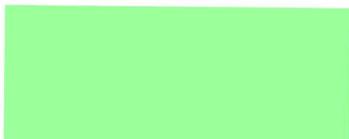


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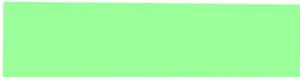
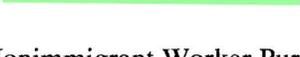
U. S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W. MS 2090  
Washington, DC 20529-2090



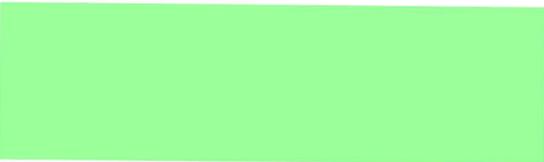
U.S. Citizenship  
and Immigration  
Services



DATE: JUN 20 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)

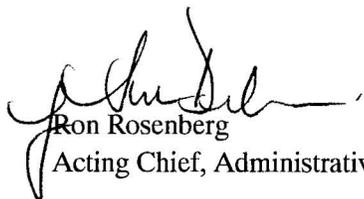
ON BEHALF OF PETITIONER:  


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,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner describes itself as a private institute offering classes in standardized test preparation and general academic skill enhancement.<sup>1</sup> The petitioner endeavors to employ the beneficiary as a part-time math and science teacher 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and attached exhibits in support of the appeal.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following 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

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<sup>1</sup> The AAO notes that on the Form I-129, the petitioner claimed it was engaged in financial investment management. Upon request for clarification from the director, the petitioner acknowledged that this entry was erroneous and it was in fact a private tutoring center.

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

Again, the petitioner describes itself as a private tutoring center which provides classes for standardized test preparation as well as general academic enrichment. Regarding the proffered position, the petitioner claims that it requires the services of the beneficiary as a science and math teacher, and claims that her duties would be as follows:

[The beneficiary] is being offered the position of Science and Math teacher at our company. The job duties to be handled by the position include the following:

1. Teaching the subjects of Algebra One, Algebra Two, SAT Math, AP Chemistry, SAT Chemistry, AP Biology, SAT Biology E/M and International Chemistry Olympiad in a class setting. (70%).
2. Designing the curriculum, grading the homework, and preparing class materials, including in-class tests and practice sets. (10%)
3. Consulting students regarding their learning progress and studying efficiency. (10%).
4. One-on-one tutoring. (10%).

The petitioner concluded by stating that in order to perform the complex duties of the proffered position, the incumbent must have at least a bachelor's degree in mathematics or a relevant scientific discipline such as physics, chemistry, engineering, etc. The petitioner further stated that a teaching credential is not required for the proffered position because the petitioner is a private tutoring center and not a public school.

The director issued an RFE in this matter. Specifically, the director requested additional evidence that the proffered position qualifies as a specialty occupation position, as well as additional information clarifying the nature of the petitioner's business and the beneficiary's education credentials. The petitioner responded to the director's requests. The petitioner restated the duties of the proffered position as set forth in the initial letter of support, and included the following additional explanation:

An instructor of young students must of course demonstrate mastery of the subjects he or she is expected to teach. At a minimum, to teach a high school course, AP course, or high school standardized testing level material, the instruct[or] must possess a Bachelor's Degree from an accredited institution of higher learning. Such a requirement and expectation is supported in the OOH, 2008-2009 edition, on page 277, where it summarizes: "Educational qualifications range from expertise in a particular field to a Ph.D., depending on the subject taught and the type of educational institution."

Whereas high school graduates may be deemed suitable for informal tutoring by certain parents, parents enroll their children with our academy for supplementary education as provided by individuals with higher qualifications and experience in the subjects they wish their children to master.

The petitioner also submitted a copy of the beneficiary's diploma and transcripts from [REDACTED], demonstrating that she holds a Ph.D. in Biomedical Engineering.

The director denied the petition on June 21, 2011, finding that the proffered position did not qualify as a specialty occupation.

