



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **APR 17 2014**

OFFICE: VERMONT SERVICE CENTER

FILE: 

IN RE:

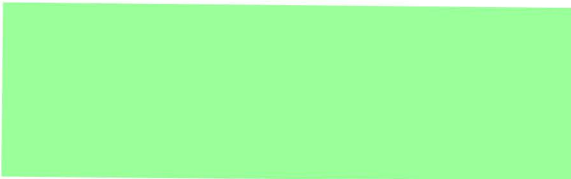
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:

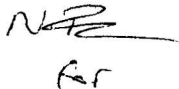


INSTRUCTIONS:

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

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

Thank you,



Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on April 4, 2013. On the Form I-129 petition, the petitioner states that it is engaged in shipping and transportation. In order to employ the beneficiary in a position to which it assigned the job title of "Shipping Coordinator," the petitioner seeks 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 petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserts that the director's basis for denial was erroneous and contends that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

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

The AAO will review whether the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

I. THE LAW

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

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

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

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

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

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

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

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

II. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner stated on the Form I-129 petition that it seeks the beneficiary's services in a position that it designates as a "Shipping Coordinator" to work on a full-time basis at an annual salary of \$64,500. The petitioner was established in 2007 and has 8 employees and a gross annual income of \$4,800,000.

The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Transportation Inspectors" - SOC (ONET/OES) Code 53-6051, at a Level III wage.

In a support letter dated April 2, 2013, the petitioner explained that it "provides nationwide and overseas product transportation and warehousing, and specializes in loading cars, heavy equipment, and oil equipment in containers." The petitioner also stated that it wishes to expand its business and in order to so it is "seeking to employ a professional who has the academic, as well as work experience in the area of warehousing, shipping and transportation." The petitioner also stated that the beneficiary will perform the following duties in the proffered position:

- Document freight conditions any incident during shipments, or handling of freight;
- Negotiate and administer contracts with customers and Vessel Operating Common Carriers.
- Prepare reports and record shipments details, and investigate and resolve lost/damage cargo complaints;
- Coordinate Cargo shipments and direct packing crews to use extra bracing for special shipments;
- Direct packing crews to ensure compliance with procedures and safe packing of cargo
- Maintains inventory of cars, heavy equipment, oil equipment in containers, and other shipping Cargo.
- Determines method of shipment, utilizing knowledge of shipping procedures, routes, and rates.
- Inspect cargo, ensure safety and compliance with regulations, and remedy discovered violations.

The petitioner stated that the proffered position requires "the application of knowledge gained through completion of a bachelor's degree (or its equivalent) in Business Administration, Law, or related fields."

The petitioner stated that the beneficiary is qualified to perform services in the proffered position by virtue of his degree and professional qualifications. The petitioner provided a copy of the beneficiary's Bachelor of Law degree from [REDACTED] and a copy of the beneficiary's transcript. The petitioner also stated that the beneficiary "has over none [sic] (8) years of professional experience as a Director of International Shipping...in Egypt." The petitioner provided a document entitled, "Academic Credentials Report," dated April 16, 2012, rendered by the Foreign Credentials Service of America stating that the beneficiary has the U.S. equivalency of a Bachelor of Laws (L.L.B.).

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 18, 2013. In the request, the director asked the petitioner to provide additional evidence to establish that the proffered position qualifies as a specialty occupation. The notice requested a more detailed description of the work to be performed by the beneficiary, including the specific job duties, the percentage of time to be spent on each duty, the level of responsibility, the hours per week of work, etc. The director outlined some of the types of evidence that could be submitted.

The petitioner's attorney responded to the director's RFE and submitted a response letter and additional evidence. In the letter in response to the RFE, dated July 12, 2013, counsel explained the nature, scope and activity of the petitioner as follows:

[The petitioner] is a licensed NVOCC (Non-vessel Operating Common Carrier)

member of Federal Maritime Carriers [REDACTED]. NVOCC's are more sophisticated and complex than traditional freight forwarders with the most significant difference: assuming liability for loss or damage of the freight in transit and issuance of bills of lading to shippers.

