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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: FEB 26 2014 Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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)

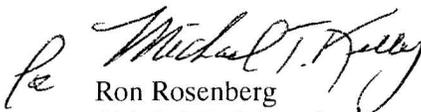
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a preschool and kindergarten<sup>1</sup> established in 2009. In order to continue to employ the beneficiary in what it designates as a kindergarten teacher position, the petitioner seeks to continue her classification 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: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B, Notice of Appeal or Motion, accompanied by counsel's brief and additional documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's grounds for denying this petition.<sup>2</sup> Accordingly, the appeal will be dismissed and the petition will remain denied.

USCIS is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation]."). Absent a determination that the proffered position is in fact a specialty occupation, there is no basis on which the director could have determined whether the beneficiary is qualified or unqualified to perform the duties of the claimed specialty occupation. Therefore, the AAO will first examine the record of proceeding to determine whether the proffered position in this matter qualifies as a specialty occupation.

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<sup>1</sup> On the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement, on page 17, at Part A, section 6, the petitioner lists the North American Industry Classification System (NAICS) Code as 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> (last accessed February 18, 2014). However, on the Labor Condition Application (LCA) submitted with the petition, as well as on its Form 1120S, U.S. Income Tax Return for an S Corporation, the petitioner lists the NAICS code as 624410, which corresponds to "Child Day Care Services." *See id.*

<sup>2</sup> The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

## I. Statutory and Regulatory Framework

### A. Specialty Occupation Issue

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 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 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 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.

B. Beneficiary Qualifications

The statutory and regulatory framework that the AAO must apply in its consideration of the evidence of the beneficiary's qualification to serve in a specialty occupation follows below.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and  
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In addition, 8 C.F.R. § 214.2(h)(4)(v)(A) states:

General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In order to equate a beneficiary's credentials to a U.S. baccalaureate or higher degree, the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;<sup>3</sup>
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . .

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<sup>3</sup> The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not training and/or work experience.

In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

It is always worth noting that, by its very terms, 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) is a matter strictly for USCIS application and determination, and that, also by the clear terms of the rule, experience will merit a positive determination only to the extent that the record of proceeding establishes all of the qualifying elements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) – including, but not limited to, a type of recognition of expertise in the specialty occupation.

## II. Facts and Procedural History

In a letter submitted in support of the petition, the petitioner indicated it is a registered and licensed preschool and kindergarten in the City of [REDACTED]. The petitioner stated that the duties of the beneficiary, in the position of kindergarten teacher, would be as follows:

[The beneficiary] will have full responsibility for teaching kindergarten classes. She will encourage children to use their senses to explore, experiment and use their imagination to the fullest, utilizing dramatic play, visual aides, manipulatives and learning centers within the classroom such as art, science, blocks, math and literacy,

imparting the children with readiness skills for future learning. She will work closely with each child to help develop their healthy self-esteem through problem solving, encouraging self-expression and offering positive reinforcement.

In a separate document, the petitioner provided a more detailed overview of the proffered position. Specifically, the petitioner stated:

**JOB GOAL:** To create a flexible kindergarten program and kindergarten environment favorable to learning and perpetual growth; to establish effective rapport with pupils; to motivate pupils to develop skills, attitudes, and knowledge needed to provide a good foundation for further participation in the total school program, in accordance with each pupil's ability; and to establish good relationships with parents and with other staff members.

**PERFORMANCE RESPONSIBILITIES:**

1. Provides learning experiences in language arts, social studies, pre-reading, arithmetic, science, art, physical education, and music to pupils, using the course of study adopted by the Board of Education, and other appropriate learning activities
2. Instructs pupils in citizenship and basic subject matter specified in state law and administrative regulations and procedures
3. Develops and uses instructional materials suitable for verbal or visual instruction of pupils with wide range of mental, physical, and emotional maturities
4. Provides individual and group instruction designed to meet individual needs and help the pupils make a satisfactory transition to school
5. Establishes and maintains standards of pupil behavior needed to achieve effective participation in all activities without interfering with the naturally informal atmosphere of a kindergarten
6. Evaluates academic and social growth of pupils, and keeps appropriate records
7. Communicates with parents through a variety of means. Holds parent conferences to discuss the individual pupil's progress and interprets the facility program
8. Identifies pupil needs and cooperates with other professional staff members in assessing and helping pupils solve health, attitude, and learning problems
9. Creates an effective environment for learning through functional and attractive displays, bulletin boards, and interest centers
10. Maintains professional competence through in-service education activities provided by the district and self-selected professional growth activities
11. Selects and requisitions books and instructional aids; maintains required inventory records