On appeal, counsel contends that the petitioner has sustained its burden of proof, and specifically contends that the petitioner has established eligibility under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and (3).

To make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining this criterion include whether the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, indicates that the proffered position is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty.

The director found that the proffered position was akin to that of a self-enrichment teacher. Counsel for the petitioner, however, contends that the proffered position is akin to that of a high school math teacher. The AAO will review both sections of the *Handbook* in making the determination regarding the proper classification of the proffered position.

The director found that the *Handbook's* section discussing self-enrichment teachers was most closely associated with the duties of the proffered position. The *Handbook* describes this occupational classification under the heading of "Teachers—Self-Enrichment Education" as follows:

Self-enrichment teachers instruct in a variety of subjects that students take for fun or self-improvement, such as music and foreign languages. These classes generally do not lead to a

degree or certification, and students take them voluntarily to learn new skills or gain understanding of a subject.

#### Duties

Self-enrichment teachers generally provide instruction in formal education programs, such as adult education programs, or they teach classes or lessons on their own as a private instructor.

Self-enrichment teachers in formal education programs typically do the following:

- Create and teach lessons
- Propose new classes to program directors or their supervisor
- Determine class goals and objectives and develop a curriculum to meet those goals
- Evaluate the course and make any necessary improvements or changes
- Help advertise and promote classes

In formal education programs, self-enrichment teachers instruct students in a variety of subjects. Some teach academic subjects, such as literature, foreign languages, and history. Others teach classes that provide students with useful life skills, such as cooking, personal finance, and time management.

Self-enrichment teachers also teach classes intended solely for recreation, such as photography, pottery, and painting. Some teach classes offered through religious institutions, such as marriage preparation for couples or religious education for children.

Most self-enrichment classes are relatively informal. Some classes, such as pottery or sewing, may be largely hands-on. The instructor may demonstrate techniques and then observe and correct students as they try to do the activity themselves. Other classes, such as financial planning or religious studies, may include lectures or rely more heavily on group discussions.

Self-enrichment classes may last 1 or 2 days or several weeks. These brief classes may be introductory and generally focus on one topic. For example, a cooking class might focus on making bread. Others, such as language classes, last longer and help students progress with increasing levels of difficulty. Some self-enrichment classes introduce children and youth to activities such as drama. They may be designed to last from 1 week to several months.

Private self-enrichment teachers typically do the following:

- Advertise their services to find new students
- Locate a space to give lessons, which in some cases may be in the teacher's home
- Schedule lessons
- Teach students one-on-one or in small groups
- Determine rates and keep financial records

Private self-enrichment teachers often teach lessons in piano, guitar, singing, or other instruments. The instructor might work with the student for only 1 or 2 hours per week and then tell the student what to practice between lessons. Many instructors work with the same students each week for years.

All self-enrichment teachers must prepare lessons. The amount of time needed to prepare varies, depending on the subject and the length of the course.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., “Self-enrichment Teachers,” <http://www.bls.gov/ooh/education-training-and-library/self-enrichment-teachers.htm#tab-2> (last accessed September 25, 2012). The duties of the proffered position accord somewhat with the duties of self-enrichment teachers as described in the *Handbook*. Specifically, self-enrichment teachers provide instruction in formal education programs, and may teach academic courses in a variety of subjects. However, self-enrichment teachers typically provide instruction for fun or self-improvement, and do not provide instruction in courses that will lead to degrees or certifications. While the petitioner’s tutoring center likewise does not provide instruction that will result in degrees or certifications, the services of the petitioner appear to be focused more on college preparation, such as standardized and advanced placement test preparation, which is not simply recreational in nature.

