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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Service  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

DATE: **MAY 29 2014** OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

for  
Ron Rosenberg  
Chief, Administrative Appeals Office

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

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a freight forwarding company established in 2005. In order to employ the beneficiary in what it designates as an industrial engineer position, the petitioner seeks to classify him 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. On appeal, counsel for the petitioner submits a brief and additional evidence, asserting that the director's findings with regard to the proffered position were erroneous and contending that the petitioner met its burden of proof in this matter.

The record of proceeding contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and additional documents in support of the appeal.

We reviewed the record in its entirety before issuing its decision.<sup>1</sup> For the reasons that will be discussed below, we agree with the director that the record as currently constituted does not establish eligibility for the benefit sought. Accordingly, the director's decision will be affirmed, and the petition will be denied.

## I. THE LAW

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.

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<sup>1</sup> We review service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 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 & 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 both 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. *See* section 214(i)(1) of the Act.

## II. FACTUAL AND PROCEDURAL HISTORY

On the Form I-129 petition, the petitioner indicates that it is seeking the beneficiary's services as an industrial engineer on a full-time basis at an annual salary of \$48,000. In its March 6, 2013 letter of support, the petitioner explained that it is engaged in the business of freight forwarding, specifically noting that it distributes merchandise primarily into Mexico by handling freight logistics. Regarding the proffered position, the petition provided the following overview of the beneficiary's proposed duties:

In this position, he will design, develop, and evaluate the company's logistics and systems for managing its key processes, including efficiency of employees, quality control, inventory control, logistics and material flow, cost analysis, and client service coordination. He will plan and establish sequence of operations to promote efficient utilization of company resources to better serve our clients. [The beneficiary] will review work schedules of all employees to better utilize each employee's strengths and protect against weaknesses to improve customs procedures. He will estimate overhead costs, including variable costs for particular services, cost savings methods, and the effects of specific company process changes on expenditures for management review, action and control. He will draft and design layout of equipment, materials, and workspace to illustrate maximum efficiency using drafting tools and computer. He will coordinate and implement quality control



objectives, activities, or procedures to resolve workflow problems, maximize client service reliability, or minimize costs. [The beneficiary] will communicate with management and user personnel to develop process design standards. He will recommend methods for improving utilization of personnel, material, and utilities. Moreover, he will develop efficiency, labor utilization standards, and cost analysis systems to promote efficient staff and facility utilization. Furthermore, he will also confer with clients, vendors, staff and management personnel regarding purchases, client service processes, or project status. Finally, [the beneficiary] will apply statistical methods and perform mathematical calculations to determine client service processes, staff requirements, and operations standards.

The petitioner also stated that the position of industrial engineer was professional in nature and requires the services of an individual with a bachelor's degree in industrial engineering or a related field. The petitioner further contended that the beneficiary was qualified to perform the duties of the proffered position by virtue of his education, which the petitioner claims is equivalent to a U.S. bachelor's degree in industrial engineering with a minor in systems engineering. In support of this contention, the petitioner submitted a copy of an Academic Equivalency Evaluation from the [redacted] dated March 4, 2013, accompanied by the beneficiary's educational credentials.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the job prospect corresponds to the occupational classification of "Logistician" – SOC (ONET/OES) Code 13-1081, at a Level I (entry level) wage. In addition, the petitioner submitted a copy of various corporate documents, including excerpts from its 2011 federal income tax return.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 18, 2013. The petitioner was asked to submit documentation to establish that a specialty occupation position exists for the beneficiary, as well as evidence clarifying the nature of the petitioner's business. The director outlined the specific evidence to be submitted.

