

(b)(6)



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

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

Thank you,

*for Michael T. Keely*  
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 (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a premier provider of sports education. In order to extend the employment of the beneficiary in what it designates as a Director of Sports Science & Technical Development,<sup>1</sup> 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 on the basis of her determination that the petitioner had failed to demonstrate that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

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

#### I. EVIDENTIARY STANDARD APPLIED ON APPEAL

As a preliminary matter, the AAO affirms that, in the exercise of its appellate review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

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The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

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<sup>1</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O\*NET/OES) Code 27-2022, the associated Occupational Classification of "Coaches and Scouts," and a Level I (entry-level) prevailing wage rate.

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director 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.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. See *INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

*Id.*

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director's determinations in this matter were correct. Upon its review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, the AAO finds that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claims are "more likely than not" or "probably" true.

## II. FACTUAL AND PROCEDURAL BACKGROUND

In the petition signed on September 14, 2012, the petitioner indicates that it is seeking the beneficiary's services under a job title of Director of Sports Science & Technical Development on a full-time basis at the rate of pay of \$40,000 per year. In the June 19, 2012 letter of support, the petitioner states that it offers a professional youth soccer training using [REDACTED] a system which the petitioner describes as developed by [REDACTED] one of the oldest and most famous soccer clubs in the world. The petitioner also states that "given the significant size and growth potential of soccer within the U.S., [the petitioner] is charged with bringing a training program to the North East that can develop regional talent."

According to the petitioner, it currently has over 650 children attending its soccer program, at tuition prices that range from \$750 to \$2,400 per child, per year. As a result of these high tuition prices, the petitioner contends that parents expect a high level of sports education in return, thereby requiring the petitioner to hire highly specialized employees. Specifically, the petitioner states that



"in order to deliver this level of training and professional development requires a finite understanding of teaching methodology, progressive schemes of work, child psychology and biomechanics," and that such a level can only be gained through a baccalaureate or equivalent of learning.

Regarding the proffered position, the petitioner stated that the beneficiary's job duties would include the following:

Continue to oversee soccer activities related to U15-U18 year old boys including the development of the club, its team's coaches, trainers and players. Coordinate work load with Mr. [REDACTED] Director of Sports Science for U11-U14 Boys team. Continue to act as contact person for coaching issues, including training, coach/player conflict, coach/parent conflict, disputes, and provide reports to the Managing Director documenting significant issues. Continue to develop, oversee and manage boys U15-U18 age group curriculums (developmental and competitive). Continue to coordinate coaching development, including organizing and implementing coaching clinics and training (at least 7 clinics) for U15-U18 coaches. [The beneficiary] will also continue with directing Soccer Camps, Road Shows, Private Groups, and Town Training.

[The beneficiary] will also continue in the implementation of a strategic plan to increase brand awareness of [the petitioner] by implementing a recruiting tool that will link U15-U18 students with potential college recruiters and professional scouts. This plan has improved student retention by offering a comprehensive college recruitment plan. For example, analyzing student's game films and skills and developing student's bio.

The AAO observes that the petitioner also stated that the qualified candidate for the position must have at least a bachelor's degree in Sports Studies or the equivalent in experience in sport and exercise science. The petitioner claimed that the beneficiary is qualified to perform the duties of the proffered position by virtue of his bachelor's degree in Sports Studies from the [REDACTED] England as well as his B-Tee National Diploma in Sports Science from [REDACTED]. The petitioner further states that the beneficiary's 18 years of coaching experience further qualify him for the proffered position.

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the job prospect corresponds to the occupational classification of "Coaches and Scouts" - SOC (ONET/OES Code) 27-2022, at a Level I (entry level) wage. The petitioner also submitted: (1) screenshots of its website; (2) a copy of its organizational chart; (3) a copy of its IRS Form 1065, U.S. Return of Partnership Income for 2011; (4) a copy of the beneficiary's resume; (5) a copy of a credentials evaluation report from [REDACTED]; (6) copies of letters of support written by peers of the beneficiary; (7) copies of various certificates of achievement earned by the beneficiary; and (8) copies of the beneficiary's IRS Form W-2, Wage and Tax Statement, for 2011 as well as copies of paystubs for that period.



The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on December 26, 2012. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. Specifically, the director requested additional information with regard to the nature of the proffered position and the petitioner's hiring practices for the proffered position.

