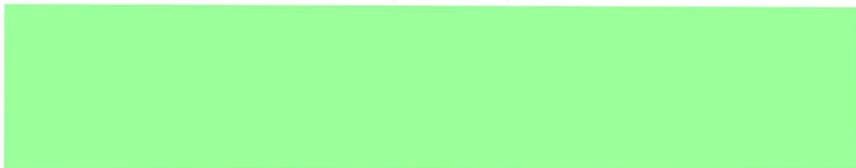


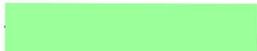


U.S. Citizenship
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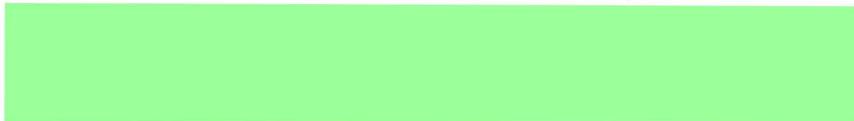
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DATE: **FEB 25 2013**

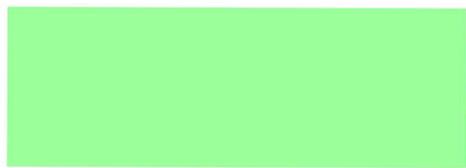
OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a higher education institute established in 1957. In order to employ the beneficiary in what it designates as a dance skills specialist position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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 and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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.

In the petition signed on January 6, 2012, the petitioner indicates that it wishes to employ the beneficiary as a dance skills specialist on a full-time basis at the rate of pay of \$30,000 per year. In the letter of support dated January 6, 2012, the petitioner describes the duties of the proffered position as follows:

This Dance Skills Specialist is a lead teacher in the [petitioner's] Dance Department. [The beneficiary] teaches weekly dance classes (including individual coachings and ensembles rehearsals) in which the content ranges from beginning to advanced ballet technique. The skills specialist also assists in preparing pieces for [the petitioner's] Dance Department performances and productions. This includes selecting students through audition, rehearsing (preparing) soloists or ensembles and overseeing performances. This Dance Skills Specialist role requires active participation in all levels of the Dance Department's program implementation, including planning meetings with the Department Chair, faculty meetings, student supervision and advisement, and parent meetings.

In addition, the petitioner states that "[a] Dance Skills Specialist is required to have a bachelor's degree in dance or extensive experience (more than 10 years with significant portfolio) in their area of performing arts expertise."¹ The petitioner further claimed that its "special requirements include: The Dance Skills Specialist must be accomplished and experienced teacher in order to fulfill the needs of [the] school." The petitioner continued by stating that this "experience is gained through enrollment at well-established dance training institutions, participation in established professional dance companies and teaching opportunities." According to the petitioner, "A college degree is not required if this rigorous training has been attained in the manner described." With the Form I-129 petition, the petitioner submitted documentation regarding the beneficiary's credentials.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Self-Enrichment Education Teachers" - SOC (ONET/OES Code) 25-3021, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought and

¹ For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must generally be demonstrated for each year of college-level training the alien lacks, in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). 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. *Id.*

(b)(6)

issued an RFE on January 23, 2012. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted. The AAO notes that the director specifically requested the petitioner to provide a more detailed description of the work to be performed by the beneficiary for the entire period requested, including the specific job duties, the percentage of time to be spent on each duty, level of responsibility, etc.

On April 16, 2012, the petitioner and counsel responded by submitting further information regarding the proffered position and additional evidence. The petitioner enclosed its "formal job description for the Dance Skills Specialist position." The petitioner stated that "[t]his description is current and has been in effect since 2007." The description of the position is below:

POSITION SUMMARY
Assumes responsibility for teaching dance classes for [the petitioner]. Works with accompanists, children and adults of all ages, developing appropriate teacher/student rapport necessary to enhance educational progress in the dance setting. This is a regular full-year position.

KEY RESPONSIBILITIES	% OF TIME
Develops class schedules and prepares daily lesson plans. Teaches dance lessons in all areas of expertise to students at the [petitioner's].*	70%
Administers dance skills programs as necessary and appropriate.*	10%
Prepares choreography as necessary and appropriate.	5%
Identifies performance and educational opportunities as well as assists in the development of [the petitioner's] programs as necessary and appropriate. Supports performance needs as necessary and appropriate.*	5%
Attends [the petitioner] and Dance Department events, performances, meetings and other school activities to demonstrate support for the [petitioner's] program and its students. Maintains current knowledge of events and programs and leadership support for the department and its division.	5%
Instructs collegiate dance students as necessary and appropriate.	5%

Performs other related duties as assigned.	
*Indicates an "essential" job function.	