In response to the director's RFE, the petitioner submitted a letter addressing the director's questions, along with additional details regarding the duties of the proffered position. Specifically, in a letter dated July 1, 2013, the petitioner again provided the initial overview of duties, but added the percentages of time the beneficiary would devote to each stated duty. Specifically, the petitioner stated:

The Industrial Engineer will design, develop, and evaluate the company's logistics and systems for managing its key processes, including efficiency of employees, quality control, inventory control, logistics and material flow, cost analysis, and client service coordination (30%). He will plan and establish sequences of operations to promote efficient utilization of company resources to better serve our clients (9%). He will review work schedules of all employees to better utilize each

employee's strengths and protect against weaknesses to improve customs procedures (6%). He will estimate overhead costs, including variable costs for particular services, cost savings methods, and the effects of specific company process changes on expenditures for management review, action and control (5%). He will draft and design layout of equipment, materials, and workspace to illustrate maximum efficiency using drafting tools and computer (3%). He will coordinate and implement quality control objectives, activities, or procedures to resolve workflow problems, maximize client service reliability, or minimize costs (10%). He will communicate with management and user personnel to develop process design standards (5%). He will recommend methods for improving utilization of personnel, material, and utilities (5%). Moreover, he will develop efficiency, labor utilization standards, and cost analysis systems to promote efficient staff and facility utilization (10%). Furthermore, he will also confer with clients, vendors, staff and management personnel regarding purchases, client service processes, or project status (12%). Finally, the Industrial Engineer will apply statistical methods and perform mathematical calculations to determine client service processes, staff requirements, and operations standards (5%).

The petitioner also submitted additional documents in support of the petition, including: (1) a copy of a letter from [REDACTED] Professor of Systems and Industrial Engineering at the [REDACTED] along with [REDACTED]'s resume; (2) copies of ten job advertisements for positions the petitioner claims are parallel to the proffered position in organizations similar to the petitioner; and (3) an excerpt from the U.S. Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), which addresses the occupational category of "Logisticians."

The director denied the petition on July 12, 2013, finding that the petitioner had failed to establish that the proffered position was a specialty occupation. On appeal, counsel for the petitioner submits a brief and additional evidence, asserting that the proffered position does in fact qualify for classification as a specialty occupation.

### III. PRELIMINARY OBSERVATIONS AND FINDINGS

Before applying the criteria at 8 C.F.R. § 214.2(h)(4) to the evidence, we shall enter some findings that have a material bearing on the application of several of those criteria to this particular record of proceeding.

#### A. Insufficient Evidence about the Proffered Position and Its Duties

The petitioner's March 6, 2013 letter of support and July 1, 2013 letter in response to the RFE set forth the same 11 sets of duties that the proffered position would require the beneficiary to perform. We have broken them down as follows:



1. Design, develop, and evaluate the company's logistics and systems for managing its key processes, including efficiency of employees, quality control, inventory control, logistics and material flow, cost analysis, and client service coordination;
2. Plan and establish sequences of operations to promote efficient utilization of company resources to better serve our clients;
3. Review work schedules of all employees to better utilize each employee's strengths and protect against weaknesses to improve customs procedures;
4. Estimate overhead costs, including variable costs for particular services, cost savings methods, and the effects of specific company process changes on expenditures for management review, action and control (5%);
5. Draft and design layout of equipment, materials, and workspace to illustrate maximum efficiency using drafting tools and computer;
6. Coordinate and implement quality control objectives, activities, or procedures to resolve workflow problems, maximize client service reliability, or minimize costs;
7. Communicate with management and user personnel to develop process design standards;
8. Recommend methods for improving utilization of personnel, material, and utilities;
9. Develop efficiency, labor utilization standards, and cost analysis systems to promote efficient staff and facility utilization;
10. Confer with clients, vendors, staff and management personnel regarding purchases, client service processes, or project status; and
11. Apply statistical methods and perform mathematical calculations to determine client service processes, staff requirements, and operations standards.

While the petitioner has identified separate functional elements of the proffered position, we also find that the petitioner describes each of those functional elements in generalized and relatively abstract terms. Take, for instance, the first duty description, which reads:

Design, develop, and evaluate the company's logistics and systems for managing its key processes, including efficiency of employees, quality control, inventory control, logistics and material flow, cost analysis, and client service coordination.