12. Ensures a comfortable room environment through control of heating, lighting, and ventilation to the extent possible
13. Supervises pupils in out-of-classroom activities during the assigned working day
14. Participates in curriculum and other developmental programs as required
15. Participates in faculty committees and the sponsorship of pupil activities
16. Demonstrates effective human relations and communication skills (at all times)
17. Complies with good safety practices (at all times)
18. Other duties/responsibilities deemed necessary may be assigned

Regarding the requirements for the position, the petitioner stated: "The position of Kindergarten Teacher at [the petitioner] requires a bachelor's degree in pedagogy, education, or a related discipline." The petitioner noted its belief that "the beneficiary's credentials make her particularly well suited for the position of Kindergarten Teacher," noting that she holds both a bachelor's degree and master's degree in political science with a pedagogical certification for primary and secondary education from [redacted] in [redacted]. An academic credentials evaluation from [redacted] was also submitted, which confirmed that the beneficiary held the U.S. equivalent of a bachelor's degree and master's degree in political science.

As the Labor Condition Application (LCA) required to correspond to the petition, the petitioner submitted an LCA that had been certified for the petitioner's use with a job opportunity that would be within the occupational classification "Kindergarten Teachers, Except Special Education," SOC (ONET/OES) Code 25-2012.00, and that would merit only a Level I (entry-level) prevailing wage rate.

In addition, the petitioner submitted (1) copies of job advertisements for positions which it asserts as parallel to the proffered position in organizations similar to the petitioner; (2) a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2011; (3) copies of business licenses from the City of [redacted] and the State of Illinois; (4) copies of entries from its Facebook page; and (5) a copy of an online article from [redacted] regarding career information on kindergarten teacher positions.

Upon review, the director requested further detail in support of the petitioner's contention that the proposed position was a specialty occupation. The director also requested additional evidence in support of the beneficiary's qualifications to perform the duties of a specialty occupation, and outlined the specific evidence to be submitted.

In response, the petitioner resubmitted the list of duties previously provided, but allocated the time the beneficiary would spend performing these responsibilities:

1. Provides learning experiences in language arts, social studies, pre-reading, arithmetic, science, art, physical education, and music to pupils, using the

- course of study adopted by the Board of Education, and other appropriate learning activities (40%)
2. Instructs pupils in citizenship and basic subject matter specified in state law and administrative regulations and procedures (10%)
  3. Develops and uses instructional materials suitable for verbal or visual instruction of pupils with wide range of mental, physical, and emotional maturities (5%)
  4. Provides individual and group instruction designed to meet individual needs and help the pupils make a satisfactory transition to school (10%)
  5. Establishes and maintains standards of pupil behavior needed to achieve effective participation in all activities without interfering with the naturally informal atmosphere of a kindergarten (3%)
  6. Evaluates academic and social growth of pupils, and keeps appropriate records (5%)
  7. Communicates with parents through a variety of means. Holds parent conferences to discuss the individual pupil's progress and interprets the facility program (2%)
  8. Identifies pupil needs and cooperates with other professional staff members in assessing and helping pupils solve health, attitude, and learning problems (5%)
  9. Creates an effective environment for learning through functional and attractive displays, bulletin boards, and interest centers (5%)
  10. Maintains professional competence through in-service education activities provided by the district and self-selected professional growth activities (2%)
  11. Selects and requisitions books and instructional aids; maintains required inventory records (3%)
  12. Ensures a comfortable room environment through control of heating, lighting, and ventilation to the extent possible (2%)
  13. Supervises pupils in out-of-classroom activities during the assigned working day (3%)
  14. Participates in curriculum and other developmental programs as required (3%)
  15. Participates in faculty committees and the sponsorship of pupil activities (2%)
  16. Demonstrates effective human relations and communication skills (at all times)
  17. Complies with good safety practices (at all times)
  18. Other duties/responsibilities deemed necessary may be assigned

