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U.S. Citizenship  
and Immigration  
Services

Date: **FEB 25 2013** Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

[REDACTED]

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 director, Vermont Service Center, denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On the Form I-129 petition, the petitioner claims to be a massage therapy service company, and it seeks to employ the beneficiary in what it designates as a training and development specialist. The petitioner, therefore, endeavors to classify the beneficiary 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 proffered position was not a specialty occupation and that the petitioner did not appear to have a need for the proffered position. On appeal, counsel for the petitioner contends that the director's findings were erroneous and submits a brief and additional evidence in support of this contention.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

*Specialty occupation* means an occupation which requires [(1)] theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires [(2)] the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its

particular position is so complex or unique that it can be performed only by an individual with a degree;

- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's decision denying the petition; and (5) the

petitioner's Form I-290B and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner indicates on the Form I-129 that it is a massage therapy service established in 2008 with 12 employees and a gross annual income of \$600,000. In a letter dated March 29, 2011, the petitioner claims that it "offers a variety of body and mind treatments and enhancements inspired by ancient Asian remedies" and provides various types of massage services and reflexology. The petitioner further stated that its 12 employees are stationed at its seven locations in Pennsylvania and New Jersey.

Regarding the proffered position, the petitioner claims that it requires the services of the beneficiary as a training and development specialist, and states that her duties would be as follows:

1. Assess company's training needs through surveys, interviews with employees and meetings with business managers and service development specialists.
2. Design, plan, organize and direct orientation and training for employees or customers of industrial or commercial establishment.
3. Using the orient medicinal theories to design and develop proprietary training programs that meet company's service requirements.
4. Direct training programs to help workers maintain or improve their job skills.
5. Organize and develop training procedure manuals and guides and course materials such as handouts and visual materials.
6. Present information, using a variety of instructional techniques and formats such as role playing, simulations, team exercises, group discussions, videos and lectures.
7. Monitor, evaluate and record training activities and program effectiveness.
8. Select and assign outside instructors to conduct specific training programs.

The petitioner concluded by stating that the beneficiary is qualified to perform the duties of the proffered position by virtue of her foreign bachelor's degree in Chinese Medicine and her vast experience in the industry.

On May 25, 2011, the director issued an RFE, which requested, *inter alia*, a more detailed description of the work to be performed by the beneficiary as well as specific documentation demonstrating that the petitioner met one of the four alternative criteria in 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner responded on June 30, 2011, addressing the director's queries and submitting several documents in response to the director's requests. Regarding the proffered position, counsel for the petitioner restated the previous list of duties provided in its March 29, 2011 letter of support, and stated as follows:

[T]he beneficiary needs to train employees and students in theory. She need[s] to talk to business managers, employees to find out common practice issues in order to design the course for training purpose[s]. She needs to evaluate the practice of the workers and to design the education materials, either through the theory education or through the application, to improve the performance of the workers. Beneficiary needs to design orientation and training materials based on the theory and her practice experience. She shall use the terms understandable by lay-man to attract the general customers while applying the precise concept of theory used to train the employee. Beneficiary needs to observe the reaction and the health improvement of the customers, to collect, analyze and compare the different Chinese massages according to the market demand. Beneficiary needs to design and adjust the material of training program based on the observation on the workers when they apply different Chinese [massages] to the customers.

The petitioner also clarified that although it had multiple locations, the beneficiary would work at its [redacted] New Jersey location.

In further support of the petition, the petitioner submitted copies of job postings for positions it claimed were similar to the proffered position, as well as the Summary Report for the occupation of training and development specialist from *O\*Net Online*. In addition, the petitioner responded to queries regarding the nature of the petitioner's business operations as well as the beneficiary's qualifications.

On January 23, 2012, the director denied the petition. Specifically, the director concluded that the record did not establish that the proffered position met any of the four supplemental criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A). The director equated the duties of the proffered position to those of a training and development specialist as described in the summary report from *O\*Net Online*, but concluded that there was no requirement for at least a bachelor's degree in a specific specialty for entry into the occupation.