The AAO now turns to the *Handbook’s* section pertaining to high school teachers, which the petitioner claims is the category most akin to the proffered position. Specifically, the *Handbook* states:

High school teachers typically do the following:

- Plan lessons in the subjects they teach, such as biology or history
- Assess students to evaluate their abilities, strengths, and weaknesses
- Teach students as an entire class or in small groups
- Grade students’ assignments to monitor progress
- Communicate with parents about students’ progress
- Work with individual students to challenge them, to improve their abilities, and to work on their weaknesses
- Prepare students for standardized tests required by the state
- Develop and enforce classroom rules
- Supervise students outside of the classroom—for example, at lunchtime or during detention

High school teachers generally teach students from the 9th through 12th grades. They usually teach one or two of the subjects or classes a student has throughout the day.

For example, they may teach government and history.

In one class, high school teachers may work with students from different grades because, in many schools, students are divided into classes based on their abilities, not only their age. For example, a high school teacher of Spanish may have students

from 9th through 12th grades in first-year Spanish and also have students from 9th to 12th grades in advanced Spanish—depending on how much language instruction the students have had.

High school teachers see several different classes of students throughout the day. They may teach the same material—for example, world history—to more than one class if the school has many students taking that subject.

Some teachers instruct special classes, such as art, music, and physical education. For more information, see the profile on career and technical education teachers.

Teachers use time during the day, when they do not have classes, to plan lessons, grade assignments, and meet with other teachers and staff.

In some schools, there are English as a second language (ESL) or English for speakers of other languages (ESOL) teachers who work exclusively with students who are learning English. These students are often referred to as English language learners (ELLs). These teachers work with students individually or in groups to help them improve their English skills and to help students with assignments for other classes.

Students with learning disabilities and emotional or behavioral disorders often are taught in traditional classes. Therefore, high school teachers may work with special education teachers to adapt lessons to these students' needs and to monitor the students' progress. 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, teachers may create websites or discussion boards to present information and to expand a lesson taught in class.

Some high school teachers coach sports and advise student clubs and other groups, activities which frequently happen before or after school.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "High School Teachers," <http://www.bls.gov/ooh/education-training-and-library/high-school-teachers.htm#tab-2> (last accessed September 25, 2012). The duties of the proffered position contain elements of teaching at the high school level. Notwithstanding that the petitioner may not be an ordinary school in the sense of offering a full-time curriculum to its students, the beneficiary's duties include preparing students for standardized tests required by the state, planning lessons, teaching students and grading assignments. The AAO finds, therefore, that the proffered position is more similar to that of a high school teacher than it is to a self-enrichment education teacher position. The position will be analyzed as such, and the AAO hereby withdraws the director's specific finding to the contrary.

Regarding the educational requirements for entry into this occupation, the *Handbook* states:

All states require public high school teachers to have at least a bachelor's degree. Most states require high school teachers to have majored in a content area, such as chemistry or history. While majoring in a content area, future teachers typically enroll in their higher education's teacher preparation program and take classes in education and child psychology, as well.

Teacher preparation—or teacher education—programs instruct how to present information to students and how to work with students of varying abilities and backgrounds. Programs typically include fieldwork, such as student teaching.

Some states require high school teachers to earn a master's degree after earning their teaching certification.

Teachers in private schools do not need to meet state requirements. However, private schools typically seek high school teachers who have a bachelor's degree and a major in a content area.

#### Licenses and Certification

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

High school teachers typically are awarded a secondary or high school certification. This allows them to teach the 7th through the 12th grades.

Requirements for certification vary by state. However, all states require at least a bachelor's degree. States 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 typically require candidates to pass a general teaching certification test, as well as a test that demonstrates their knowledge in the subject they will teach.

Often, teachers are required to complete annual professional development classes to keep their license. Most states require teachers to pass a background check, and 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 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 type of programs. For more information about alternative certification programs, contact the National Center for Alternative Certification.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "High School Teachers," <http://www.bls.gov/ooh/education-training-and-library/high-school-teachers.htm#tab-4> (last accessed September 25, 2012). The petitioner acknowledges in response to the RFE that it is a private tutoring center and not a public school. Therefore, for purposes of this analysis, the AAO is concerned only with the educational requirements imposed on teachers in private settings.