Essentially, to common carriers, NVOCC's are considered shippers, and to shippers, NVOCC's function as though they own a vessel. Like many other NVOCC's, [the petitioner] assumes all liability of cargo and manages end-to-end logistics and custom clearance of transported freight. Although, NVOCC's do not own their own vessels, they are in contractual agreements with vessel carriers and negotiate discounted rates for shippers. All rates and charges for the transportation are required to be filed in tariff form with the FMC.

Evidently, such significant liability intensified the importance of compliance with an array of applicable domestic and international laws and regulations, and close monitoring of every aspect of shipments. It is very well understood in this industry, that a single minor error can have serious negative consequences for the company, both in terms of cost and potential legal turmoil.

In the RFE response letter, counsel also stated that "[s]ince NVOCC's do not actually own vessels, they are able to fully and effectively operate with [a] smaller number of employees....[w]hile the alien beneficiary will oversee and manage the staff and warehouse personnel to ensure compliance, he is exempt from performing non-qualifying functions."

Also, in the RFE response letter, counsel provided a revised description of the job duties for the proffered position as follows:

- 1- Assuring company's compliance with all applicable laws, regulations, and procedures while supporting key company goals and profitability is the single most important duty of this position. This duty mainly involves:
 - A. Inspect and enforce safety and compliance and remedy discovered violations by reviewing, modifying and implementing policies in accordance to the applicable laws and regulations; 25%
 - B. Document freight conditions and incidents reported to him by warehouse manager/personnel and coordinate to ensure synchronized flow of shipments by providing advice and consultation to warehouse manager and staff to assist them in maintaining a safe working environment in compliance with warehouse safety regulations, standards and practices. This includes, amount other things, directing the crew to use extra bracing for special/custom shipments. 25%
 - C. Investigate unresolved lost/damage cargo complaints for exposure evaluation and work with management to prepare comprehensive reports and recommendations for corrective action to eliminate or minimize liability. 20%

This will be the major focus of the alien beneficiary's work at [the petitioner] and he will devote 70 percent (total) of his time to this duty.

- 2- Second most significant duty of the beneficiary is to negotiate and administer contracts and common carriers service agreements to ensure company's best interest and profitability, within the perimeters of law. In this capacity, he will also oversee the issuance of bill of lading, obtainment of custom clearance documents, and ensure work orders' accuracy.

It is anticipated that he will devote approximately 20 percent of his time to this duty depending on the number of contracts to be negotiated at any given time.

- 3- Maintain inventory of cars, containers, and other shipping cargo. The inventory documents are prepared by the warehouse manager on [a] daily basis, but the accuracy and compliance of the inventory has to be verified by the beneficiary and the records must be kept in his possession.

It is anticipated that he will devote approximately 5 percent of his time to this duty.

Determine methods of shipment, utilizing knowledge of shipping procedures, routes, and rates. While other employees will be primarily responsible for this function, the beneficiary will ensure its accurate execution and advise the staff accordingly, as needed. He has the ultimate responsibility for correctly routing shipments and ensuring that all packing and documentation requirements are met.

It is anticipated that he will devote approximately 5 percent of his time to this duty.

Counsel contends that the position of shipping coordinator is a specialty occupation for the following reasons:

The proffered position of "Shipping Coordinator" demands complex knowledge of domestic and International maritime, commercial, and custom laws and regulations, as well as [the] ability to interpret and ensure compliance with the same. It also requires deep understanding of international and domestic contracts, and superb negotiation skills. The individual must have a sound business judgment and thorough understanding of transportation industry practices, inspection, and compliance methods, and keep inform[ed] of any industry or regulatory changes.

The director denied the petition on July 23, 2013, finding that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation.