Upon review of the duties of the proffered position submitted by the petitioner with the initial petition and in response to the RFE, the AAO notes that the job descriptions are generalized and generic as the petitioner fails to convey either the substantive nature of the work that the beneficiary would actually perform, any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it, or the educational level of any such knowledge that may be necessary. The responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations. Furthermore, the petitioner did not provide sufficient documentation to substantiate the job duties and responsibilities of the proffered position.

The petitioner failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or any substantive evidence regarding the actual work that the beneficiary would perform. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described fail to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner's assertion with regard to the educational requirement is conclusory and unpersuasive, as it is not supported by the job description or substantive evidence.

Further, the AAO observes that the job description provided in response to the RFE also indicates that a "Bachelor's Degree [is] required" and "3 years to < 5 years" of work experience is required for the proffered position. The AAO notes that the petitioner does not indicate that the minimum academic requirement for the position is a bachelor's degree *in a specific specialty*, or its equivalent. Moreover, as previously noted, in the January 6, 2012 letter of support, the petitioner stated that "a bachelor's degree in dance or extensive experience (more than 10 years with significant portfolio) in their area of performing arts expertise" is required for the proffered position. No explanation for the variance was provided.²

In addition, the petitioner and counsel submitted, in part, (1) a job vacancy announcement; (2) letters from several individuals in the industry; (3) a letter from [REDACTED]; Director of Dance for the petitioner; (4) a letter from [REDACTED] Chair of the Dance Department for the petitioner;

² The petitioner has provided inconsistent information as to the requirements of the proffered position. 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).

(5) a printout of [REDACTED]; and (6) a letter from [REDACTED], Director of the Dance Department for the petitioner regarding its hiring practices.

The director reviewed the information provided by the petitioner and counsel. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties 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. The director denied the petition on April 27, 2012. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition. With the Form I-290B, counsel submitted a brief and additional evidence.³

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To make this determination, the AAO turns to the record of proceeding. To ascertain the intent of a petitioner, USCIS must look 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. 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."

³ With regard to the documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not and does not consider the sufficiency of such evidence submitted for the first time on appeal. The appeal will be adjudicated based on the record of proceeding before the director.

In the appeal brief, counsel requests that various materials be returned to the petitioner. The AAO reminds counsel to follow the proper procedures for making such a request. See USCIS website on the Internet at www.uscis.gov and Form G-884, Request for Return of Original Documents, and its accompanying instructions.

The AAO reviewed the record in its entirety and will make some findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

As previously mentioned, the AAO notes that the petitioner has provided inconsistent information regarding the minimum requirements for the proffered position. In the petitioner's "formal job description," the petitioner states that a bachelor's degree is required for the position, but it did not indicate that a bachelor's degree in a *specific specialty*, or its equivalent, is required. The requirement of a general-purpose bachelor's degree (no specific specialty) 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. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a bachelor's degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558.

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study, or its equivalent. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).⁴

Moreover, based upon a review of the record of proceeding, the AAO finds that there are additional discrepancies and inconsistencies in the record of the proceeding with regard to the proffered position. This is exemplified by the wage level chosen by the petitioner in the LCA for the proffered position.

⁴ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

As previously stated, the petitioner submitted an LCA in support of the instant petition that designated the proffered position to corresponding occupational category of "Self-Enrichment Education Teachers" - SOC (ONET/OES Code) 25-3021. The wage level for the proffered position in the LCA corresponds to a Level I (entry). The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.⁵ The LCA was certified January 10, 2012. The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

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.

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 and level of supervision, and the level of understanding required to perform the job duties.⁶ The U.S. Department of Labor (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 wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

⁵ The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

⁶ 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.

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.

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.

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. *Id.* The occupational category "Self-Enrichment Education Teachers" 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 proffered 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.