The petitioner also provided additional copies of job postings it deemed parallel to the proffered position in similar organizations, as well as a new academic credentials evaluation from [REDACTED]. In the letter submitted with the response to the RFE, counsel specifically states that it wishes to withdraw the previously-submitted academic evaluation from [REDACTED]. Specifically, counsel points out that this evaluation highlights the beneficiary's post-secondary level coursework in Early Childhood Education, and concludes that the beneficiary possesses the equivalent of a teaching certificate

from an accredited institution in the United States.<sup>4</sup> The petitioner, through counsel, also submits several online articles addressing the career of a kindergarten teacher, as well as an excerpt from the Department of Labor's *Occupational Outlook Handbook (OOH)* which discusses the occupation of kindergarten teacher.

Upon review of the evidence in the record, the director denied the petition, determining that the record did not establish that the beneficiary was qualified to perform the duties of a specialty occupation. On appeal, counsel for the petitioner contends that the director's findings were erroneous, and submits a brief and additional evidence in support of this contention.

As noted previously, the director did not address the issue of whether the proffered position in this matter was a specialty occupation. For the reasons set forth below, the AAO finds that the proffered position does not qualify as a specialty occupation.

### III. Analysis

The petitioner states on the Form I-129 and in an accompanying letter of support that it is a preschool and kindergarten. However, on the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement, on page 17, at Part A, section 6, the petitioner lists the North American Industry Classification System (NAICS) Code as 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> (last accessed February 25, 2014). However, on the LCA submitted with the petition, as well as on its Form 1120S, U.S. Income Tax Return for an S Corporation, the petitioner lists the NAICS code as 624410, which corresponds to "Child Day Care Services." *See id.* Moreover, the petitioner's city and state business licenses also list its business as that of a "Day Care Center," and the state license lists the petitioner's hours of operation from 6:30 a.m. to 6:30 p.m. 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).

In this matter, it appears that the petitioner's claimed distinction between "preschool" and "kindergarten" classes is entirely self-defined. The AAO observes that the petitioner's "day care center" license, authorizing the petitioner to provide day care services to a maximum of 50 children ages 2 through 6, is not probative evidence that the petitioner in fact operates a kindergarten. Moreover, aside from the description of the beneficiary's duties, the petitioner provides no information, such as brochures or flyers, advertising its kindergarten program. The AAO further notes this statement which appears multiple times on the petitioner's Facebook page (copies of which were submitted into the record in response to the RFE):

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<sup>4</sup> The AAO notes that the initial evaluation from [REDACTED] did not discuss the beneficiary's teaching certificate or coursework in early childhood education, except to classify the "certificate" as "Non-credit."

We provide a safe and fun learning environment. Our educational program is focused on effective learning tasks. Daily activities includes art, music, rhythmic, gymnastics, creative movement, pretending play, reading, math, science, games, puzzles, quizzes, and much more!

This statement suggests a combined program for all ages, as appropriate. Again, as stated above, there is no documentary evidence demonstrating the elements of its kindergarten program, nor does the petitioner submit copies of its kindergarten curriculum or syllabus to establish that it is in fact providing a separate program that is distinct from its preschool or day care curriculum.

Moreover, the description of duties of the proffered position, which repeatedly discusses the beneficiary's interaction with "pupils" without denoting the age of such pupils, suggests a lack of clarity between the asserted kindergarten curriculum and other preschool instruction. No further explanation was provided. Absent evidence to support its claim, the petitioner's contention that it operates a kindergarten is not probative as to whether the petitioner provides kindergarten instruction that is distinguishable from preschool instruction or day care activities. 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)).

Upon review of the petitioner's description of the proffered position, and in light of the discrepancies in the record with respect to the type of services provided by the petitioner, as well as the lack of probative evidence demonstrating that the petitioner provides kindergarten-level academic instruction, the AAO finds that the evidence of record fails to establish that the proffered position is actually falls within the kindergarten teachers occupational group. In fact, based upon our review of the entire record of proceeding, we find that the proffered position appears to more likely fall within the "Preschool Teachers" occupational category.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>5</sup> The AAO reviewed the chapter of the *Handbook* entitled "Preschool Teachers," including the sections regarding the typical duties and requirements for this occupational category.<sup>6</sup> However, the *Handbook* does not indicate that "Preschool Teachers" comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.

