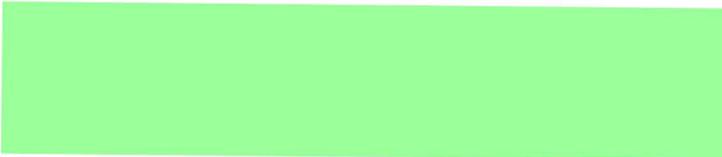




U.S. Citizenship  
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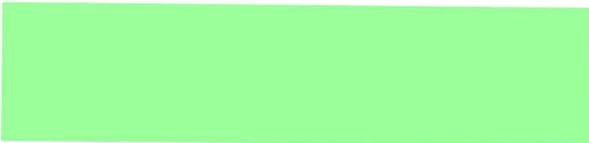


DATE: **JUN 14 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE:

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 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,

*for*   
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition and affirmed her decision in response to two subsequently-filed motions to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the petition remanded for further consideration and action.

On the Form I-129 visa petition, the petitioner describes itself as a Montessori school<sup>1</sup> established in 2007. In order to employ the beneficiary in what it designates as a kindergarten teacher position,<sup>2</sup> 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 the basis of her determination that the petitioner failed to demonstrate that the beneficiary qualifies to perform the duties of the proffered position.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; (5) the Form I-290B and supporting documentation submitted in support of the petitioner's first motion to reopen and reconsider; (6) the director's letter dismissing the petitioner's first motion and affirming her prior decision; (7) the Form I-290B and supporting documentation submitted in support of the petitioner's second motion to reopen and reconsider; (8) the director's letter dismissing the petitioner's second motion and affirming her prior decision; and (9) the Form I-290B and supporting documentation submitted in support of the appeal.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has overcome the director's ground for denying this petition. Accordingly, the director's decision will be withdrawn.

However, beyond the decision of the director, the AAO finds that the evidence in the record of proceeding does not establish that the proffered position qualifies for classification as a specialty occupation. Consequently, the petition may not be approved at this time, and the petition will be remanded for further action in accordance with the instructions set forth below.

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 611110, "Elementary and Secondary Schools." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "611110 Elementary and Secondary Schools," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed May 17, 2013).

<sup>2</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O\*NET/OES) Code 25-2012.00, the associated Occupational Classification of "Kindergarten Teachers, Except Special Education," and a Level I (entry-level) prevailing wage rate.

## I. Beneficiary Qualifications

The AAO will first address the director's finding that the beneficiary is not qualified to perform the duties of a specialty occupation. Upon review of the entire record, the AAO finds that the petitioner has overcome that finding.

After receiving a bachelor's degree in international studies from [REDACTED] the beneficiary earned a Montessori Diploma, from an accredited Association Montessori Internationale (AMI) training center, after successful completion of a three-year course of studies required by AMI for the diploma. The beneficiary, therefore, qualifies to perform the duties of a specialty occupation under the requirements set forth at section 214(i)(2) of the Act and 8 C.F.R. § 214.2(h)(4)(iii)(C)(I).

Consequently, the director's sole ground for denying this petition is hereby withdrawn.

## II. Specialty Occupation

Although the petitioner has overcome the director's sole ground for denying this petition, the AAO finds nonetheless that the petition cannot be approved, as the record of proceeding as currently constituted does not establish that the proffered position is a specialty occupation. As such, the matter will be remanded for further consideration and action in this regard.