The *Handbook* addresses the educational requirements of teachers in private institutions as follows:

Teachers in private schools do not need to meet state requirements. However, private schools typically seek high school teachers who have a bachelor's degree and a major in a content area.

*Id.*

The *Handbook* indicates, therefore, that private school teachers are not obligated to meet state requirements, which include a minimum of a bachelor's degree and licensing or certification. Moreover, which the *Handbook* indicates that private schools *typically* seek teachers who have a bachelor's degree and a major in a content area, there is no definitive requirement that incumbents possess a degree. Moreover, there is no requirement that an incumbent possess a degree in a specific specialty. As the record of proceeding has not demonstrated that a minimum of a bachelor's degree, or the equivalent, in a specific specialty is normally the minimum requirement for entry into the type of teaching position that is the subject of this petition, the petitioner has not demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, 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 requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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.

As stated earlier, 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 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

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

In the RFE, the petitioner was asked to submit evidence that similar organizations in the petitioner's industry routinely require a degree for entry into parallel positions. The petitioner failed to submit such evidence, but on appeal submits evidence from competitors, such as job postings and staff listings, in support of the contention that a degree requirement is commonly imposed. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted for the first time on appeal.

Nevertheless, the AAO notes that the petitioner includes three job postings in support of the premise that a degree requirement is common within the petitioner's industry. Although the AAO will not evaluate this evidence for the reason set forth above, it should be noted that, even if the vacancy announcements provided were for parallel positions in similar organizations and required a minimum of a bachelor's degree or the equivalent in a specific specialty, three announcements are insufficient to demonstrate an industry-wide requirement. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.<sup>2</sup>

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<sup>2</sup> According to DOL's *Occupational Employment Statistics (OES)* detailed statistics on high school teachers for 2010, there were approximately 200 persons employed as high school teachers in the category entitled "other schools and instruction; private," and there were approximately 400 persons employed as high school teachers in the category entitled "educational support services; private." Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012-13 Edition*, High School Teachers, available at <http://www.bls.gov/ooh/education-training-and-library/high-school-teachers.htm#tab-6> (last accessed September 25, 2012). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just three job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the field of high school teaching. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisement was randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

The petitioner, therefore, has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first alternative prong at 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). That prong is satisfied if the petitioner is able to demonstrate that the proffered position is so complex or unique that it can be performed only by an individual with a degree.

The proffered position, as was noted above, is chiefly a position teaching SAT preparatory courses, as well as AP level chemistry, math, and biology courses. Nothing in the record of proceeding establishes that any aspect of these classes is so complex or unique as to require a person with at least a bachelor's degree or the equivalent in any specific specialty. Thus, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also finds that there is insufficient evidence to demonstrate that the petitioner has an established history of recruiting and hiring for the proffered position only individuals with at least a bachelor's degree, or the equivalent, in a specific specialty, as required under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

In support of the initial petition, the petitioner submitted a staff list which identified two individuals, namely [REDACTED] and [REDACTED] as being employed by the petitioner as math and science teachers. The list also identified three additional employees holding similar teaching positions: [REDACTED] Math Teacher; [REDACTED] Math Olympiad Teacher; and [REDACTED] Elementary Math Teacher. Additionally, the petitioner submitted copies of its Employers Quarterly Federal Tax Returns (Form 941), for 2008 and for the first two quarters of 2009.<sup>3</sup> Of the five employees listed above, only two, [REDACTED] were listed as employees on all returns submitted.

In support of the appeal, counsel for the petitioner submitted copies of staff biographies as set forth on its website, [REDACTED]. The petitioner submitted biographies for five employees, dated July 31, 2011, in support of the contention that it routinely hired only degreed

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As such, even if the job announcement supported the finding that the job of self-enrichment teacher for a four-person non-profit research organization required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that this single posting, which appears to have been consciously selected, could credibly refute the statistics-based findings of the *OES* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

<sup>3</sup> The AAO notes that while the return for the third quarter of 2008 is included in the record, the attachment listing all employees on the payroll for that quarter is omitted.

individuals for the proffered position. Specifically, the petitioner submitted biographies, including degree information, for the following individuals:

- 1.
- 2.
- 3.
- 4.
- 5.