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<sup>5</sup> All of the AAO's references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

<sup>6</sup> For additional information on the occupational category "Preschool Teachers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Preschool Teachers, on the Internet at <http://www.bls.gov/ooh/education-training-and-library/preschool-teachers.htm#tab-1> (last visited February 25, 2014).

The subchapter of the *Handbook* entitled "What Preschool Teachers Do" states the following about this occupation:

Preschool teachers educate and care for children, usually ages 3 to 5, who have not yet entered kindergarten. They teach reading, writing, science, and other subjects in a way that young children can understand.

#### **Duties**

Preschool teachers typically do the following:

- Prepare children for kindergarten by introducing concepts they will explore further in kindergarten and elementary school
- Work with children in groups or one on one, depending on the needs of children and the subject matter
- Plan and carry out a curriculum that targets different areas of child development, such as language, motor, and social skills
- Organize activities so children can learn about the world, explore interests, and develop talents
- Develop schedules and routines to ensure children have enough physical activity, rest, and playtime
- Watch for signs of emotional or developmental problems in children and bring problems to the attention of parents
- Keep records of the students' progress, routines, and interests, and keep parents informed about their child's development

Young children learn from playing, problem solving, questioning, and experimenting. Preschool teachers use play and other instructional techniques to teach children about the world. For example, they use storytelling and rhyming games to teach language and vocabulary. They may help improve children's social skills by having them work together to build a neighborhood in a sandbox or teach math by having children count when building with blocks.

Preschool teachers work with children from different ethnic, racial, and religious backgrounds. Teachers include topics in their lessons to teach children to respect people of different backgrounds and cultures.

The duties of the proffered position as described by the petitioner appear to be encompassed by the typical duties of preschool teachers as stated in the *Handbook*.

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

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

**Education**

In childcare centers, preschool teachers generally are required to have at 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 are required to have at least an associate's degree. However, at least 50 percent of all preschool teachers in Head Start programs nationwide must have a bachelor's degree in early childhood education or a related field. 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.

**Licenses, Certifications, and Registrations**

Many states require childcare centers, including those in private homes, to be licensed. To qualify for licensure, staff must pass a background check, have a complete record of immunizations, and meet a minimum training requirement.

Some states require staff to have certifications in CPR and first aid.

Some states and employers require childcare workers to have a nationally recognized certification. Most often, states require the Child Development Associate (CDA) certification offered by the Council for Professional Recognition. Obtaining the CDA certification requires coursework, experience in the field, a written exam, and observation of the candidate working with children. Some states recognize the Child Care Professional (CCP) designation offered by the National Early Childhood Program Accreditation. Candidates for the CCP must be 18 years old, have a high school diploma, experience in the field, take courses in early childhood education, and pass an exam.

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.

### Other Experience

A few states require preschool teachers to have some work experience in a childcare setting. The amount of experience necessary varies by state. In these cases, preschool teachers often start out as childcare workers or teacher assistants.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Preschool Teachers, on the Internet at <http://www.bls.gov/ooh/education-training-and-library/preschool-teachers.htm#tab-4> (last visited February 25, 2014).

The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Rather, the *Handbook* states that although there is a range of acceptable credentials, most preschool teachers are required to have a high school diploma. The *Handbook* further indicates that some employers *prefer* to hire workers with some postsecondary education in early childhood education. The *Handbook* does not indicate that "some postsecondary education" is a baccalaureate (or higher degree). Thus, it appears that an associate's degree may be sufficient. Moreover, the AAO notes again that obviously, a *preference* for a particular level of education does not indicate a *requirement* for such education.

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

It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. As previously mentioned, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Again, 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. at 165.

In the case before us, the petitioner has not established that the proffered position falls within an occupational category for which the *Handbook*, or other authoritative source, indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties of the proffered position as described in the record of proceeding by the petitioner do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter.