The evidence of record does not expand or supplement this description with additional information and/or documentation that communicates the substantive nature of the "design, develop, and evaluate" activities in which the beneficiary would engage for managing its key processes.

Likewise, the record of proceeding does not establish either the substantive nature of the work required, or the educational or education-equivalent level of knowledge in any specific specialty that such work would require, to actually "plan and establish sequence of operations"; "review work schedules of all employees"; "communicate with management and user personnel to develop process design standards"; and "confer with clients, vendors, staff and management personnel regarding purchases, client service processes, or project status."

In this regard, we also note that there is no well-known, generally shared knowledge upon which we can take administrative notice of the nature and academic attainment in any specialty that the generally described functions of the proffered position would require.

Additionally, we find that, as evident in the list of duties itself and as reflected in our related comments and findings above, the evidence of record develops neither the proffered position nor its constituent duties in sufficient detail to distinguish either of them as more specialized, complex, and/or unique than others in the position's occupational group that are performed by persons without at least a bachelor's degree in a specific specialty, or the equivalent.

#### **B. Document Submitted for Consideration as Expert Opinion**

The petitioner submitted a letter for consideration as an expert opinion. This letter, prepared for the petitioner by a Professor [REDACTED] of the [REDACTED] was submitted as part of the petitioner's response to the RFE.

Dr. [REDACTED] states, in his letter dated May 13, 2013, that he is a Professor in the Department of Systems and Industrial Engineering at the [REDACTED]. He claims that he holds a doctorate degree from the Department of Industrial and Operations Engineering from the [REDACTED] and that he has engaged in many research activities, is the author of numerous book chapters, case studies, and journal articles as well as the co-author of a book dealing with this area of his expertise. He concludes that this extensive background in engineering qualifies him to render his professional opinion regarding the requirements for the position of Industrial Engineer in this matter.

At the outset, we must note that this professor's references to his experience in rendering opinions and evaluations carry little weight as they do not establish either the quality or accuracy of those opinions and evaluations or the weight that they may have been accorded. In any event, in deciding the weight of any opinion submitted as expert, we look primarily to the extent and quality of the factual and analytical foundations that the opining person's submission presents for his or her findings and conclusions.

Regarding the proffered position, Dr. [REDACTED] states: "The comprehensive and in-depth analytical and operational duties of the position could not be adequately performed without the solid foundation of at least a Bachelor's Degree in Industrial Engineering, Logistics Management, or a related field." Dr. [REDACTED]'s letter does not demonstrate that his opinion is based upon sufficient information about the particular "industrial engineer" position proposed here. First, the letter reveals that his knowledge of the position is limited to the duties submitted by the petitioner to USCIS – which, as we have stated, are relatively abstract. Second, Dr. [REDACTED] does not relate any personal observations of those operations or of the work that the beneficiary would perform, nor does he state that he has reviewed any projects or work products related to the proffered position. Third, Dr. [REDACTED]'s opinion does not relate his conclusions to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for his conclusions about the educational requirements for the particular position here at issue.

Notably, Dr. [REDACTED] states in his evaluation that "according to the employer's support letter, the employer is primarily engaged in distribution of inventory from Texas into Mexico" and does not indicate that he has any further independent knowledge of the petitioner's actual business operations. In this regard, we find that the professor's letter is perfunctory and conclusory, particularly in that it concludes – without substantive discussion and analysis – that "the comprehensive and in-depth analytical and operational duties" constitute a position requiring at least a bachelor's degree in Industrial Engineering, Logistics Management, or a related field. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

Therefore, we accord no probative weight to this document towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

### **C. Implications of the Submission of the LCA Certified for Level I Wage-Rate**

In addition, the record of proceeding contains discrepancies between (1) what the petitioner claims about the level of responsibility and requirements inherent in the proffered position and (2) the lower level of responsibility and requirements conveyed by the wage level indicated in the LCA submitted in support of petition.