On appeal, counsel for the petitioner contends that the director's findings were erroneous and asserts that the degree requirements for this occupational category vary based on the job's specific industry. Counsel submits additional documentation, including a copy of the petitioner's "Academy" brochure in support of the contention that the proffered position is a specialty occupation.

The AAO will first address the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The petitioner contends, and the director appears to have agreed, that the proffered position is akin to that of a training and development specialist. The AAO does not dispute that a review of this occupational category reveals similarities to the proffered position.

Although the petitioner and the director relied upon the summary report from *O\*Net Online* in evaluating the proffered position under the regulatory requirements, the AAO will also review the description of this occupational category as set forth in the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)*.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>1</sup> The AAO reviewed the information in the *Handbook* regarding the occupational category "Training and Development Specialists" and notes that this occupation is one for which the *Handbook* does not provide detailed data. The *Handbook* states the following about these occupations:

#### **Data for Occupations Not Covered in Detail**

Employment for the hundreds of occupations covered in detail in the *Handbook* accounts for more than 121 million, or 85 percent of all, jobs in the economy. [The *Handbook*] presents summary data on 162 additional occupations for which employment projections are prepared but detailed occupational information is not developed. These occupations account for about 11 percent of all jobs. For each occupation, the Occupational Information Network (O\*NET) code, the occupational definition, 2010 employment, the May 2010 median annual wage, the projected employment change and growth rate from 2010 to 2020, and education and training categories are presented. For guidelines on interpreting the descriptions of projected employment change, refer to the section titled "Occupational Information Included in the OOH."

Approximately 5 percent of all employment is not covered either in the detailed occupational profiles or in the summary data given here. The 5 percent includes categories such as "all other managers," for which little meaningful information could be developed.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Data for Occupations Not Covered in Detail," <http://www.bls.gov/ooh/About/Data-for-Occupations-Not-Covered-in-Detail.htm> (last visited Feb. 7, 2012).

Thus, the narrative of the *Handbook* indicates that there are over 160 occupations for which only brief summaries are presented. That is, detailed occupational profiles for these 160+ occupations are not developed.<sup>2</sup> The *Handbook* continues by stating that approximately five percent of all

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<sup>1</sup> The director's decision referred to the 2010-2011 edition of the *Handbook*. All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/oco/>.

<sup>2</sup> The AAO notes that occupational categories for which the *Handbook* only includes summary data includes a range of occupations, including for example, postmasters and mail superintendents; agents and business managers of artists, performers, and athletes; farm labor contractors; audio-visual and

employment is not covered either in the detailed occupational profiles or in the summary data. The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed.

Accordingly, in certain instances, the *Handbook* is not determinative. When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position more likely than not satisfies this or one of the other three criteria, notwithstanding the absence of the *Handbook*'s support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other objection, authoritative sources) that supports a finding that the particular position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider and weigh all of the evidence presented to determine whether the particular position qualifies as a specialty occupation.

The AAO observes that the *Handbook* does not indicate that training and development specialist positions comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. The full-text of the *Handbook* regarding this occupational category is as follows:

**Training and Development Specialists**

(O\*NET 13-1151.00 [previously 13-1073.00])

Design and conduct training and development programs to improve individual and organizational performance. May analyze training needs.

- 2010 employment: **217,700**
- May 2010 median annual wage: **\$54,160**
- Projected employment change, 2010-20:
  - Number of new jobs: **61,600**
  - Growth rate: **28 percent (faster than average)**
- Education and training:
  - Typical entry-level education: **Bachelor's degree**
  - Work experience in a related occupation: **None**

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multimedia collections specialists; clergy; merchandise displayers and window trimmers; radio operators; first-line supervisors of police and detectives; crossing guards; travel guides; agricultural inspectors, as

o Typical on-the-job-training: **None**

*Id.* (last visited Feb. 7, 2012).

The *Handbook* summary data provides "education and training categories" for occupations. The occupational category "Training and Development Specialists" falls into the group of occupations for which a bachelor's degree (no specific specialty) is the typical entry-level education. The AAO notes that, as evident in the above *Handbook* excerpt on this occupation, the *Handbook* reports only that a bachelor's degree is typical – but not required – for entry into training and development specialist positions and, more importantly, the *Handbook* does not report that bachelor's degrees held by those entering the occupation are limited to and must be in any specific specialty directly related to the occupation. Accordingly, the *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty is normally the minimum requirement for entry into this occupational category.