Counsel for the petitioner claimed that this documentation demonstrated that the petitioner routinely employed specialty-degreed individuals in the proffered position, since the biographies each listed the educational credentials of these employees.

On December 21, 2012, the AAO issued an RFE in which additional evidence regarding the petitioner's hiring practices was requested. Specifically, the AAO requested evidence demonstrating that the petitioner routinely required only specialty-degreed individuals for the proffered position, including but not limited to: (1) the names and position titles of all individuals currently or previously employed by the petitioner in the proffered position; (2) copies of their educational credentials, including diplomas, transcripts, and evaluations of foreign educational credentials, if applicable; and (3) evidence of employment with the petitioner, including employment agreements, paystubs, quarterly tax returns, and/or Forms W-2, Wage and Tax Statements. In addition, the petitioner was asked to demonstrate (1) how each individual's baccalaureate or higher degree is directly related to the job duties and responsibilities of the proffered position; and (2) that the petitioner's specialty-degree requirement is not simply a token or artificial degree requirement or preference but is in fact necessary to perform the position's duties.

In a response received on January 22, 2013, the petitioner, through counsel, addressed the director's queries. In a letter dated January 17, 2013, the petitioner stated that it currently employed four teachers in the position of math and science teacher, namely:

- 1.
- 2.
- 3.
- 4.

The petitioner also submitted copies of the diplomas for three of the four individuals above, noting that [REDACTED] was on vacation and therefore a copy of his educational credentials were unavailable at the time the response was filed. The petitioner likewise submitted copies of W-2 forms for [REDACTED] and [REDACTED] which evidenced their employment with the petitioner in 2012.<sup>5</sup>

<sup>4</sup> Although [REDACTED] was listed as an employee, the petitioner indicated that he left his employment with the petitioner in the fall of 2012.

<sup>5</sup> According to the petitioner, [REDACTED] was hired in January of 2013.

The AAO, however, finds the evidence submitted insufficient to establish that the petitioner routinely hires only specialty-degreed individuals to perform the duties of the proffered position.

At the time of filing, the petitioner submitted a staff list demonstrating that it employed five individuals in the position of math and/or science teacher, and submitted quarterly tax returns demonstrating that two of these employees, namely, [REDACTED] were continually employed with the petitioner in 2008 and the first half of 2009. However, the petitioner failed to submit any evidence, such as transcripts or copies of diplomas, demonstrating that these individuals held a degree in a specific specialty that was directly related to the proffered position.

Although counsel submitted new evidence on appeal in support of the contention that it had a history of hiring only specialty-degreed individuals, the evidence submitted is insufficient. First, three of the five teacher biographies identify individuals not previously listed on the petitioner's staff prior to adjudication. Additionally, although [REDACTED] and [REDACTED] were initially identified on the petitioner's staff list, the record contained no evidence, such as copies of transcripts or diplomas, to corroborate their claimed degrees in applied mathematics and physics, respectively.

Finally, in response to the AAO's RFE, the petitioner claimed to employ four individuals in the proffered position who were not previously identified as faculty or staff members prior to adjudication. Although the petitioner submits evidence in support of the claims that [REDACTED] have bachelor's degrees or higher in a related specialty, this evidence is insufficient to establish eligibility under this criterion.

