



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE:

MAR 18 2015

OFFICE: VERMONT SERVICE CENTER

FILE:

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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 service center director denied the nonimmigrant visa petition. The matter is before us on a combined motion to reopen and reconsider. Upon review, the combined motion will be dismissed and the petition will remain denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center. In the Form I-129 visa petition, the petitioner describes itself as a child development center established in [REDACTED]. In order to continuously employ the beneficiary in what it designates as a preschool teacher position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director reviewed the information and determined that the petitioner had not established eligibility for the benefit sought. The director denied the petition, concluding that the petitioner did not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The director also questioned whether the petitioner had a preschool program and, therefore, sufficient work for the beneficiary to serve in the offered position.

The petitioner submitted an appeal, which was summarily dismissed. Subsequently, the petitioner filed an untimely appeal. Thereafter, the petitioner submitted this combined motion to reopen and reconsider.¹

¹ On June 6, 2014, the director denied the petition. Thereafter, on July 7, 2014, the petitioner submitted a Form I-290B (Notice of Appeal or Motion), which it marked as an appeal ([REDACTED]). Although the petitioner stated that the director erred, it did not identify specifically any erroneous conclusion of law or statement of fact. Moreover, although the petitioner stated that a brief and/or additional evidence would be submitted to our office (the AAO) within 30 calendar days of filing the appeal, our office did not receive a submission within the allotted timeframe. Therefore, the appeal was summarily dismissed.

On August 28, 2014, the petitioner filed another Form I-290B [REDACTED], which it submitted to the USCIS Lockbox. The submission was received 83 days after the director's decision was issued and, thus, was untimely.

On October 9, 2014, the petitioner filed this combined motion ([REDACTED]). Upon review, the submission does not meet the requirements for a motion to reopen or a motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Further, the petitioner has not demonstrated that our prior decision was based upon an incorrect application of law or policy and that the decision was incorrect on the evidence of record at the time of the decision. Further, the submission does not state new facts that were previously unavailable. Further, we reviewed the record of proceeding and determined that the petitioner has not established eligibility for the benefit sought. Therefore, for these reasons the combined motion will be dismissed. Nevertheless, for the purpose of

The record of proceeding contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision; (5) the Notice of Appeal or Motion (Form I-290B) ([REDACTED]); (6) our decision; (7) the Form I-290B ([REDACTED]) and supporting documentation; (8) our decision; and (9) the Form I-290B ([REDACTED]) and supporting documentation. We reviewed the record in its entirety before issuing our decision.²

For the reasons that will be discussed below, we find that the petitioner has not established eligibility for the benefit sought. The combined motion is dismissed and the petition remains denied.

II. SPECIALTY OCCUPATION

The primary issue is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position.

A. Legal Framework

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the

assisting the petitioner in understanding the deficiencies in the record, we are providing an analysis of the director's grounds for denying the petition.

² We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 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.

In ascertaining the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, 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."

B. Proffered Position

In a support letter dated December 17, 2013, the petitioner states that the beneficiary will perform the following job duties in the proffered position:

1. Supervises and ensures the safety and well-being of the children at all times, being alert for needs and/or problems of the children as individuals and as a group. 15%
2. Plans and implements the monthly, weekly, and daily curriculum for the assigned class, together with her/his assistant teachers and aides. 15%
3. Documents children's daily achievements, accomplishments, and developmental milestones, using the Creative Curriculum Goals and Objectives as guide and makes sure that her assistants/aides do the same. 15%
4. Collects, collates, shares, and discusses with her assistants/aides children's documentations and feedbacks for the purpose of the quarterly assessment and evaluation. 15%

5. Meets and shares quarterly with the parents the group's assessment and evaluation of the children's developmental progress/needs and goals for the coming quarter. 10%
6. Assists and supports his/her assistants and aides' personal as well as professional growth and development. 10%
7. Schedules classroom fire drills, fieldtrips, co-workers' planning and evaluation meetings/trainings, and quarterly meetings/social gatherings with parent's/guardians. 10%
8. Updates the Director of any classroom, children, and parents' concerns (developmental milestones, suspected abuse/neglect, special needs, unusual incidents/accidents, etc.). 10%

* * *

The duties of [the beneficiary] as a preschool teacher are so highly complex and so specialized such as that will require no less than a Bachelor's Degree. The requirement of a Bachelor's degree is a minimum requirement in our School and certainly it is also the standard minimum requirement in our industry.