The AAO will now turn to *O\*Net Online*'s summary report for the occupation of training and development specialist. The AAO finds that the description of this occupation by *O\*Net Online* is also akin to the proffered position as described by the petitioner in this matter. Therefore, the AAO now turns to the standard educational requirements for entry into this occupation. The director found that a bachelor's degree in a specific specialty was not required for this occupation.

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), it must be established that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position. Regarding this occupation, *O\*Net Online* states in the Job Zone section as follows:

**Title** Job Zone Four: Considerable Preparation Needed

**Education** Most of these occupations require a four-year bachelor's degree, but some do not.

**Related Experience** A considerable amount of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified.

**Job Training** Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

**Job Zone Examples** Many of these occupations involve coordinating, supervising, managing, or training others. Examples include accountants, sales managers, database

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well as others.

administrators, teachers, chemists, environmental engineers, criminal investigators, and special agents.

**SVP Range** (7.0 to < 8.0)

According to *O\*Net Online*, most of the occupations in this category require a four-year bachelor's degree, but some do not. Therefore, although it states that considerable preparation is needed, there is no requirement for a degree in a specific specialty for entry into this occupational category. Despite counsel's claims to the contrary on appeal, there is no stated requirement that a degree in a specific specialty, or a degree specific to the industry in which the training is to be conducted, is required for entry into the occupation. In fact, *O\*Net Online* specifically states that, while a four-year degree is common, not all positions in this category even require at least a bachelor's degree. Consequently, the AAO concurs with the director's finding that the proffered position does not, simply by virtue of this categorization, satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* or, in this case, *O\*Net Online* 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)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* or *O\*Net Online* reports an industry-wide, standard requirement of at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation. In response to the RFE, the petitioner submitted three job postings for positions it claims are akin to that of the proffered position in this matter. The AAO will address each individually.

The first posting is for the position of "Training Specialist" with CVS Caremark. This posting contains minimal information regarding the nature of the hiring entity, but based on the heading identifying CVS and the statement that "specialty pharmacy experience" is preferred, it appears that this position is offered by CVS or an affiliated entity generally known for pharmacy and retail services. This position, therefore, is for a training specialist in a national pharmaceutical company. Such a position within a national pharmaceutical company cannot be deemed similar to that of a

training and development specialist for a 12-person massage therapy service company. Moreover, regardless of the differences in the industries of the two companies, the job announcement simply requires a 4-year bachelor's degree, and does identify a specific specialty in which the degree should be held. Therefore, this posting is not sufficient to establish that an industry-wide, standard requirement of at least a bachelor's degree in a specific specialty or its equivalent exists for entry into the occupation.

The second posting is for a "Massage Therapy Teacher/College Instructor" at Northern Virginia University College. While the general subject area, i.e., massage therapy, is shared between this poster and the petitioner, the posting is for a part-time instructor at a community college. This posting therefore offers a position that differs extensively from an in-house training and development specialist for a massage therapy service company. Consequently, this posting is also insufficient.

The final posting is for the position of "Adjunct Instructor – Therapeutic Massage Technology" with Eagle Gate College. This posting, like the one just discussed, is for a faculty teaching position in a college in the education industry and thus differs vastly from the nature of the proffered position in this matter. There is insufficient evidence, therefore, to demonstrate that any of these job postings are for parallel positions within similar companies in the petitioner's industry. The petitioner, therefore, has failed to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).<sup>3</sup>

In the alternative, the petitioner may submit evidence to establish that the duties of the position are so complex or unique that only an individual with a bachelor's or higher degree in a specific specialty or its equivalent can perform the duties associated with the position. The test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but

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<sup>3</sup> On appeal, counsel and the petitioner contend for the first time that the beneficiary will serve as an instructor, and that she will be required to train employees *and students* in the petitioner's newly established [REDACTED] located in [REDACTED] New Jersey. Although the petitioner previously stated, in response to the RFE, that it was in the process of establishing such an academy, the first evidence submitted demonstrating that it will operate such an academy in addition to its massage therapy locations was submitted on appeal.

