of Teacher Education Services, [REDACTED], dated October 14, 2011 (hereinafter, the "[REDACTED] Letter"); (2) a letter from [REDACTED], Executive Director, [REDACTED] International – USA, dated October 12, 2011 (hereinafter, the "[REDACTED] – USA Letter"); (3) an undated and unsigned letter purportedly from [REDACTED] Director of Training, [REDACTED] Montessori Training Center, [REDACTED] of the [REDACTED] (hereinafter, the "[REDACTED] Letter"); and (4) copies of several job advertisements.

The AAO reviewed the evidence submitted in the record. The [REDACTED] Letter states that "[t]o be eligible to earn a *full* Montessori credential at an [REDACTED]-affiliated teacher education program, one must hold a BA or BS degree, or its equivalent (or higher) from a [four-]year accredited institution in the [United States]." [Emphasis in original] The [REDACTED] – USA Letter states "that a bachelor's degree is [a] prerequisite to attending an [REDACTED] training center in the United States."

The [REDACTED] Letter states “that [the beneficiary] received a Montessori diploma and certification from [REDACTED] Montessori Training Course . . . for children from the ages of 3 to 6 years of age She has successfully completed her training and the bachelor’s degree is a prerequisite in order to be admitted in the [REDACTED] Montessori course.”

Upon review of these three letters, the AAO finds that, while all three letters indicate that a bachelor’s degree is a prerequisite for their respective Montessori training programs, they do not establish that a bachelor’s degree, in a specific specialty, is common to the petitioner’s industry in parallel positions in organizations that are similar to the petitioner. Rather, contrary to the purpose for which these letters were submitted, they indicate that a bachelor’s (or higher) degree does not need to be in a specific specialty to be admitted to their training programs.

Furthermore, the AAO notes that there are some problems with the aforementioned [REDACTED] Letter. The [REDACTED] Letter states that a “[. . .] bachelor’s degree is a prerequisite in order to be admitted in the [REDACTED] Montessori course.” This statement contradicts the information posted on the [REDACTED] website which states the following in the section titled “Apply to the [REDACTED] Montessori Training Course”:

*Eligibility

Graduates with backgrounds in the humanities or psychology are preferred. Candidates seeking admission should possess at least a high school certificate or an equivalent.

[REDACTED] Montessori Training Course, Apply to the [REDACTED] Montessori Training Course, available on the [REDACTED] / (last visited November 8, 2012).

Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Additionally, the [REDACTED] Letter merits no evidentiary weight, as the letter lacks a signature and therefore confirmation of the accuracy of its content by its purported author.

In support of its assertion that the degree requirement is common to the petitioner’s industry in parallel positions among similar organizations, the petitioner submitted copies of 16 job advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions.² Upon review of the job advertisements, the AAO finds that the petitioner

² Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from 16 job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar schools. *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

fails to establish that similar organizations to the petitioner routinely employ individuals with bachelor's degrees (or higher) in a specific specialty, or its equivalent, in parallel positions. Thus, for the reasons discussed in greater detail below, the petitioner's reliance upon the job advertisements is misplaced.

As previously mentioned, in the Form I-129 petition, the petitioner describes itself as a school, established in 1994, with five employees. The petitioner claims that it has a gross annual income of \$172,727, but did not disclose its net annual income. For the petitioner to establish that a school is similar, it must demonstrate that the petitioner and the school 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 the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. 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)).

The AAO reviewed the job advertisements submitted by the petitioner. The petitioner and counsel did not provide sufficient information to establish that each advertising employer and the petitioner share the same general characteristics, such as evidence of the level of revenue and staffing. In addition, the petitioner and counsel did not provide any independent evidence of how representative these job advertisements are of each advertising employer's recruiting history for the type of job advertised. Further, as each advertisement is only a solicitation for hire, it is not evidence of each employer's actual hiring practices.