On March 21, 2013, counsel for the petitioner responded to the RFE. Included in the response was a summary of the position's daily duties, which is set forth below:

50 percent of daily duties (20 hours per week) are a combination of:

1. Manage, direct and implement all soccer activities related to U15-U18 year old boys including the development of the club, its team's coaches, trainers and players.
2. Oversee and implement the [REDACTED]. An Elite Player performance program for boys U15-U18 through development of the training curriculum (developmental and competitive). This is based on the Elite Player Performance Plan as delivered at [REDACTED] to all players from youth to college recruitment age.
3. Coordinate coaching development, including organizing and implementing coaching clinics and trainings for U15-U18 coaches.
4. Recruit, coach and build competitive U15 to U18 boys' teams in order to gain entry and participate in college showcase events, leagues and tournaments, thereby offering players of this age group the best possible exposure to college recruitment.
5. Develop a strategic plan to increase brand awareness of [the petitioner] by implementing a recruiting tool that will link U15-U18 students with potential college recruiters and/ professional scouts. This includes liaison and ongoing communication with college coaches, meetings with parents and players as well as assisting in the college application process.
6. Develop a strategic plan to improve student retention by offering a comprehensive college recruitment plan. For example, analyzing student's game films and skills, editing and uploading film, and developing student's bio to present to college coaches and staff at college showcase events.
7. Develop relationships with High School coaches in the region to identify and recruit qualified high school players and prospects with the necessary

academic background that would benefit from the development of a competitive athletic resume gained by playing for [the petitioner].

8. Act as liaison for coaching issues, including training, coach/player conflict, coach/parent conflict, disputes and provide reports to the Managing Director documenting significant issues.

30 percent of daily duties (12 hours per week) are a combination of:

1. Directly responsible for the development, marketing, organization and implementation of all logistics and operations involved with taking two full boys teams and chaperones to a top European tournament every summer. The participation in [REDACTED] based in [REDACTED] Ireland involves liaising with organizers, co-ordinating the full schedule and the management of all operations in the US and the UK.
2. Weekly email communication giving review of weekly game/training development for students, coaches and management.
3. Represent the Club and act as a point of contact for any functions, meetings and events or as directed by the Managing director.
4. Evaluate performance of coaching staff and team managers and make recommendations to Superiors.
5. Weekly and semi-annual meeting with coaches about student progress and performance and discuss parent concerns.
6. Organize and plan workshops, seminars and other types of education programs to enhance U-15-U18 player development and delegate supervision to Coaches.

20 percent of daily duties (8 hours per week) are a combination of:

1. Research, review and approve tournament selections to ensure proper team and student development. Solicit high level competitions where scouts will be present.
2. Delegate administrative duties such as registering teams for various events to Administrator to ensure successful registration.
3. Develop reports and update databases continuously to give parents the most recent information regarding program expectations, program activities, and their child's progress.

4. Review and approve select tryout for all U15-U18 age groups according to relevant regulations and rules. Provide a comprehensive plan to the Coaches of how the tryouts will be implemented at least one month before the scheduled tryouts.
5. Organize summer training camps and clinics focused on developing specific skill sets, i.e., defensive strategies, offensive, goal keeping etc.
6. Organize end of season review for each competitive team.
7. Attend and provide monthly comprehensive reports to Superiors. Recommend changes and improvements to coaching U15-U18 boys.

Counsel also submitted additional documentary evidence in response to the RFE, including: (1) a letter from the petitioner dated March 6, 2013; (2) an updated statement of duties for the proffered position; (3) a letter from Dr. [REDACTED] Ed.D.; (4) the petitioner's organizational chart accompanied by payroll information for its employees; (5) a list of its employees and their educational credentials; (6) letters from companies in the petitioner's industry; (7) job vacancy announcements for positions that the petitioner deems similar to the proffered position; (8) an excerpt from the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*; (9) a letter from [REDACTED] Senior Partner of the petitioner; and (10) a list of the petitioner's former employees.

The director reviewed the information provided by the petitioner and counsel to determine whether the petitioner had established eligibility for the benefit sought. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on May 21, 2013. On appeal, counsel submitted a brief and additional evidence, and contends that the director's findings were erroneous.