As previously discussed, the petitioner submitted an LCA in support of the petition that designated the job prospect in this matter to the corresponding occupational category of "Logisticians" - SOC (ONET/OES) code 13-1081. The wage level for the proffered position in the LCA is listed by the petitioner as a Level I (entry) position. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.<sup>2</sup> The LCA was certified on March 6, 2013. We note that by completing and submitting the

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<sup>2</sup> 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



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) occupational 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.<sup>3</sup>

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) position 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.<sup>4</sup> 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:

**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

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<http://www.bls.gov/oes/>. The OES All Industries Database is available at the Office of 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/>.

<sup>3</sup> For additional information regarding prevailing wage determinations, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>4</sup> 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.



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 U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

The petitioner and its counsel claim that the proffered position involves complex, unique and/or specialized duties. In its letter submitted in support of the petition, the petitioner contends that the position of industrial engineer requires advanced knowledge and will be particularly important in the petitioner's business operations, as the industrial engineer will design, develop, and evaluate its existing logistics for managing its key processes. Moreover, the petitioner claimed that in the course of performing his duties, the beneficiary would employ quantitative methodologies and logistical management concepts. On appeal, counsel further states that the job duties provided in the support letter demonstrated the complex nature of the position.

Furthermore, within the record, the petitioner claims that the beneficiary's academic background, qualify him for the proffered position, noting specifically that his bachelor's degree in industrial engineering sufficiently qualifies him to perform the duties of the proffered position. Although a potential employee's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation, we observe that the petitioner emphasized the beneficiary's academic credentials as relevant in performing the duties of the proffered position.

Upon review of the assertions regarding the proffered position, we must question the stated requirements for the proffered position, as well as the level of complexity, independent judgment and understanding that are actually needed for the proffered position, as the LCA is certified for a Level I entry-level position. The petitioner's characterization of the position and the claimed duties, responsibilities and requirements as described in the record of proceeding conflict with the Level I wage-rate 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. Furthermore, as indicated by the DOL guidance, a Level I designation is appropriate for a position such as a research fellow, a worker in training, or an internship.

The LCA submitted in support of the petition 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. As previously mentioned, 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).

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 [DOL] 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 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 (emphasis added):

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 . . . and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

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, provided the proffered position was in fact found to be a higher-level and more complex position as asserted by the petitioner and counsel elsewhere in the petition, the petitioner would have failed to submit an LCA that corresponds to the claimed duties and requirements of the proffered position. That is, the LCA submitted in support of the petition would then fail to correspond to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position.

The statements regarding the requirements and claimed level of complexity and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. We find that, fully considered in the context of the entire record of proceeding, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

As such, a review of the enclosed LCA indicates that the information provided therein does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position. As a result, even if it were determined that the proffered position were a higher-level and



more complex position as claimed in the petition in support of the petitioner's assertions that this position qualifies as a specialty occupation, the petition could still not be approved for this additional reason.

#### IV. ANALYSIS

The issue before us is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. 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."

As a preliminary matter, we find that, to the extent they are described in the record of proceeding – which we find to be exclusively in generalized terms of functions generic to, and normally performed by, logisticians – the proposed duties fail to convey any particular level of specialization, complexity, and/or uniqueness that would distinguish them from those of logistician positions not requiring at least a bachelor's degree in a specific specialty or the equivalent.

Accordingly, we find that the extent to which the proposed position and its constituent duties are described in this record of proceeding do not convey, either alone or in the aggregate, an inherent need for the theoretical and practical application of at least a bachelor's degree-level of a body of highly specialized knowledge in a specific specialty.

Although the petitioner asserts many functional components for its proposed position, it does not, however, explain and document them in any substantially specific detail that conveys the methodologies, analytical processes, and other substantive aspects of the position; what performance of those job aspects would require in theoretical and practical applications of highly specialized knowledge; or any necessary correlation between such applications and attainment of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

As such, we find that the evidence in the record of proceeding does not distinguish the proposed duties or the position they collectively comprise as more unique, specialized, and/or complex than positions which may share those same generalized functions and yet not require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, which requirement is essential for a specialty occupation as defined at section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

We also observe that the petitioner has not supplemented the position and duty descriptions with persuasive evidence that their actual performance in the particular context of the petitioner's business operations would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.