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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 determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely upon a proffered position's title. The specific duties of the 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 at 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In its June 18, 2011 letter of support, the petitioner stated that the duties of the proffered position would include the following:

- Teaching and managing her classroom by applying her knowledge and experience in the following areas by using the Montessori method to teach students in classes on basic reading, writing, arithmetic, art, and music:
  - Child growth and development;
  - Child health, safety, and nutrition;
  - Child psychology;
  - Differences in and diversity of learning; and
  - Educational games;
- Teaching theories and concepts in the following areas in order to build an awareness of literary, scientific, and mathematical concepts:
  - Language;
  - Mathematics;
  - Writing;
  - Reading;
  - Art; and
  - Music;
- Designing and developing a curriculum for students in language, mathematics, writing, reading, and art, and integrating curricular activities into classes, including computer-based lessons, cooperative learning, games, and exploration activities;
- Designing, administering, and grading tests that reflect the Montessori method;
- Designing and developing alternative measures of assessment such as problem-based learning projects and games, and documenting educational results and actions by maintaining student reports, logs, and records;
- Participating in the training of fellow teachers;
- Tutoring students after school as needed;

- Attending parent-teacher conferences; and
- Updating her knowledge of the job by participating in educational opportunities, reading professional publications, maintaining personal networks, and participating in professional organizations.

The AAO will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

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 it addresses.<sup>3</sup> The duties proposed for the beneficiary generally align with those of the "Kindergarten and Elementary School Teachers" occupational category as described in the *Handbook*.

In pertinent part, the *Handbook* states the following with regard to this occupational classification:

Kindergarten and elementary school teachers prepare younger students for future schooling by teaching them the basics of subjects such as math and reading. . . .

Kindergarten and elementary school teachers typically do the following:

- Plan lessons that teach students subjects, such as reading and math, and skills, such as study skills and social skills
- Assess students to evaluate their abilities, strengths, and weaknesses
- Teach students as an entire class or in small groups the lessons they have planned
- Grade students' assignments to monitor their progress
- Communicate with parents about their child's progress

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<sup>3</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

- Work with individual students to challenge them and overcome their weaknesses
- Prepare students for standardized tests required by the state
- Develop and enforce classroom rules to teach children proper behavior
- Supervise children outside of the classroom—for example, at lunchtime or during recess

Kindergarten and elementary school teachers act as facilitators or coaches to help students learn and apply important concepts. Many teachers use a hands-on approach, including props, to help students understand abstract concepts, solve problems, and develop critical thinking skills.

For example, they may show students how to do a science experiment and then have the students do the experiment. They may have students work together to learn how to collaborate to solve problems.

Kindergarten and elementary school teachers generally teach kindergarten through fourth or fifth grade. However, in some schools elementary school teachers may teach sixth, seventh, and eighth grade.

Kindergarten and elementary school teachers most often teach students many subjects, such as reading, science, and social studies, which students learn throughout the day.

Some teachers, particularly those who teach young students, may teach a multilevel class that includes children who would traditionally be in different grades. They may have the same group of students for several years.

Kindergarten and elementary school students spend most of their day in one classroom. Teachers may escort students to assemblies; to classes taught by other teachers, such as art or music; or to recess. While students are away from the classroom, teachers plan lessons, grade assignments, or meet with other teachers and staff.

In some schools with older students, teachers work in teams. These teachers often specialize in teaching one of two pairs of specialties, either English and social studies or math and science. Generally, students spend half their time with one teacher and half their time with the other.

Some kindergarten and elementary school teachers teach special classes, such as art, music, and physical education.

Some schools employ teachers of English as a second language (ESL) or English for speakers of other languages (ESOL). Both of these types of teachers work exclusively with students who are learning English, often referred to as English language learners (ELLs). The teachers work with students individually or in groups to help them improve their English skills and to help them with assignments they got in other classes.

Students with learning disabilities or emotional or behavioral disorders are often taught in traditional classes. Teachers work with special education teachers to adapt lessons to these students' needs and monitor the students' progress. In some cases, kindergarten and elementary school teachers may co-teach lessons with special education teachers. For more information, see the profile on special education teachers.

Some teachers maintain websites to communicate with parents about students' assignments, upcoming events, and grades. For students in higher grades, teachers may create websites or discussion boards to present information or to expand on a lesson taught in class.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Kindergarten and Elementary School Teachers," <http://www.bls.gov/ooh/Education-Training-and-Library/Kindergarten-and-elementary-school-teachers.htm#tab-2> (last visited May 17, 2013).