In the appeal brief, dated September 17, 2013, counsel asserts that the duties of the proffered position are sufficiently described such that the type of position offered, and whether it requires a minimum of a bachelor's degree in a specific specialty or its equivalent, can be determined. Counsel cited the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as support for the proposition that the proffered position requires a bachelor's degree.

III. ANALYSIS

The AAO reviewed the record of proceeding in its entirety. To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the supplemental, additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The petitioner stated that the beneficiary would be employed in a shipping coordinator position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the evidence in the record of proceeding establishes that performance of the particular proffered 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 a specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (hereinafter the *Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ However, the AAO notes there are occupational categories which are not covered in detail by the *Handbook*, as well as occupations for which the *Handbook* does not provide any information. The *Handbook* states the following about these occupations:

Data for Occupations Not Covered in Detail

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. The AAO's references to the *Handbook* are to the 2014-2015 edition available online.

Although employment for hundreds of occupations are covered in detail in the *Occupational Outlook Handbook*, this page presents summary data on additional occupations for which employment projections are prepared but detailed occupational information is not developed. For each occupation, the Occupational Information Network (O*NET) code, the occupational definition, 2012 employment, the May 2012 median annual wage, the projected employment change and growth rate from 2012 to 2022, and education and training categories are presented.

Thus, the narrative of the *Handbook* indicates that there are occupations for which only brief summaries are presented. (That is, detailed occupational profiles for these occupations are not developed.)² 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.

As previously mentioned, the petitioner asserted in the LCA that the proffered position falls within the occupational category "Transportation Inspector." The AAO reviewed the information in the *Handbook* regarding the occupational category "Transportation Inspector" and notes that this occupation is one for which the *Handbook* does not provide detailed data. The director reviewed the petitioner's job description and found the proffered position to fall under the occupational category "Cargo and Freight Agent," an occupational category that is listed in the *Handbook* but that does not indicate that a baccalaureate degree in a specific field of study is the minimum educational requirement. The AAO observes that the *Handbook* does not support a conclusion that either occupation normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation.

More specifically, the text of the *Handbook* regarding this occupational category is as follows:

Transportation Inspectors

(O*NET 53-6051.00, 53-6051.01, 53-6051.07, and 53-6051.08)

Inspect equipment or goods in connection with the safe transport of cargo or people. Includes rail transportation inspectors, such as freight inspectors; rail inspectors; and other inspectors of transportation vehicles, not elsewhere classified. Excludes "Transportation Security Screeners"(33-9093).

² 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 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 well as others.

2012 employment: **26,200**

May 2012 median annual wage: **\$63,680**

Projected employment change, 2012-22:

Number of new jobs: **2,900**

Growth rate: **11 percent (about as fast as average)**

Education and training:

Typical entry-level education: **High school diploma or equivalent**

Work experience in a related occupation: **None**

Typical on-the-job-training: **Moderate-term on-the-job training**

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Data for Occupations Not Covered in Detail, on the Internet at <http://www.bls.gov/ooh/About/Data-for-Occupations-Not-Covered-in-Detail.htm> (last visited April 16, 2014).

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into this occupational category. The *Handbook* summary data provides "education and training categories" for occupations. The occupational category "Transportation Inspectors" falls into the group of occupations for which a high school diploma or equivalent is the typical entry-level education. As the *Handbook* reports that a high school diploma is sufficient for entry into this occupation, it does not support the claim that the proffered position falls under an occupational group that qualifies as a specialty occupation.

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, 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 authoritative sources) that supports a favorable finding with regard to this criterion. 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." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

On appeal, counsel for the petitioner contends that the proffered position of Shipping Coordinator is "similar to combination of a Management analyst, Contract Administrator, and Occupational Health and Safety Specialist." The petitioner was put on notice of the deficiencies of the petition in the RFE but only on appeal does counsel mention that the duties of the proffered position may be a combination of various positions. 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).