### III. LAW

We recognize that this petition was filed to extend the validity period of a previously approved petition. Counsel emphatically asserts that the subject of this extension petition is the same position that was the subject of the previously approved petition. However, contrary to counsel's suggestions on appeal, this fact does not require the director either to presume that the prior approval was correct or to refrain from issuing an RFE.

We note first that the language of the regulation at 8 C.F.R. § 214.2(h)(14), *Extension of visa petition eligibility*, expressly authorizes the director to issue an RFE at his or her discretion. That regulation reads (with emphasis added):



The petitioner shall file a request for a petition extension on Form I-129 to extend the validity of the original petition under section 101(a)(15)(H) of the Act. *Supporting evidence is not required unless requested by the director.* A request for a petition extension may be filed only if the validity of the original petition has not expired.

Further, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Counsel also references an April 23, 2004 memorandum authored by William R. Yates (hereinafter the Yates memo) as establishing that USCIS must give deference to those prior approvals or provide detailed explanations why deference is not warranted. Memorandum from William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3, (Apr. 23, 2004).

First, it must be noted that the Yates memo specifically states as follows:

[A]djudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology International*, 19 I&N 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. *See* 8 C.F.R. § 103.8(d). . . . Material error, changed circumstances, or new material information must be clearly articulated in the resulting request for evidence or decision denying the benefit sought, as appropriate.

Thus, the Yates memo does not advise adjudicators to approve an extension petition when the facts of the record do not demonstrate eligibility for the benefit sought. On the contrary, the memorandum's language quoted immediately above acknowledges that a petition should not be

approved, where, as here, the evidence of record has not demonstrated that the petition merits approval.

Again, as indicated in the Yates memo, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). Further, if the approvals of the previous nonimmigrant petitions were based on the same description of duties and assertions that are contained in the current record, those approvals would constitute material and gross error on the part of the director.

Second, the Yates memo clearly states that each matter must be decided according to the evidence of record. Neither that memo nor any statute, regulation, or policy directive require USCIS to look at the prior records of proceeding dealing with the separate adjudications of the approved H-1B petitions filed on behalf of the beneficiary – or on behalf of others for substantially similar petitions – and provide a reason why deference to those approvals is not warranted.

Copies of the allegedly approved petitions, however, were not included in the record. If a petitioner wishes to have prior decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5.

In any event, when "any person makes an application for a visa or any other document required for entry, or makes an application for admission, [ . . . ] the burden of proof shall be upon such person to establish that he is eligible" for such benefit. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972). Each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. There is no requirement either in the regulations or in USCIS procedural documentation requiring nonimmigrant petitions to be combined in a single record of proceeding.<sup>2</sup> Accordingly, the director was not required to request and obtain a copy of the prior H-1B petitions.

Again, the petitioner in this case has not submitted copies of the prior H-1B petitions and their respective supporting documents and approval notices. As the record of proceeding does not contain any evidence of the allegedly approved petitions, there were no underlying facts to be analyzed and, therefore, no prior, substantive reasons could have been provided to explain why deference to the approvals of the prior two H-1B petitions was not warranted. The burden of

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<sup>2</sup> USCIS does not engage in the practice of reviewing previous nonimmigrant petitions when adjudicating extension petitions. Given the various and changing jurisdiction over various nonimmigrant petitions and applications, requiring previously adjudicated nonimmigrant petitions to be reviewed before any newly filed application or petition could be adjudicated would result in extreme delays in the processing of petitions and applications. Furthermore, such a suggestion, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361.



proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. For this additional reason, the Yates memorandum does not apply in this instance.

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language



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

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

#### IV. ANALYSIS

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 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.

At Part 5 of the Form I-129, the petitioner specified '[REDACTED]' as its type of business, and stated it was established in 2005, currently employed 12 persons, and had a gross annual income of \$1,123,355.00.

The duties of the proffered position, as claimed by the petitioner in the initial support letter and the statement submitted in response to the RFE assert numerous and varied endeavors that would engage the beneficiary (such as, for instance, developing strategic plans to increase brand awareness and improve student retention; act as liaison for coaching issues develop reports and update databases to keep parents informed; evaluate the performance of coaching staff; and coordinate coaching development). However, the descriptions of the proposed duties provided in both the initial letter and the RFE response are limited to general, generic functional categories. Such descriptions only broadly paint the proposed duties and so fail to communicate both (a) the substantive nature of the work in which the beneficiary would actually engage in performing the job, and (b) the educational level of any body of highly specialized knowledge in a specific specialty that the beneficiary would have to apply to perform such work in the context of the petitioner's business operations.