In support of the petitioner's assertion that the proffered position is a specialty occupation position, the record of proceeding contains numerous job announcements which the petitioner claims are demonstrative of the degree requirement in parallel positions among similar organizations. However, upon review of the evidence, the AAO finds that the petitioner's reliance on the job announcements is misplaced.

As discussed previously, on the Form I-129, the petitioner stated that it is a preschool and kindergarten with 8 employees. In the petition, the petitioner reported its gross annual income as approximately \$351,000, and its net annual income as approximately \$18,000. The evidence of records reflects that the petitioner is licensed to operate a day care center to serve a maximum of 50 children ages 2 to six.

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

The AAO reviewed the job advertisements submitted in support of the H-1B petition. Notably, the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs

advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documents, the AAO notes that the petitioner has not established that all of the organizations are similar to the petitioner. For example, there is a lack of information regarding several of the organizations (e.g., private, public/charter, faith based, publicly funded). Moreover, the petitioner has failed to establish that the advertised positions are for jobs parallel to the proffered position. The postings do not contain sufficient information regarding the duties of the advertised positions such that the AAO can ascertain if they are parallel to the proffered position. The job postings lack information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, the documentation does not establish that the duties and responsibilities of these positions are the same or parallel to the proffered position. That is, the advertisements provide insufficient information regarding the specific duties of the jobs to ascertain whether the positions are parallel to the proffered position. Notably, the petitioner did not supplement the record of proceeding to establish that the positions are parallel to the proffered position and located in organizations that are similar to the petitioner.

Many of the postings submitted are for kindergarten teachers in public schools. As discussed above, the nature of the petitioner's business, a day care center, cannot be deemed similar to public or even private elementary schools. Although some postings, are for kindergarten or preschool teacher positions in child day care centers, the petitioner fails to demonstrate that such postings are representative of day care centers with a maximum of 50 children and a net annual income of approximately \$18,000. Specifically, the "Kindergarten Teacher" positions advertised by [REDACTED], a national child day care center, may be similar in nature; however, [REDACTED] operates more than 1,700 centers nationwide and employs more than 40,000 teachers.

Moreover, contrary to the purpose for which they were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. The AAO notes that some of the job postings requesting a bachelor's degree do not specify a specific specialty. For example, the posting for "Kindergarten Teacher" at [REDACTED] a charter school, and the posting for a "Pre-Kindergarten Teacher" for [REDACTED] state an education requirement of a "Bachelor's degree." Thus, some of the advertisements do not indicate that candidates must possess at least a baccalaureate in a *specific specialty*, or its equivalent.

As previously mentioned, an entry requirement of at least a bachelor's degree without any specialization is inadequate to establish that the advertised positions qualify as specialty occupation positions. A petitioner must demonstrate that the proffered position requires a *precise and specific course of study* that relates directly to the duties and responsibilities of the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a general-purpose degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

The AAO reviewed all of the advertisements submitted in support of the H-1B petition in the instant case. However, as the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

The job advertisements do not establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.<sup>7</sup>

Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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<sup>7</sup> According to the *Handbook's* detailed statistics on this occupation, there were approximately 438,200 persons employed as preschool teachers in 2010. *Handbook*, 2014-15 ed., available at <http://www.bls.gov/ooh/education-training-and-library/preschool-teachers.htm#tab-6> (last accessed February 25, 2014). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the submitted job announcements had supported findings that: (1) the employers placing them were organizations similar to the petitioner, (2) those employers required for the advertised positions at least a bachelor's degree in a specific specialty, and (3) the advertised positions were similar to the one that is the subject of this petition, it cannot be found that such a limited number of postings that appear to have been consciously selected would 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.

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted minimal documentation. Regarding the proffered position, the petitioner submitted a generic overview of the beneficiary's duties, yet failed to provide any specific documentation with regard to its claimed kindergarten curriculum. This lack of specific evidence, coupled with documentary evidence establishing that, contrary to its initial claims, the petitioner is operating a day care center, fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. That is, the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. The petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions in the pertinent occupation that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO also observes that the petitioner has indicated that the beneficiary's training and experience will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. In the instant case, the evidence of record does not demonstrate the proposed duties comprise a position so complex or unique as to be distinguishable from similar positions in the pertinent occupation that can be performed by persons without at least a bachelor's degree in a specific specialty or the equivalent. As the evidence does not demonstrate that the particular position here proffered is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

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

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

On the Form I-129, the petitioner indicated that it was established in 2008 (approximately 4 years prior to the submission of the H-1B petition) and has 8 employees. The petitioner provided no details regarding its other employees, such as their position titles, duties, or levels of education. This lack of detail regarding the organizational hierarchy of the petitioner's organization further contributes to the petitioner's failure to establish that it provides kindergarten-level academic instruction that is distinguishable from its preschool and child care services.