While the *Handbook* notes that all 50 States require public kindergarten and elementary school teachers to have at least a bachelor's degree in elementary education, it also notes that private school teachers do not need to meet state requirements. The *Handbook* also states that private schools "typically seek kindergarten and elementary school teachers who have a bachelor's degree in elementary education." *Id.* at <http://www.bls.gov/ooh/Education-Training-and-Library/Kindergarten-and-elementary-school-teachers.htm#tab-4>.

That the *Handbook* does not indicate that private kindergarten teacher positions normally require at least a bachelor's degree in a specific specialty is also evident in the following discussion in the "How to Become a Kindergarten Teacher or Elementary School Teacher" section of its chapter "Kindergarten Teachers and Elementary School Teachers," which does not specify a requirement of a bachelor's degree in a particular major or academic concentration for private school kindergarten teachers:

Kindergarten and elementary school teachers must have a bachelor's degree. In addition, public school teachers must have a state-issued certification or license. For information about teacher preparation programs and certification requirements in your state, contact the U.S. Department of Education.

## **Education**

All states require public kindergarten and elementary school teachers to have at least a bachelor's degree in elementary education. Some states also require kindergarten and elementary school teachers to major in a content area, such as math or science. Those who major in a content area typically enroll in their university's teacher preparation program and also take classes in education and child psychology.

In teacher education programs, future teachers learn how to present information to young students and how to work with young students of varying abilities and backgrounds. Programs typically include fieldwork, such as student teaching.

Some states require kindergarten and elementary school teachers to earn a master's degree after receiving their teaching certification.

Teachers in private schools do not need to meet state requirements. However, private schools typically seek kindergarten and elementary school teachers who have a bachelor's degree in elementary education.

### **Licenses and Certification**

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

Kindergarten and elementary school teachers are typically certified to teach early childhood grades, which are usually preschool through third grade, or elementary school grades, which are usually first through sixth grades or first through eighth grades.

Requirements for certification vary by state. However, all states require at least a bachelor's degree. They also require completing a teacher preparation program and supervised experience in teaching, typically gained through student teaching. Some states require a minimum grade point average. States often require candidates to pass a general teaching certification test, as well as a test that demonstrates their knowledge of the subject they will teach. Although kindergarten and elementary school teachers typically do not teach only a single subject, they may still be required to pass a content area test to earn their certification.

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

All states offer an alternative route to certification for people who already have a bachelor's degree but lack the education courses required for certification.

Some alternative certification programs allow candidates to begin teaching immediately after graduation, under the supervision of an experienced teacher. These programs cover teaching methods and child development. After they complete the program, candidates are awarded full certification.

Other programs require students to take classes in education before they can teach. Students may be awarded a master's degree after completing either of these programs. For information about alternative certification programs, contact the National Center for Alternative Certification.

### **Advancement**

Experienced teachers can advance to be mentors or lead teachers. These teachers often work with less experienced teachers to help them improve their teaching skills.

With additional education or certification, teachers may become school counselors, school librarians, or instructional coordinators. Some become assistant principals or principals, both of which generally require additional education in education administration or leadership. For more information, see the profiles on school and career counselors, librarians, instructional coordinators, and elementary, middle, and high school principals.

### **Important Qualities**

**Communication skills.** Teachers must collaborate with teacher assistants and special education teachers. In addition, they need to discuss students' needs with parents and administrators.

**Creativity.** Kindergarten and elementary school teachers must plan lessons that engage young students, adapting the lessons to every student's learning style.

**Instructional skills.** Kindergarten and elementary school teachers need to be able to explain difficult concepts in terms that young students can understand. In addition, they must be able to get students engaged in learning and adapt their lessons to each student's needs.

**Patience.** Working with students of different abilities and backgrounds can be difficult. Kindergarten and elementary school teachers must respond [and] be patient when students struggle with material.