C. Labor Condition Application

In support of the petition, the petitioner submitted a Labor Condition Application (LCA) stating that the proffered position falls under the occupational category "Preschool Teachers, Except Special Education" - SOC (ONET/OES) code 25-2011, at a Level I (entry) wage.

When completing the LCA, wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.³

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount

³ For additional information on wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

and level of supervision, and the level of understanding required to perform the job duties.⁴ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The "Prevailing Wage Determination Policy Guidance" issued by the U.S. Department of Labor (DOL) provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

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.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

DOL guidance further indicates that a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones would be an indication that a wage determination at Level II would be proper classification for a position.⁵

⁴ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

⁵ A Level II wage rate is described by DOL as follows:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at <http://www.foreignlaborcert.doleta.gov/pdf/>

The occupational category "Preschool Teachers, Except Special Education," has been assigned an O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, most occupation in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." See O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3.

In the instant case, the petitioner designated the proffered position as a Level I position. This suggests that the petitioner's academic and/or professional experience requirements for the position would be *less than* "training in vocational schools, related on-the-job experience, or an associate's degree" as stated for occupations designated as O*NET Job Zone 3. Accordingly, the designation of the proffered position as a Level I (entry) position (relative to others within the occupational category) suggests that less than a bachelor's degree is sufficient to perform the tasks of the proffered position.

D. Analysis

In the instant case, the petitioner states that a bachelor's degree is the minimum entry requirement for the proffered position. To establish that the proffered position is a specialty occupation, however, the petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a 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) (stating that "[t]he mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility"). Thus, while a general-purpose degree or a degree in any discipline may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *Id.* Thus, the petitioner's claim that a general-purpose degree is acceptable is tantamount to an admission that the proffered position is not in fact a specialty occupation.

Nevertheless, we will continue our evaluation and analysis of the evidence provided by the petitioner. To that end we will first discuss the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position.

USCIS recognizes DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on

the duties and educational requirements of the wide variety of occupations that it addresses.⁶ We reviewed the chapter of the *Handbook* entitled "Preschool Teachers," and note that the subchapter of the *Handbook* entitled "How to Become a Preschool Teacher" states, in 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.

⁶ All references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. Excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational category are hereby incorporated into the record of proceeding.

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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Preschool Teachers, available on the Internet at <http://www.bls.gov/ooh/education-training-and-library/preschool-teachers.htm#tab-4> (last visited February 28, 2015).

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, preschool teachers generally are required to have at least a high school diploma and a certification in early childhood education. The *Handbook* further indicates that employers may prefer to hire workers with at least some postsecondary education in early childhood education. However, a *preference* for a particular level of education does not indicate a requirement for entry into the occupation. Moreover, the phrase "some postsecondary education" does not indicate that such education must be a baccalaureate or higher degree.

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.⁷ Thus, these paragraphs of the *Handbook* are not relevant to the instant matter.

Upon review, we find that the *Handbook* does not support the claim that the occupational category here is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent. Even if it did (which it does not), the record lacks sufficient evidence to support a finding that the particular position proffered here – which the petitioner has indicated on the LCA is a Level I (entry) position in relation to others within the occupation) – would normally have such a minimum, specialty degree requirement or its equivalent.

We also reviewed title 29 of the [REDACTED] for teachers at child development facilities.⁸ The requirements are outlined below:

⁷ The *Handbook* reports that in public schools, preschool teachers must be licensed to teach early childhood education, which covers preschool through third grade. In response to the RFE, the petitioner states that a license is not required for the proffered position (which it refers to as "child development staff").

⁸ The petitioner submitted a letter from the program manager for the child care licensing unit of the [REDACTED] and claimed that it was relevant in the instant matter. The letter references the child