On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

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 directly related to the duties and job responsibilities of that particular position. The petitioner does not explain or clarify which of the duties, if any, of the proffered position are so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty-degreed employment.

Although the petitioner relies on the Job Zone section of the summary report for *O\*Net Online* as evidence that considerable preparation is needed to enter this occupation, there is insufficient evidence in the record to demonstrate that the duties of the proffered position are so complex or unique that it would require an individual with at least a bachelor's degree in a specific specialty or its equivalent to perform them. Additionally, although the petitioner submits a copy of the handbook for the [REDACTED] located in [REDACTED] New Jersey, it is unclear how this document establishes the complexity and uniqueness of the duties of the proffered position, particularly since there is no discussion or explanation in the record regarding how this document pertains to the proposed duties of the beneficiary.

The petitioner has thus failed to establish either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. Although evidence of the petitioner's past hiring practices was requested in the RFE, the petitioner failed to submit any evidence that related to this criterion. There is no evidence in the record that the petitioner currently or has previously employed other persons in the position of training and development specialist. Since the record is devoid of sufficient evidence that the petitioner currently or previously hired and employed directly-related, specialty, baccalaureate-degreed individuals to fill the proffered position, the petitioner has failed to satisfy this criterion.

The AAO further notes that while a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree in a specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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 in a specific specialty, or its equivalent.

The petitioner has submitted no independent documentation in support of the contention that specialized and complex knowledge is required to perform the duties of the proffered position. The petitioner and counsel simply provide their own unsupported opinions with regard to the qualifications necessary for a training and development specialist to successfully function in the proffered position. Moreover, the description of the duties of the proffered position does not specifically identify any tasks that are so specialized or complex that knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent. Relative specialization and complexity have not been developed for the proffered position and, as such, the evidence of record does not establish that this position is significantly different from training and development specialists that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, to the extent that they are depicted in the record, the duties have not been demonstrated as being so specialized and complex as to require the highly specialized knowledge usually associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty.<sup>4</sup> Therefore, the evidence does not establish that the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.

Beyond the decision of the director, the AAO notes again that, on appeal, counsel and the petitioner contend for the first time that the beneficiary will serve as an instructor, and that she will be required to train employees *and students* in the petitioner's newly established [REDACTED] located in [REDACTED] New Jersey. Although the petitioner previously stated, in response to the RFE, that it was in the process of establishing

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<sup>4</sup> The duties as described lack sufficient specificity to distinguish the proffered position from other training and development specialist positions for which a bachelor's or higher degree in a specific specialty, or its equivalent, is not required to perform their duties.

Moreover, the petitioner has designated the proffered position as a Level I position on the submitted Labor Condition Application (LCA), indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. See Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage. 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).

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such an academy, the first evidence submitted demonstrating that it will operate such an academy in addition to its massage therapy locations was submitted on appeal.

In the instant matter, the petitioner filed the Form I-129 with USCIS on April 13, 2011. The LCA provided at the time of filing was certified (1) for a training and development specialist, (2) pursuant to SOC (ONET/OES) code 13-1073.00, (3) for the job location of [REDACTED] New Jersey, and (4) at a Level I prevailing wage of \$21.19 per hour. Counsel's contentions on appeal that the proffered position is also that of an instructor at the petitioner's newly created [REDACTED] New Jersey, necessitate a certified LCA for SOC (ONET/OES) code 25-3099.00 (Teachers and Instructors, all others) as well as the corresponding prevailing wage and a change in the place of employment.

As previously stated in this decision, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. at 176 (Assoc. Comm'r 1998).

As demonstrated in the body of the decision, the AAO adjudicated the petition for the position of training and development specialist as originally claimed and requested by the petitioner. Therefore, the AAO will not examine these issues further, except to note that, if the proffered position is indeed an instructor and not a training and development specialist as originally claimed, the petition would be also be denied for failure to submit a certified LCA that corresponds to the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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