In addition, the petitioner and counsel claim that the proffered position involves complex, unique and/or specialized duties. For instance, the petitioner states that the proffered position is a "senior faculty position." The petitioner further reports that it provides a professional level of training through "faculty specialists with extraordinary qualifications like those of [the beneficiary]." The petitioner references letters submitted in support of the petition, which the petitioner claims "attest to the specialized training and responsibility of faculty positions like this." The letters discuss the expertise and high-level of qualifications required for the position. The petitioner and counsel assert that the petitioner's operations can be distinguished from "local dance studio[s]." According to the petitioner, it offers "an elite training program that requires faculty with specialized training and ability" and that it "has an obligation to deliver ballet training at the highest level." The petitioner continues by emphasizing the complexity of the job duties and reports that the position "requires extensive training in dance to meet the requirements of the position." The petitioner claims that "to deliver the training [it] promises [its] students, senior faculty, or 'specialists' who teach in [its] program must have advanced credentials." In the formal job description for the proffered position, the petitioner claims that it requires a bachelor's degree and approximately three to five years of experience. In the appeal, counsel emphasizes that the nature of duties of the

proffered position is specialized and complex.

Upon review of the assertions made by the petitioner and counsel, the AAO must question the level of complexity, independent judgment and understanding actually required for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described by the petitioner and counsel conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, the selected wage rate indicates that 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.⁷

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

The AAO notes that the prevailing wage of \$20,966 per year (\$10.08 per hour) on the LCA corresponds to a Level I position for the occupational category of "Self-Enrichment Education Teachers" for [REDACTED] Connecticut).⁸ Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$33,738 per year (\$16.22 per hour) for a Level II position, \$46,509 per year (\$22.36 per hour) for a Level III position, and \$59,280 per year (28.50 per hour) for a Level IV position.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the

⁷ Counsel claims that the proffered position is distinct from other dance teachers, stating "[t]his is not a local dance studio position." The AAO notes that a petitioner may distinguish its proffered position from others within the occupation through the proper wage level designation to indicate factors such as complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. That is, through the wage level the petitioner is able to reflect the job requirements, experience, education, special skills/other requirements and supervisory duties.

⁸ For additional information regarding the prevailing wage for this occupation in Hartford County, see the All Industries Database for 7/2011 - 6/2012 for Self-Enrichment Education Teachers at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?area=73450&code=25-3021&year=12&source=1> (last visited February 20, 2013).

Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted.

The AAO also notes that this aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. 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. 591-92.

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Italics added]. The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a

Level I position. This conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

For the foregoing reasons, a review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the other independent reasons for the director's denial, the petition could still not be approved for this reason.

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the inconsistencies and discrepancies in the record of proceeding regarding the beneficiary's proposed employment.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether DOL's *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁹ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Self-Enrichment Education Teachers."

⁹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

The AAO reviewed the chapter of the *Handbook* entitled "Self-Enrichment Education Teachers," including the sections regarding the typical duties and requirements for this occupational category.¹⁰ However, the *Handbook* does not indicate that normally the minimum requirement for entry into these positions is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "How to Become a Self-Enrichment Education Teacher" states, in part, the following about this occupation:

There are no formal education requirements, but employers generally require self-enrichment teachers to have experience in the subject they teach. Some employers prefer workers who have teaching experience.

Education

In general, there are few educational or training requirements for self-enrichment teachers beyond having expert knowledge of the chosen subject. However, self-enrichment teachers may be required to have formal training in disciplines where educational programs are available, such as music or foreign languages.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Self-Enrichment Education Teachers, on the Internet <http://www.bls.gov/ooh/education-training-and-library/self-enrichment-teachers.htm#tab-4> (last visited February 20, 2013).

When reviewing the *Handbook*, the AAO must again note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into these positions. The *Handbook* reports that there are no formal education requirements for entry into this occupation. The *Handbook* further states that employers generally require self-enrichment teachers to have experience in the subject they teach. In addition, the *Handbook* states that there are few educational or training requirements for self-enrichment teachers beyond having expert knowledge of the chosen subject. Thus, the *Handbook* does not support the assertion that jobs falling within the

¹⁰ For additional information regarding the occupational category "Administrative Services Managers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Self-Enrichment Education Teachers, on the Internet at <http://www.bls.gov/ooh/education-training-and-library/self-enrichment-teachers.htm#tab-1> (last visited February 20, 2013).

occupational category "Self-Enrichment Education Teachers" normally require at least a bachelor's degree in a specific specialty, or its equivalent. Although the *Handbook* reports that self-enrichment teachers may be required to have formal training in disciplines where educational programs are available, such as music or foreign languages, it does not indicate that the formal training must lead to a bachelor's degree. The *Handbook* does not conclude that normally the minimum requirement for entry into these positions is at least a bachelor's degree in a specific specialty, or its equivalent.