*Id.* As indicated above, while private schools may typically seek kindergarten teachers with a bachelor's degree in elementary education, such a specialty degree is not required for entry into this particular occupation. Because the *Handbook* indicates that entry into the private school kindergarten teaching occupation does not normally require a degree in a specific specialty, the *Handbook* does not support the proffered position as being a specialty occupation.

The materials from DOL's Occupational Information Network (O\*NET OnLine) do not establish that the proposed position qualifies as a specialty occupation under the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. O\*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as O\*NET's OnLine's JobZone designations make no mention of the specific field of study from which a degree must come. As was noted previously, the AAO 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 proposed position. Also, the Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. For all of these reasons, the O\*NET OnLine excerpt submitted by counsel is of little evidentiary value to the issue presented on appeal.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 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* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Nor does the petitioner submit any other

evidence 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.

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as 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.

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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."

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. A review of the record indicates that the petitioner has failed to credibly demonstrate that the duties 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.

Specifically, the petitioner failed to demonstrate how the kindergarten 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 kindergarten 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.

Additionally, the AAO incorporates here by reference and reiterates its earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that she will receive specific instructions on required tasks and expected results; and that her work will be reviewed for accuracy.

Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other private school kindergarten teacher positions that do not require at least a baccalaureate degree in a specific specialty, or the equivalent, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. 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 proffered position.<sup>4</sup> In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

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 employer 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 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position 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 at 387. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty 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

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<sup>4</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within its occupation.

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.

As evidence of eligibility under this criterion, the record contains evidence regarding one of the petitioner's other employees. However, the AAO does not consider a single previous hire, particularly one made pursuant to an H-1B approval, sufficient evidence of a past history of employing only persons with at least a bachelor's degree, or the equivalent, in a specific specialty to establish eligibility under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). As the petitioner has failed to demonstrate a history of recruiting and hiring only individuals with a bachelor's degree, or the equivalent, in a specific specialty for the proffered position, it has failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty.

Both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level I is indicative of duties of relatively low complexity.

The *Prevailing Wage Determination Policy Guidance* (available at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf) (last accessed May 17, 2013)) issued by DOL states the following with regard to Level I wage rates:

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

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level indicates that the proffered position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to possess a basic understanding of the occupation; that she will be expected to perform routine tasks requiring limited, if any, exercise of

judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the record of proceeding as currently constituted does not permit approval of this petition. However, as the director did not address this issue in her decision denying the petition, the matter will be remanded for further consideration and action on this issue.

### **III. Conclusion**

As set forth above, the petitioner has established that the beneficiary is qualified to perform the duties of a private-school kindergarten teacher found to be a specialty occupation. a specialty occupation. Accordingly, the director's sole ground for denying the petition is withdrawn. However, because the director did not address the issue of whether the proffered position qualifies as a specialty occupation – that is, whether the kindergarten teacher position that is the subject of this petition is one whose actual performance requires the practical and theoretical application of at least a bachelor's degree level of highly specialized knowledge in a specific specialty – the AAO is remanding the petition for the director to do so.

With regard to this remand, it should be noted that the AAO's comments with regard to the record of proceeding as presently constituted are not meant to preclude the director from expanding the record by issuing an additional RFE to allow the petitioner to more fully address the specialty occupation issue. In fact, in the particular context of this particular record of proceeding as presently constituted, the director should issue an additional RFE that would request: (1) documentary evidence as to whether the petitioner is an AMI-accredited Montessori school; (2) evidence establishing the minimum educational credentials that it has required for hire as a kindergarten teacher, including whether it normally requires Montessori diplomas issued by AMI-accredited training centers; and (3) any additional evidence that the director may deem necessary, in his or her independent discretion, for correctly determining whether the proffered position qualifies as a specialty occupation.

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 been met in part. Accordingly, the director's decision will be withdrawn and the matter will be remanded for entry of a new decision.

**ORDER:** The director's decision dated January 21, 2012 is withdrawn. The matter is remanded to the director for further action consistent with the above and entry of a new decision.