The petitioner did not state the total number of people who currently or in the past have served in the proffered position, nor did it claim to have routinely employed only specialty-degreed individuals in the proffered position. Upon review of the record of proceeding, the AAO finds that the petitioner has not provided sufficient probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The AAO acknowledges that the petitioner and counsel may believe that the proffered position qualifies as a specialty occupation under this criterion of the regulations. In support of the petition, the petitioner submitted various documents, including a City of [REDACTED] and State of Illinois license to operate a day care center, photos of the petitioner's premises and selected

lessons printed on its Facebook page, news articles discussing the career path to becoming a kindergarten teacher, as well as other documentation regarding the proffered position.<sup>8</sup> The AAO reviewed all of the evidence in the record; however, the documentation does not establish that nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner so as to elevate the nature of the position's duties above the nature of duties in positions within the occupation that do not require knowledge usually associated with attainment of at least a bachelor's degree or the equivalent in a specific 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 February 20, 2014)) 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. That wage-level is appropriate for use with an actually low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, by using here an LCA certified only for a Level I wage- rate, the petitioner is attesting 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

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<sup>8</sup> The AAO hereby incorporates by reference its previous discussion regarding the evidence submitted by the petitioner and counsel, as well as the deficiencies in the record of proceeding for establishing eligibility for the benefit sought.

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 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.

The director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a baccalaureate or higher degree in a specific specialty or its equivalent.

The petitioner must demonstrate that the beneficiary obtained knowledge of the particular occupation in which he or she will be employed. *Id.* Thus, even if the petitioner had demonstrated that the proffered position requires at least a bachelor's degree in a specific specialty, or its equivalent, the petition could not be approved, because the petitioner failed to demonstrate that the beneficiary has taken sufficient courses or gained knowledge considered to be a realistic prerequisite to entry into the pertinent field.

According to the first academic credentials evaluation submitted in support of the petition, the beneficiary holds the U.S. equivalent of a bachelor's degree and a master's degree in political science, along with a "Non-credit" certificate which was not discussed in detail. The evaluator's conclusion did not mention the certificate and equated the beneficiary's foreign degrees to a U.S. bachelor's degree and master's degree in political science.

In response to the RFE, the petitioner, through counsel, submitted a second academic credential evaluation, and requested USCIS to withdraw the first evaluation. This the AAO will not do, as the document at issue had been duly submitted into the record and, thereby, was endorsed by the petitioner, whose representative's signature on the Form I-129 attested to the accuracy of the documents submitted.

This new evaluation points out that the beneficiary pursued a concurrent teaching program while earning her bachelor's and master's degrees, and claims she was awarded a teaching certificate in 2002. While the AAO notes the inclusion of various early childhood education courses in the beneficiary's transcripts, the second evaluator also concludes that the beneficiary holds a bachelor's degree and a master's degree in political science. There is no claim or affirmation that the beneficiary's coursework in education amounted to a foreign major or minor in the discipline. Therefore, although the second evaluator highlights the beneficiary's coursework in education, it nevertheless is not evidence that the beneficiary possesses the U.S. equivalent of a baccalaureate degree or higher in the specific specialty.

Based upon the beneficiary's academic coursework, it is unclear how degrees in the field of political science, with some coursework in education, would qualify her to perform the claimed teaching duties of the proffered position. The petitioner makes no reference to nor draws a nexus between the beneficiary's degrees and the broadly and generically stated duties of the proffered position. Most importantly, the petitioner claimed in its letter of support that it "requires a bachelor's degree in pedagogy, education, or a related discipline." Aside from coursework in education, that amounted to a teaching certificate (that one evaluator identified as "Non-credit"), the beneficiary possesses none of the educational qualifications mandated by the petitioner.