As the above evidentiary assessments and findings are critical to its analysis of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), we hereby deem them incorporated into our analysis of each of those criteria, which will follow below.

Having made these preliminary findings, we will now discuss application of the additional, supplemental requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

We 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 an industrial engineer 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 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.

We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>5</sup> As previously noted, the petitioner asserts in the LCA that the proffered position of "industrial engineer " falls under the occupational category "Logisticians."

We reviewed the chapter of the *Handbook* entitled "Logisticians," and concur that the duties of the proffered position, as described, correspond with this occupational category.<sup>6</sup> The *Handbook* describes the duties of "Logisticians" in the subsection entitled "What Logisticians Do" and states, in part, the following about the duties of this occupation:

Logisticians analyze and coordinate an organization's supply chain—the system that moves a product from supplier to consumer. They manage the entire life cycle of a product, which includes how a product is acquired, distributed, allocated, and

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<sup>5</sup> All of our references are to the 2014-15 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>.

<sup>6</sup> For additional information regarding the occupational category "Logisticians," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Logisticians, <http://www.bls.gov/ooh/business-and-financial/logisticians.htm#tab-2> (last visited May 28, 2014).

delivered.

### **Duties**

Logisticians typically do the following:

- Direct the allocation of materials, supplies, and finished products
- Develop business relationships with suppliers and customers
- Work to understand customers' needs and how to meet them
- Design strategies to minimize the cost or time required to move goods
- Review the success of logistical functions and identify areas for improvement
- Propose improvements to management and customers

Logisticians oversee activities that include purchasing, transportation, inventory, and warehousing. They may direct the movement of a range of goods, people, or supplies, from common consumer goods to military supplies and personnel.

Logisticians use sophisticated software systems to plan and track the movement of goods. They operate software programs tailored specifically to manage logistical functions, such as procurement, inventory management, and other supply chain planning and management systems.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Logisticians, <http://www.bls.gov/ooh/business-and-financial/logisticians.htm#tab-2> (last visited May 28, 2014).

According to the *Handbook*, logisticians analyze and coordinate an organization's supply chain—the system that moves a product from supplier to consumer. The description of the proffered position indicates that the beneficiary will be responsible for similar duties, and therefore finds that the proffered position is akin to that of a logistician.

A review of the *Handbook's* education and training requirements for this occupational category, however, indicates that it does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into this occupation in the United States. Therefore, this classification, contrary to counsel's claims, does not by virtue of this categorization satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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. According to the *Handbook*, the educational requirements of a logistician are as follows:

Although an associate's degree may be sufficient for some logistician jobs, a bachelor's degree is typically required for most positions. Work experience in a related field is helpful for jobseekers.



**Education**

Logisticians may qualify for positions with an associate's degree. However, as logistics becomes increasingly complex, more companies prefer to hire workers who have at least a bachelor's degree. Many logisticians have a bachelor's degree in business, industrial engineering, process engineering, or supply chain management.

Bachelor's degree programs often include coursework in operations and database management, decisionmaking, and system dynamics. In addition, most programs offer courses that train students on software and technologies commonly used by logisticians, such as radio-frequency identification (RFID).

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Logisticians, <http://www.bls.gov/ooh/business-and-financial/logisticians.htm#tab-4> (last visited May 28, 2014). The *Handbook* does not report that a logistician needs, as a standard entry requirement, at least a bachelor's degree in a specific specialty or its equivalent. Rather, the *Handbook* reports that "logisticians may qualify for positions with an associate's degree." Although the *Handbook* indicates that many companies *prefer* to hire individuals with a bachelor's degree, there is no routine requirement for such a degree for entry into this occupational category.<sup>7</sup>

In the instant case, 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. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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<sup>7</sup> Additionally, although no minimum degree requirement is evident according to the *Handbook*, the *Handbook* simultaneously indicates that employers seeking degreed candidates may prefer those with a general degree in business. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). In addition to proving that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose degree, such as a degree in business administration, 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 at 147.