While the 16 job advertisements indicate that a Montessori certification is required for teaching at a Montessori school, the job advertisements, however, do not establish that at least a bachelor's degree or the equivalent in a specific specialty is required. For instance, 14 of the job advertisements required a bachelor's degree but did not specify a specific specialty and only one

accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job advertisements supported the finding that the position of preschool lead teacher at a private school required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

job posting, for a [REDACTED], required a bachelor's degree in Early Childhood Education. Thus, the job advertisements as a whole do not establish that at least a bachelor's degree or the equivalent in a specific specialty is required.

Finally, the sixteenth job advertisement, for a primary teacher at a [REDACTED], states a requirement for "a bachelor's degree or equivalent based on education and experience in Education, Early Childhood Education, Psychology or Child Development." In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as business management and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty."³ Section 214(i)(1)(b) (emphasis added).

This job advertisement, however, permits a bachelor's degree in related fields and does not limit it to closely related fields. For example, education and psychology, while related, are not closely related fields such that they would delineate essentially the same body of highly specialized knowledge. Therefore, that the educational requirement of the advertised position may also be satisfied by a degree in psychology demonstrates that the advertised position does not require a degree in a single specific specialty. Regardless, even if psychology had been demonstrated to be or were otherwise deemed to be a field closely related to education, this single job advertisement, as compared to the advertisements not requiring a specialty degree, would indicate that such a specialty degree is not required.

The documentation provided does not establish that a bachelor's degree (or higher) in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations. 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 the particular position proffered in this petition is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specialty occupation.

The petitioner and counsel claim that the duties of the proffered position are complex. In the brief on appeal, counsel for petitioner claims the following:

³ Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty.

(b)(6)

The duties of the proffered position differ from the duties normally performed by Preschool Teachers as described in the *[Handbook]*. First, the proffered position involves teaching not only preschool children from the ages of 3 to 5 but also involves **teaching kindergarten-aged children**, aged 5 to 6 years old. . . . [Emphasis in original] The [b]eneficiary's duties included [sic] instructing students in planned group activities ages 3-6 including kindergarten students. The [b]eneficiary (not the Head of School) is responsible for the school's group activities that combine both the preschool and kindergarten programs. **In addition[,] when the Lead Kindergarten Teacher/Head of School is absent, the [b]eneficiary teaches the school's kindergarten students.** [Emphasis in original] There is an overlap of duties because the Lead Preschool Teacher is capable of instructing kindergarten-aged students due [to] the nature of the Montessori method.

However, the record does not demonstrate any complex or unique nature of the proffered position that distinguishes it from similar but non-specialty degreed employment under the second prong of the criterion. Moreover, in the instant case, as established by the organizational chart(s) that petitioner and counsel submitted, there is a separate position titled Kindergarten Lead Teacher that primarily handles teaching kindergarten-aged children, in contrast to the proffered position which will primarily handle teaching preschool-aged children. Therefore, a review of the record indicates that the petitioner has failed to credibly demonstrate that the duties that the beneficiary will be responsible for or perform on a day-to-day basis entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

While the petitioner indicated that a Montessori certificate is normally required to teach at a Montessori school, the petitioner failed to demonstrate how the preschool teaching duties described 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. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex and unique. While some education courses may be beneficial in performing certain duties of a preschool teacher, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate degree in a specific specialty, or its equivalent, are required to perform the duties of the particular position here proffered. Consequently, as the petitioner fails to demonstrate how the proffered position of preschool teacher is so complex or unique relative to other private schools' (including private Montessori schools) preschool teacher positions that can be performed by persons without at least a baccalaureate degree in a specific specialty, 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 the equivalent, for the position. Of course, the AAO will necessarily review and consider whatever evidence the petitioner may

have submitted with regard to its history of recruiting and hiring for the proffered position and with regard to the educational credentials of the persons who have held the proffered position in the past.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the position. In the instant case, the record does not conclusively 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").