Upon review of the totality of the evidence in the entire record of proceeding, the AAO concludes that the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties 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 criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

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

Here and as already 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 record of proceeding does not contain any evidence from professional associations in the petitioner's industry attesting that a degree requirement is common to the industry for individuals employed in parallel positions to the proffered position. The petitioner also did not submit any letters or affidavits from firms or individuals in the industry, nor evidence that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations.

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.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner and counsel submitted various documents, including documents related to the petitioner's business operations. For instance, the petitioner and counsel provided promotional materials such as printouts from the petitioner's website; copies of carriers' Service Contracts and shippers bill of lading; information regarding Non-vessel Operating Common Carrier, and base rate tariff. The AAO reviewed the record of proceeding in its entirety. However, upon review of the record, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

The petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or is equivalent. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree directly related to the occupation 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 even required, in performing certain duties of the proffered 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 proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background and professional experience in the field will assist him 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 does not sufficiently explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Transportation Inspectors" at a Level I (entry level) wage. This designation is appropriate for positions for which the petitioner expects the beneficiary to have a basic understanding of 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; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

By way of comparison, the AAO notes that a position classified at a Level IV (fully competent) position is designated by the DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." Thus, the wage level designated by the petitioner in the LCA for the proffered position is not consistent with claims that the position would entail any particularly complex or unique duties or that the position itself would be so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty.

Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions that can be performed by a person without at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. The AAO 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 the 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.

In response to the RFE, counsel explained that prior to 2012, Mr. [REDACTED] "handled the proposed duties of the beneficiary." Counsel stated that Mr. [REDACTED] obtained a Bachelor of Art in Law. Counsel also explained that before Mr. [REDACTED] left the company, he "took time to carefully train Mr. [REDACTED] to handle some but not all of the same duties." Counsel also explained that Mr. [REDACTED] never "completely replaced" Mr. [REDACTED] but he "assists management in the proposed duties until the arrival of the beneficiary." Counsel stated that Mr. [REDACTED] holds a bachelor's degree in Commerce/Accounting.

On appeal, counsel states that "Mr. [REDACTED] was the only individual employed by the Petitioner handling the duties of Shipping Coordinator, and no other individual has held the position of Shipping Coordinator or a similar position at [the petitioner], to this date." Notably, the petitioner and counsel did not provide the job duties and day-to-day responsibilities of the positions that it claims are the same as the proffered position. The petitioner and counsel also did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, it is unclear whether the duties and responsibilities of these individuals were the same or related to the proffered position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Furthermore, the documentation provided by the petitioner does not support its claim with regard to Mr. [REDACTED]. While the petitioner submitted copies of the former employee's diplomas and Forms 1099, the AAO observes that the Forms 1099 for 2009, 2010 and 2011 indicate that Mr. [REDACTED] was compensated \$22,950; \$40,310 and \$32,700 for each corresponding year. The documentation indicates that Mr. [REDACTED] was paid significantly less than the salary offered to the beneficiary, strongly suggesting that he was employed in different positions. The petitioner did not provide an explanation for the substantial variance in the wages. Without more, the documentation does not establish that the petitioner satisfied this criterion of the regulations.

Upon review of the record, the petitioner has not provided sufficient probative evidence to establish

that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The AAO acknowledges that the petitioner and counsel may believe that the nature of the specific duties of the position in the context of the petitioner's business operations is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO reviewed the evidence, including the documents related to the petitioner's business operations (printouts from the petitioner's website; bills of lading; and contracts). The AAO finds that the petitioner's statements and the submitted documentation fail to support the assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

In this regard, the AAO here incorporates into this analysis its earlier comments and findings with regard to the implication of the Level I wage-rate designation (the lowest of four possible wage-levels) in the LCA. That is, that the proffered position's Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Transportation Inspectors," and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, the DOL indicates that Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation."

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).

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 documentation 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 that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree in a specific specialty, or its equivalent, also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications.

IV. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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