Next, we find 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 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 (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) 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 a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Thus, we incorporate by reference our previous discussion on the matter.

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, 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 advertising organization share the same general characteristics, 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) may be considered. 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.

On the Form I-129 petition, the petitioner describes itself as a freight forwarding company established in 2005, with 5 employees. The petitioner claims that it has a gross annual income of approximately \$533,000. We note that on the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement, the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 488510 – "Freight Transportation Arrangement."<sup>8</sup> The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This U.S. industry comprises establishments primarily engaged in arranging transportation of freight between shippers and carriers. These establishments are usually known as freight forwarders, marine shipping agents, or customs brokers and offer a combination of services spanning transportation modes.

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<sup>8</sup> NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited May 28, 2014).

See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 488510 – Freight Transportation Arrangement, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited May 6, 2014).

In support of the assertion that the proffered position is a specialty occupation under this criterion of the regulations, counsel submitted copies of job advertisements as evidence that the degree requirement is common amongst similar organizations for parallel positions in the freight forwarding industry. We note that the petitioner and counsel did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of job advertised. Moreover, as the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

Furthermore, the advertisements do not appear to be for parallel positions in organizations similar to the petitioner. For example, none of the postings are by freight forwarding companies. The postings include advertisements by manufacturing, auto and aviation, health and medical, and information technology firms, and several of the advertisements provide no background regarding the industry in which the advertising company is engaged. Additionally, even if the postings were for positions in organizations similar to the petitioner, the positions do not appear to have similar duties and requirements to the proffered position. Specifically, many of these positions are for Logistics Managers, and most of the postings require extensive experience in addition to varying educational requirements. Given that the proffered position has been designated as Level I (entry-level) position on the LCA, indicating that the beneficiary need only have a basic understanding of the occupation and will perform routine tasks that require limited, if any, exercise of judgment, it is unclear how postings for positions such as a Logistics Operations Manager for BP International, which requires 10-15 years of supply chain experience, equates to the proffered position in this matter. Additional postings have similar requirements, such as the Logistics Project Manager for GE and the Logistics Engineer for Ryder System, Inc. (both of which require a minimum of five years of related experience).

For the reasons discussed in detail above, these postings are insufficient to establish that employers similar to the petitioner routinely impose a common degree requirement for parallel positions within the industry. Although counsel asserts on appeal that some of these companies are indeed engaged in similar industries to that of the petitioner and thus should be considered comparable, there is no documentary evidence to support these claims. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Upon review of the documentation, the petitioner and counsel fail 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.<sup>9</sup> For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

In the instant case, the record of proceeding contains virtually no information regarding the petitioner's business operations. While it is acknowledged that the petitioner and counsel may believe that the duties of the proffered position are complex or unique, the petitioner failed to demonstrate how the industrial engineer duties 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, baccalaureate degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even essential, in performing certain duties of an industrial engineer 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 proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. On the LCA, the petitioner attested to DOL that the wage level for the proffered position - under the occupational classification of "Logisticians" - was at a Level I (entry level) wage. Level I (entry level) designation is indicative of a comparatively low, entry-level position relative to others within the occupation.<sup>10</sup> That is, in accordance with the relevant DOL explanatory information on wage

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<sup>9</sup> USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. at 376. As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

<sup>10</sup> The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work

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 he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would 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." See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

Moreover, 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 sufficient probative evidence 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. In other words, the petitioner has failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

We observe that the petitioner has indicated that the beneficiary's educational background 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 both the theoretical and practical application of a body of highly specialized knowledge and the attainment of at least a bachelor's degree in a specific specialty or its equivalent. The petitioner and counsel do 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.