In support of its assertion that the petition should be granted, the petitioner states that "[the beneficiary] has already previously qualified and held this position [with the petitioner], during the time in which she held an E-2 work visa, (2009 – 2011). The petition is an effort to reinstate her as an essential member of the faculty."

The AAO acknowledges the petitioner's statement, but finds no merit in the petitioner's assertion that the grant of E-2 classification is relevant to these proceedings. The petitioner cites no statutory or regulatory authority, case law, or precedent decision to support it. Moreover, neither the statutory nor regulatory provisions governing USCIS adjudication of Form I-129 H-1B specialty occupation petitions provide for the approval of an H-1B specialty occupation petition on such grounds, or even indicate that USCIS decisions on E-2 adjudications are relevant to USCIS adjudications of Form I-129 H-1B petitions. The petitioner is required to establish that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions. It may not rely on a previous grant of E-2 status to establish eligibility for H-1B classification.

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. 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." As previously discussed, 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Upon review of the record, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally a minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding 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 petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This 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.

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

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 of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference its previous discussion on the matter.

The petitioner submitted several documents to establish eligibility under this criterion of the regulations. However, as discussed below, the AAO finds that the documentation does not establish a common degree requirement in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings or other documentation submitted by a petitioner is 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 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). Notably, it is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

In the Form I-129, the petitioner described itself as a higher education institute established in 1957, with 1,050 employees. The petitioner reported its gross annual income as "SEE FINANCIALS" and its net annual income as "SEE FINANCIALS."¹¹ The petitioner designated its operations under the North American Industry Classification System (NAICS) code 611310 – Colleges, Universities, and Professional Schools.¹² The NAICS website describes this industry as follows:

¹¹ The petitioner and counsel did not provide an explanation for failing to extrapolate the requested information from the financial statement and providing the information as requested on the Form I-129 petition.

¹² According to the Department of Commerce, U.S. Census Bureau, the North American Industry Classification System is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy, 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 visited February 20, 2013).

This industry comprises establishments primarily engaged in furnishing academic courses and granting degrees at baccalaureate or graduate levels. The requirement for admission is at least a high school diploma or equivalent general academic training. Instruction may be provided in diverse settings, such as the establishment's or client's training facilities, educational institutions, the workplace, or the home, and through diverse means, such as correspondence, television, the Internet, or other electronic and distance-learning methods. The training provided by these establishments may include the use of simulators and simulation methods.

See U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 611310 – Colleges, Universities, and Professional Schools, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 20, 2013).

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted letters from several ballet schools.¹³ The letters provided, however, do not indicate that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions. Instead, the letters appear to be letters of recommendation attesting that the beneficiary is a great asset for the petitioner. The letters do not address the educational requirement for dance skill specialist positions for organizations similar to the petitioner. The writers did not submit any documentation regarding their organizations' recruiting and hiring practices for parallel positions. The letters do not established that similar organizations in the same industry commonly require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions.

In addition, the petitioner submitted a copy of one advertisement in response to the RFE. The AAO reviewed the job advertisement submitted by the petitioner, but notes that the petitioner did not provide any independent evidence of how representative this posting is of the particular advertising employer's recruiting history for the type of job advertised. Further, as it is only a solicitation for hire, it is not evidence of the employer's actual hiring practices.

Moreover, upon review of the advertisement, the petitioner fails 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. Most importantly, the AAO notes that the advertisement does not indicate that a degree is required for the position. The requirements for the advertised position focus on experience. There is no indication that such experience must be the equivalent to a baccalaureate (or higher degree) in a specific specialty. Furthermore, the job advertisement submitted by the petitioner is for a higher education institute, however, the posting is devoid of sufficient information regarding the advertising organization to conduct a legitimate

¹³ It must be noted for the record that two of the letters are almost identical to each other. More specifically, the wording of the letters matches virtually verbatim, including grammatical and punctuation errors. When affidavits are worded the same (and include identical errors), it indicates that the words are not necessarily those of the affiant and may cast some doubt on the affidavits' validity.

comparison of the organization to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organization is similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organization. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.¹⁴

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

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that 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.