On appeal, counsel for the petitioner points out that the beneficiary earned her "master's level teaching certificate" while pursuing her political science degrees, and asserts that this credential "not only meets but exceeds the petitioner's minimum requirement of a bachelor's degree in early childhood development, pedagogy, education, or a related discipline." However, this assertion does not establish that the beneficiary is qualified to perform the duties of a specialty occupation. First, she does not possess the requisite degree required by the petitioner. Second, neither evaluator equated her teaching certificate and/or foreign coursework in education to that of a U.S. bachelor's or master's degree, nor did the coursework and certificate equate to simply a minor in the field of education. Consequently, the petitioner's claim on appeal that the beneficiary is qualified to perform the duties of the position by virtue of her teaching certificate is likewise inadequate to establish eligibility in this matter. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

The petitioner has not established that the beneficiary is qualified to perform services in a specialty occupation. Consequently, the petition must be denied for this additional reason.

Finally, the AAO notes the petitioner's contention regarding the impact of the approved a prior petition previously filed on behalf of the beneficiary. The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The prior approval does not preclude USCIS from denying an extension of the original visa based on reassessment of eligibility for the benefit sought. See *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

In this regard, we will also address why counsel's reliance upon the USCIS Interoffice Memorandum from William R. Yates, Associate Director for Operations, USCIS, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3 (April 23, 2004) – to which we shall refer as the Yates memo - is misplaced.

In the brief on appeal, counsel emphasizes the assertion that the proffered position is the same position in job title and duties as the previously approved H-1B petition filed by the petitioner on behalf of the beneficiary. Counsel also references the Yates memo as establishing that USCIS must give deference to the prior approval or provide a detailed explanation why deference is not warranted. More specifically, counsel contends (at page 4 of the brief) that, in the light of the Yates memo, USCIS must either defer to the prior approval (and approve this extension petition) or "detail the material error that it supposedly committed in approving the initial petition."

It must be noted that the Yates memo specifically states as follows:

[A]djudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology International*, 19 I&N 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. See 8 C.F.R. § 103.8(d)... Material error, changed circumstances, or new material information must be clearly articulated in the resulting request for evidence or decision denying the benefit sought, as appropriate.

Thus, the Yates memo does not advise adjudicators to approve an extension petition when the facts of the record do not demonstrate eligibility for the benefit sought. On the contrary, the memorandum's language quoted immediately above acknowledges that a petition should not be approved, where, as here, the petitioner has not demonstrated that the extension petition should be granted.

Again, as indicated in the Yates memo, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). If the previous nonimmigrant petition was approved based on the same description of duties and assertions that are contained in the current record, that approval is erroneous, at the least, and may constitute material and gross error on the part of the director. In any event, it would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a

subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. See *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Second, the Yates memo clearly states that each matter must be decided according to the evidence of record. On appeal, counsel suggests that the director was required to look at the prior record of proceeding dealing with the separate adjudication of the approved H-1B petition filed on behalf of the beneficiary and provide a reason why deference is not warranted. In this regard, the AAO notes that it has reviewed, and fully considered as part of the present record of proceeding, all of the documents that the petitioner has submitted from the record of proceeding pertaining to the prior approved petition. However, the AAO nonetheless finds that neither that documentation nor the related approval of the prior petition to which those documents relate is probative evidence that the proffered position, as described and supported by the evidence in the present petition, satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Further, when any person makes an application for a "visa or any other document required for entry, or makes an application for admission [...] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; see also *Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. Since each petition filing is a separate proceeding with a separate record, in making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). There is no requirement either in the regulations or in USCIS procedural documentation requiring nonimmigrant petitions to be combined in a single record of proceeding. Accordingly, the petitioner errs to the extent that it may be suggesting that the director was required to retrieve and review the entire record of proceeding of the prior H-1B petition. (The AAO has reviewed, considered, and weighed all of the documents that the petitioner has submitted into the present record of proceeding, including those from the record of the prior 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. For this additional reason, the Yates memo does not compel that this appeal be sustained, for, as discussed in this decision, the petitioner has not met that burden in the matter that is the subject of this appeal.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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