334 TEACHER QUALIFICATIONS

334.1 A teacher shall be at least twenty (20) years of age and meet one of the following requirements:

- (a) An associate's degree or higher from an accredited college or university in early childhood education or early childhood development;
- (b) An associate's degree or higher from an accredited college or university, at least fifteen (15) credit hours from an accredited college or university in early childhood education or early childhood development, and at least one (1) year supervised experience working with children in a licensed [REDACTED] Child Development Center or its equivalent in another jurisdiction;
- (c) At least forty-eight (48) credit hours from an accredited college or university, at least fifteen (15) credit hours from an accredited college or university in early childhood education or early childhood development, and at least two (2) years supervised experience working with children in a licensed [REDACTED] Child Development Center or its equivalent in another jurisdiction;
- (d) A valid Child Development Associate (CDA) credential, specifying that the individual is qualified for the assigned age classification;
- (e) Satisfactory completion of a child care certification course of no less than 90 hours from an accredited college or university, approved by the Director of the Department of Health or his/her designee, and at least three (3) years supervised experience working with children in a licensed [REDACTED] Child Development Center or its equivalent in another jurisdiction; or
- (f) Montessori school teacher, at least forty-eight (48) credit hours of successful completion of course work from a regionally accredited or OSSE approved college or university; a Montessori certificate issued by a program accredited by any of the following: the Montessori Accreditation Commission for Teacher Education, National Center for Montessori Education, or the Association Montessori Internationale; and at least two (2) years supervised experience working with children in a licensed [REDACTED] child development center or its equivalent in another jurisdiction.

Title 29 [REDACTED] 334.1. The petitioner claims that a bachelor's degree is required for the proffered position to ensure compliance with the [REDACTED] municipal regulations; however, this assertion is not supported by the evidence in the record of proceeding or by our review of the [REDACTED]

development facilities section of the [REDACTED] as outlining the requirements for such facilities.

municipal regulations. The regulations do not indicate that at least a bachelor's degree in a specific specialty (or its equivalent) is required for teacher positions at child development facilities, but rather there are a range of lesser credentials that are acceptable for such positions.

In the instant case, the duties and requirements of the position as described in the record of proceeding do not indicate that this particular position proffered by the petitioner is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we 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 for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) 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 independent, authoritative source) reports a standard industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the petitioner did not submit any letters or affidavits from similar firms or individuals in the petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals."

In support of the petition, the petitioner provided a few job postings placed in support of its assertion that the "a bachelor's degree is required for a Preschool Teacher."⁹ For the petitioner to establish that an organization is similar under this criterion of the regulations, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner.

⁹ The petitioner's statement suggests that a general-purpose degree or a degree in any field is sufficient for a preschool teacher. Although such a degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. We here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the position. See 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

In the Form I-129, the petitioner stated that it is a child development center with 28 employees. The petitioner also reported its gross annual income as approximately \$1.3 million, and its net annual income at "\$59,087. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 624410.¹⁰ This NAICS code is designated for "Child Day Care Services." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments primarily engaged in providing day care of infants or children. These establishments generally care for preschool children, but may care for older children when they are not in school and may also offer pre-kindergarten educational programs.

See U.S. Dep't of Commerce, U.S. Census Bureau, 2007 NAICS Definition, 624410-Child Day Care Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed February 28, 2015).

We will briefly note that, without more, not all of the job postings appear to be from organizations similar to the petitioner. When determining whether the petitioner and the 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. 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)).

We further observe that some of the advertisements do not appear to be for parallel positions. For example, the posting from the [REDACTED] states that the position is for a special education teacher. Likewise the announcement from [REDACTED] is for a position working with children with social and/or language challenges. More specifically, the school provides programs for children and young adults with special needs, including speech and language impairments, learning disabilities, intellectual disabilities, health impairments and Autism Spectrum Disorders. The petitioner classified its proffered position under the occupational category "Preschool Teachers, Except Special Education." Therefore, the advertised positions do not appear to be parallel to the proffered position.

¹⁰ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and, each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last viewed February 28, 2015).

Further, some postings do not indicate that at least a bachelor's degree in a directly related specific specialty (or its equivalent) is required.¹¹ For instance, the following postings state that a degree is necessary, but they do not state that a specific specialty is required:

- [REDACTED]
- [REDACTED]
- [REDACTED]

We also observe that the posting by [REDACTED] provides inconsistent information regarding the requirements for the position. More specifically, in the section entitled "Job Requirements," the advertisement states that "candidates must have a bachelor's program in elementary education, reading, psychology, human development, early childhood education or a closely related field and one or more years of successful professional teaching experience" and then continues by stating "Bachelor degree preferred." No explanation was provided. As previously discussed, a preference for a degree is not an indication of a requirement.

The job postings suggest, at best, that a bachelor's degree is sometimes required for preschool teachers, but not at least a bachelor's degree in a *specific specialty* (or its equivalent).¹² 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.¹³ That is, not every deficit of every job posting has been addressed.

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

¹¹ As discussed, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but one in a specific specialty that is directly related to the duties of the position. See 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

¹² It must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what inferences, if any, can be drawn from four advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

As such, even if the job announcements supported the finding that the position required a bachelor's or higher degree in a specific specialty, or its equivalent (for organizations in the same industry that are similar to the petitioner), it cannot be found that such a limited number of postings that appear to have been consciously selected outweigh 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, or its equivalent, for entry into the occupation in the United States.