With regard to the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), we incorporate here our earlier comments regarding the lack of probative detail in the petitioner's description of the duties of the proposed position. Again, as reflected in those comments, the petitioner has not

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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 U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).



focused upon, nor provided evidence that develops, relative complexity or uniqueness as attributes of the proposed position. Further, the evidence of record does not distinguish the proposed duties, or the proposed position that they collectively comprise, as more complex or unique than positions in the pertinent occupational group which may share those same generalized functions that the petitioner ascribes to its position and yet not require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, or, consequently, a person with at least a bachelor's degree in a specific specialty. Accordingly, the petitioner has not shown that its particular position is so complex or unique that it can be performed only by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Accordingly, 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. We usually review 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 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").

Therefore, 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 (1) the theoretical and practical application of a body of highly specialized knowledge and (2) the attainment of a baccalaureate or higher degree in the specific specialty or its equivalent as the minimum for entry into the occupation as required by the Act. According to the Court in *Defensor*, "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388. 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.*

The petitioner makes no claim that it currently or in the past has employed a specialty-degreed individual to serve in the proffered position. The petitioner, therefore, has not persuasively established that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.<sup>11</sup>

Moreover, we reviewed the record of proceeding but finds that the petitioner has not provided sufficient 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.

Counsel contends on appeal that the petitioner requires the full-time services of the beneficiary in the position of industrial engineer to enable the petitioner to compete in today's rapidly expanding freight forwarding market. However, neither counsel nor the petition submit evidence in support of the claimed complexity of the duties associated with the proffered position, and instead refer back to Dr. [REDACTED]'s evaluation as evidence of the complex nature of the position. As previously discussed, the evaluation of Dr. [REDACTED] is accorded little weight, specifically since there is no evidence that Dr. [REDACTED] independently evaluated the petitioner's business operations or the role of an industrial engineer in those operations, beyond the same letter of support contained in this petition. As noted previously, the description of duties and discussion of the petitioner's business as set forth in that letter is vague and provides little to no insight on the nature of the position in light of the petitioner's operations. As a result, relative specialization and complexity have not been

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<sup>11</sup> On appeal, counsel contends that the director's finding to this extent was erroneous, arguing that the routine degree requirement should not be limited to just the practices of the petitioner. However, the language under this criterion is clear: **the employer normally requires at least a bachelor's degree in a specific specialty for the proffered position.** As discussed above, the petitioner has submitted no documentation regarding its past employment practices, and makes no claim nor does it submit any evidence demonstrating that it routinely hires only specialty-degreed industrial engineers.



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 their nature as more specialized and complex than the nature of other positions in the pertinent occupational category whose performance does not require the application of knowledge usually associated with the attainment of at least a bachelor's degree in a specific specialty, or its equivalent. There is a lack of evidence substantiating both Dr. [REDACTED]'s and counsel's assertions.

Moreover, we incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the same occupational category. The petitioner designated the position of logistician as a Level I position (the lowest of four possible wage-levels). Again, DOL indicates that a Level I wage is appropriate for "beginning level employees who have only a basic understanding of the occupation." See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

As reflected in this decision's earlier discussion of the duty descriptions in the petitioner's letter of support, the proposed duties as described in the record of proceeding contain no indication of specialization and complexity such that the knowledge they would require is usually associated with any particular level of education. As generically and generally as they were described, the duties of the proposed position are not presented with sufficient detail and explanation to establish the substantive nature of the duties as they would be performed in the specific context of the petitioner's particular business operations. Also, as a result of the generalized and relatively abstract level at which the duties are described, the record of proceeding does not establish their nature as so specialized and complex as to require knowledge usually associated with at least a bachelor's degree in a specific specialty, or the equivalent.

The record supports a finding that the petitioner has submitted insufficient evidence to satisfy this criterion of the regulations. That is, the petitioner has not established that the nature of the duties of the position 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. We conclude, therefore, 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 for classification as a specialty occupation. The petition will be denied for this reason.

## V. 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. at 128. Here, that burden has not been met.

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