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 was established in 1994. While the petitioner and counsel provided a copy of the Bachelor of Science degree and 2009 pay stub for one individual that petitioner claims has previously held the proffered position and a copy of the Head of School's/Lead Kindergarten Teacher's Master of Arts in Education degree since the Head of School is presently also handling the proffered position, the petitioner did not state when the proffered position was created nor, if applicable, submit the name(s), proof of educational background, and supporting documentation for any other individual(s) (if any) that previously held the proffered position between 1994 and 2009, nor any explanation for the failure to provide such documentation.

Upon review of the record, the petitioner has not provided sufficient evidence to establish 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 probative evidence to satisfy this criterion of the regulations. The AAO acknowledges that the petitioner believes that its proffered position involves specialized and complex duties. However, upon review of the record of proceeding, there is insufficient evidence to establish that the duties of the lead 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 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.

Beyond the decision of the director, although the above-discussed aspects of the petition constitute a sufficient basis for the AAO's determination that the petitioner has not satisfied the criterion at hand, the AAO will also note an additional aspect that would preclude approval of the petition.

The AAO notes that the aforementioned characterization of the position and the claimed duties and responsibilities appear to conflict with the job title, occupational classification, and wage indicated on the LCA submitted in support of the petition. As previously stated, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational title of "Preschool Teachers, Except Special Education" – SOC (ONET/OES) code 25-2011 and claimed that the prevailing wage in Franklin County (Columbus, Ohio) for the proffered position was \$11.37 per hour (\$23,650 per year, for a full-time position). The LCA was certified on September 7, 2011 and signed by the petitioner on September 8, 2011.

As discussed above, counsel for the petitioner claims that ". . . the proffered position involves teaching not only preschool children from the ages of 3 to 5 but also involves **teaching kindergarten-aged children**, aged 5 to 6 years old. . . . [Emphasis in original] The [b]eneficiary's duties included [sic] instructing students in planned group activities ages 3-6 including kindergarten students. The [b]eneficiary (not the Head of School) is responsible for the school's group activities that combine both the preschool and kindergarten programs. **In addition[,] when the Lead Kindergarten Teacher/Head of School is absent, the [b]eneficiary teaches the school's kindergarten students.**" [Emphasis in original] This language seems to suggest that the proffered position takes on the hybrid duties of both preschool teacher and kindergarten teacher for group activities that incorporate children aged 3 to 6 years old.

The petitioner and counsel did not provide an explanation for classifying the proffered position under the occupational category of "Preschool Teachers, Except Special Education" in the LCA, but claiming that "the proffered position ". . . also involves teaching kindergarten-aged children, aged 5 to 6 years old . . ." [emphasis removed] in the appeal. With respect to the LCA, the DOL provides clear guidance for selecting the most relevant Occupation Information Network (O*NET) occupational code classification.⁴ The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the SWA should default directly to the relevant O*NET-SOC occupational code for the highest paying

⁴ 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.

occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

Thus, if the petitioner believed that its position is best described as a combination of O*NET occupations, then according to the DOL guidance the petitioner should have chosen the relevant occupational code for the highest paying occupation, in this case "Kindergarten Teachers, Except Special Education."⁵

The AAO notes that under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

Moreover, if the proffered position is indeed a hybrid position that will in effect handle the teaching duties for both the preschool class and the kindergarten class, thereby relieving the current Lead Kindergarten Teacher/Head of School from the kindergarten teaching duties, then the proffered position has been designated incorrectly in the LCA submitted in support of the petition. Also, the petitioner's offered wage to the beneficiary of \$11.50 per hour (\$230 per week) is significantly below the prevailing wage for the occupational category of "Kindergarten Teachers, Except Special Education." If such were the case, the petitioner would have failed to establish that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted. An inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. See 8 C.F.R. § 214.2(h)(10)(ii); see also 8 C.F.R. § 103.2(b)(1). For this additional reason, the petition may be denied.

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

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

⁵ It is noted that, if the proffered position were determined to be the higher level position of "Kindergarten Teachers, Except Special Education," the minimum wage that the petitioner would have been required to pay at the time for a full-time position would have been \$30,520 per year for a Level I position, \$39,930 per year for a Level II position, \$49,340 per year for a Level III position, and \$58,750 per year for a Level IV position.

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

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