The AAO recognizes that the petitioner and counsel claim that the proffered position involves complex and/or unique job duties. In support of the assertion, the record of proceeding contains information regarding the petitioner's business operations and related materials, including a copy of the petitioner's financial statement for 2009 and 2010; several letters from individuals in the industry; letters from the petitioner dance department/division; the petitioner's formal job description for the proffered position; and a printout regarding [REDACTED] (a ballet scholarship competition). In the appeal, counsel submitted a revised letter from the petitioner's Director of Dance; a copy of the petitioner's ballet syllabus; and two related books. However, even in the context of the documentation provided, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. The AAO hereby

¹⁴ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just one job advertisement 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). Moreover, given that there is no indication that the advertisement was randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcement supported the finding that a position parallel to the proffered position, for an organization similar to the petitioner, required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that one posting that appears to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

incorporates into this analysis this decision's earlier comments and findings regarding the generalized level of the information and evidence provided with regard to the proposed duties and the position that they are said to comprise. As reflected in those earlier comments and findings, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent.

That is, the petitioner failed to demonstrate how the duties of the position as described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While a few related courses may be beneficial or in some cases even required to perform certain duties of a dance skills specialist position, the petitioner has failed to demonstrate 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 particular position here.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Self-Enrichment Education Teachers" at a Level I (entry level) wage. The wage level of the proffered position indicates that 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.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, 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."¹⁵

Therefore, the evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information to the effect that a bachelor's degree in a specific specialty, or its equivalent, is not required for entry into the occupation in the United States. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

¹⁵ 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.

The AAO observes that the petitioner has indicated that the beneficiary's educational background and experience in the industry 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. The petitioner claims that the classes for its students are more rigorous than "local dance studios" and that it offers a "pre-professional dance training program," but the petitioner does not explain or clarify at any time in the record which of the duties, if any, are so complex or unique that they can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent. Upon review of the record of proceeding, the AAO finds that the petitioner has failed to establish the proffered position as satisfying the second prong of the criterion at 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, the AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

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

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See*

generally *Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in 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.

The petitioner stated in the Form I-129 petition that it has 1,050 employees and that it was established in 1957 (approximately 55 years prior to the H-1B submission). In response to the director's RFE, the petitioner submitted a letter from [REDACTED] Director. [REDACTED] states that there are 22 faculty positions categorized as Skills Specialist positions. She does not provide the number of individuals who currently or in the past have served in the proffered position of "Dance Skills Specialist."

In the letter, [REDACTED] states that "there has been no one in [the dance skills specialist] position who did not have a Bachelor's Degree or many years of training and experience in a reputable professional dance company and training institute." Notably, the petitioner did not submit probative evidence to substantiate the claim (e.g., pay records, wage reports) and documentation regarding the credentials (e.g., transcripts) as requested in the RFE. Further, the AAO observes that [REDACTED] does not indicate that these individuals possessed a baccalaureate *in a specific specialty*, or its equivalent. Again, 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 duties and responsibility of the specialty occupation claimed in the petition. Moreover, the petitioner did not submit any evidence regarding its recruiting practices. The AAO observes that the record is devoid of probative evidence to satisfy this criterion of the regulations.

Upon review of the record, the petitioner has not provided 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. Upon review of the record of the proceeding, the AAO finds that the petitioner has not sufficient provided probative evidence to satisfy this criterion of the regulations.

The AAO acknowledges that the petitioner and counsel may believe that the proffered position involves specialized and complex duties. In support of the petition, the petitioner provided documentation regarding its business operations, including a copy of the petitioner's financial

statement for 2009 and 2010; letters from individuals in the industry and from the petitioner's dance department/division; the petitioner's formal job description for the proffered position; a printout regarding a ballet scholarship competition; the petitioner's syllabus; and related materials (such as books). However, upon review of the record of the proceeding, the AAO notes that relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, there is a lack of evidence substantiating the petitioner's assertions.

The AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category of "Self-Enrichment Education Teachers." The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's 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 IV (fully competent) position, requiring a substantially higher prevailing wage. 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."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that 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. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the 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 petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in

any event, some of the evidence submitted is not accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English. Because the petitioner failed to submit a certified translation of the documentation, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). In the instant case, the petitioner elected not to comply with the requirement. Accordingly, the evidence that is in a foreign language that does not comply with 8 C.F.R. § 103.2(b)(3) is not probative and will not be accorded any weight in this proceeding. The AAO will not attempt to decipher or "guess" the meaning of documents that are not accompanied by a full, certified English language translation.

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

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

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

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