The AAO finds the evidence submitted in support of this criterion insufficient for two reasons. First, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). At the time of filing, the petitioner claimed to employ five individuals in various teaching positions involving math and/or science. However, the petitioner failed to submit evidence to demonstrate that these individuals possessed degrees in specific specialties that were directly related to the duties of the proffered position, despite being afforded the opportunity to supplement the record after the issuance of the director's RFE. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Although the AAO afforded the petitioner an additional opportunity to supplement the record in its RFE issued on December 22, 2012, the response submitted by counsel is also insufficient. First, as briefly touched upon above, the petitioner submits evidence in response to the AAO's RFE demonstrating that the petitioner hired three new math/science teachers in 2012, approximately three years after the filing of the petition. Although the record contains documentary evidence supporting the claim that two of these three teachers hold degrees in specific specialties, the petitioner failed to establish that it had an established history of hiring only specialty-degreed individuals at the time the petition was filed. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

More importantly, a review of the petitioner's website as of April 16, 2013 reveals that, contrary to the petitioner's claims, it employs more than four math/science teachers as claimed in the response to the AAO's RFE.<sup>6</sup> Specifically, a review of the petitioner's website at [www.aciacademy.com/en-us/faculty.aspx](http://www.aciacademy.com/en-us/faculty.aspx) lists nine Math & Science teachers, and only one of those teachers, [REDACTED] was identified as a specialty-degreed teacher in the petitioner's letter dated January 17, 2013. Therefore, the AAO is left to question why the remaining eight teachers were not identified in the petitioner's response, and additionally why [REDACTED] are not listed as faculty on the website.<sup>7</sup> The AAO notes that the RFE specifically requested that the petitioner provide the names and position titles of *all* individuals currently or previously employed by the petitioner in the proffered position. The regulation at 8 C.F.R. § 214.2(l)(3)(viii) states that the additional evidence may be requested in appropriate cases. Although specifically requested by the AAO, the petitioner did not fully respond to the AAO's request. As stated previously, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

A cursory review of the biographies of several of these teachers not previously identified reveals that, contrary to the petitioner's claims, all of its math and science teachers do not possess a specialty degree that is directly related to the position in question. For example, [REDACTED] merely has ten years of experience in the industry and there is no claim that he has a bachelor's degree, or its equivalent, in a specific specialty, and [REDACTED] holds a bachelor of arts degree in liberal studies, a field not directly related to math or science. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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).

The AAO has taken into account the petitioner's repeated assertions that the duties of the proffered position can only be performed by a degreed individual, and has reviewed the petitioner's job description, noting it requires the incumbent to hold a bachelor's degree in mathematics or a related scientific field. While a petitioner may believe or otherwise assert that a proffered position requires a 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

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<sup>6</sup> The petitioner in this matter previously relied upon its own website in support of the contention that the petitioner meets the regulatory requirements governing this petition. Therefore, the AAO finds that the petitioner is aware of the information contained therein and cited to above. Consequently, the requirements set forth under § 103.2(b)(16)(i) mandating notification of derogatory information prior to an adverse decision are not applicable in this matter.

<sup>7</sup> The AAO notes the petitioner's claim that [REDACTED] left his employment with the petitioner in the Fall of 2012.

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 degree requirement is only symbolic and 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"). Here, for the reasons set forth above, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its recruiting and hiring practices.

The AAO will now consider the final alternative criterion, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner is able to demonstrate that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The AAO finds that, to the extent that they are described in the record of proceeding, the duties that the petitioner ascribed to the proffered position do not establish the relative specialization and complexity required to satisfy this particular criterion. Rather, the AAO finds that, while the duties as described indicate generic functions associated with teaching in general, they do not provide evidence that demonstrates that, in the context of this particular proffered position, the substantive nature or performance requirements of those functions are so specialized and complex as to require the application of a body of highly specialized knowledge that is usually associated with attainment of at least a bachelor's degree in a specific specialty. Further, the AAO here incorporates by reference and adopts its conclusion, and associated comments regarding it, that the evidence comports with that of a high school teacher in a private institution, which is an occupational classification for which the *Handbook* does not indicate a usual association with attainment of at least a bachelor's degree in a specific specialty.

The AAO finds, first, that the requisite specialization and complexity is not self-evident in the extent to which the duties are described in the record of proceeding, and, second, that the petitioner has not provided documentary evidence establishing the duties as sufficiently specialized and complex to satisfy this criterion. In summary, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For reasons related in the preceding discussion, the petitioner has failed to establish the proffered position as a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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