¹³ The petitioner did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

the petitioner's industry in positions that are (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) 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).

We 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 described the proffered position and its business operations. In addition, the petitioner submitted a "Parent's Handbook" regarding its programs.

Upon review, we find that the petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial in performing certain duties of the position, the petitioner has not demonstrated how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The 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 does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry) wage, which is the lowest of four assignable wage levels. As previously mentioned, the wage-level of the proffered position indicates that (relative to other positions falling under this occupational category) the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.¹⁴

Without further evidence, it is not credible that the petitioner's proffered position is complex or unique as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve

¹⁴ As previously mentioned, DOL guidance indicates that a job offer for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

unusual and complex problems."¹⁵ The evidence of record does not establish that this position is significantly different from other positions in the occupational category such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty is not required for the proffered position.

The petitioner claims that the beneficiary is well qualified for the position, and references her qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires 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. To this end, we review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position, and any other documentation submitted by a petitioner in support of this criterion of the regulations.

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

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of

¹⁵ For additional information regarding wage levels as defined by DOL, see U.S. Dept of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In response to the RFE, the petitioner submitted a list, which contains the names of nineteen individuals. The petitioner claims that all of these individuals serve as preschool teachers. The petitioner further submitted copies of their educational credentials and Form W-2, Wage and Tax Statements. The petitioner states on the Form I-129 petition that it employs 28 individuals. Thus, aside from the 19 preschool teachers and the owner/president (who signed the H-1B petition), it appears that the petitioner employs 8 individuals in other positions. The petitioner did not provide specific information regarding the work of these other employees (e.g., job titles, brief description of duties), but we note that elsewhere in the record, the petitioner states that each classroom consists of two teachers and two assistants/teacher aides. No further explanation was provided by the petitioner.

Moreover, the petitioner did not provide the job duties and day-to-day responsibilities of the positions that it claims are the same as the proffered position. That is, the petitioner did not submit any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, aside from the claimed job title, it is unclear whether the duties and responsibilities of these individuals are the same or related to the proffered position. We observe that the wages paid to these individuals vary significantly from each other, as well as from the offered wage to the beneficiary. For instance, the documentation indicates that the annual wages range from \$10,839 to \$54,958, suggesting that not all of these individuals serve in positions for which the tasks and responsibilities are the same.

The petitioner claims that "[i]t is common in the industry that a Preschool Teacher need not be a Bachelor's Degree in Early Education" and that "[o]ther professional[s] with different major can also qualify to teach." However, the requirement of a general bachelor's degree is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question (or its equivalent). Since there must be a close correlation between the required specialized studies and the position, the requirement of a 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).

We note that the documentation indicates that the petitioner's employees possess academic credentials in diverse specialties including industrial engineering, secondary education with a concentration in a foreign language, mathematics, psychology, industrial education, as well as other

disciplines. This further indicates that the petitioner does not require a degree *in a specific specialty* (or its equivalent).

Without more, the evidence does not support the assertion that the petitioner normally requires at least a bachelor's degree in a specific specialty directly related to the duties of the position (or its equivalent) for the position. 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 petitioner claims that the nature of the specific duties of the position in the context of its business operations 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. We reviewed the petitioner's statements regarding the proffered position and its business operations. However, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

The petitioner asserts that this is "a Petition for Extension of an already approved I-129 for H-1B visa of the same beneficiary." However, we are 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). 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). If a previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the director. Furthermore, our 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 a nonimmigrant petition on behalf of a beneficiary, we 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 petitioner also claims that the beneficiary was previously employed as a preschool teacher at [REDACTED] in Philippines and is an experienced preschool teacher. However, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

We further incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level I position (out of four assignable wage-levels) relative to others within the occupational category. Hence, without more, the position is one not likely distinguishable by relatively specialized and complex duties. That is, without further evidence, the petitioner's has not demonstrated that its proffered position is one with

specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a substantially higher prevailing wage.¹⁶

Although the petitioner asserts that the nature of the specific duties is specialized and complex, the record lacks sufficient evidence to support this claim. Thus, the petitioner has submitted inadequate probative evidence to satisfy the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has not established 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 combined motion will be dismissed and the petition denied.

III. CONCLUSION AND ORDER

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 combined motion is dismissed.

¹⁶ As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.