Further, the AAO finds that, even when read in the aggregate, neither the above duty descriptions, nor any other in this record of proceeding, distinguish the proposed duties, or the position that they comprise, as so complex, specialized, and/or unique as to require the practical and theoretical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, as required to establish a specialty occupation in accordance with the definitions at section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii). Rather, the AAO finds, the proffered position and its constituent duties are described in terms of generalized functions which no evidence of record establishes as categorically requiring the practical and theoretical application of any particular level of educational attainment of knowledge in a specific specialty.

The AAO will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

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

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>3</sup> The AAO agrees with the petitioner that the generally described duties of the proffered position align with those of coaches and scouts as outlined in the *Handbook*.

The *Handbook* states the following with regard to the duties of coaches and scouts:

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<sup>3</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2014-15 edition available online.



Coaches teach amateur and professional athletes the skills they need to succeed at their sport. Scouts look for new players, evaluating their skills and likelihood for success at the college, amateur, or professional level. Many coaches are also involved in scouting.

**Duties**

Coaches typically do the following:

- Plan, organize, and conduct practice sessions
- Analyze the strengths and weaknesses of individual athletes and opposing teams
- Plan strategies and choose team members for each game
- Provide direction, encouragement, and motivation to prepare athletes for games
- Call plays and make decisions about strategy and player substitutions during games
- Plan and direct physical conditioning programs that enable athletes to achieve maximum performance
- Instruct athletes on proper techniques, game strategies, sportsmanship, and the rules of the sport
- Keep records of athletes' and opponents' performance
- Identify and recruit potential athletes
- Arrange for and offer incentives to prospective players

Scouts typically do the following:

- Read newspapers and other news sources to find athletes to consider
- Attend games, view videotapes of the athletes' performances, and study statistics about the athletes to determine talent and potential
- Talk to the athlete and the coaches to see if the athlete has what it takes to succeed
- Report to the coach, manager, or owner of the team for which he or she is scouting
- Arrange for and offer incentives to prospective players

**Coaches** teach professional and amateur athletes the fundamental skills of individual and team sports. They hold training and practice sessions to improve the athletes' form, technique, skills, and stamina. Along with refining athletes' individual skills, coaches are also responsible for instilling in their players the importance of good sportsmanship, a competitive spirit, and teamwork.

Many coaches evaluate their opponents to determine game strategies and to establish specific plays to practice. During competition, coaches call specific plays intended to surprise or overpower the opponent, and they may substitute players for optimum team chemistry and success.

Many high school coaches are primarily academic teachers who supplement their income by coaching part time.



*Sports instructors* differ from coaches in their approaches to athletes because of the focus of their work. For example, coaches manage the team during a game to optimize its chance for victory, but sports instructors are often not permitted to instruct their athletes during competition.

Like coaches, though, sports instructors hold practice sessions, assign specific drills, and correct athletes' techniques. They spend more of their time working one-on-one with athletes, designing customized training programs for each individual.

Sports instructors typically specialize in teaching athletes the skills of an individual sport, such as tennis, golf, or karate. Some sports instructors, such as pitching instructors in baseball, may teach individual athletes involved in team sports.

*Scouts* evaluate the skills of both amateur and professional athletes. Scouts seek out top athletic candidates for colleges or professional teams and evaluate their likelihood of success at a higher competitive level.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Coaches and Scouts," <http://www.bls.gov/ooh/entertainment-and-sports/coaches-and-scouts.htm#tab-2> (accessed May 12, 2014).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into the field:

Coaches and scouts typically need a bachelor's degree. They must also have extensive knowledge of the sport. Coaches typically gain this knowledge through their own experiences playing the sport at some level. Although previous playing experience may be beneficial, it is not required for most scouting jobs.

### **Education**

College and professional coaches must usually have a bachelor's degree. This degree can typically be in any subject. However, some coaches may decide to study exercise and sports science, physiology, kinesiology, nutrition and fitness, physical education, and sports medicine.

Scouts must also typically have a bachelor's degree. Some scouts decide to get a degree in business, marketing, sales, or sports management.

### **Other Experience**

College and professional coaching jobs also typically require experience playing the sport at some level.

However, scouting jobs typically do not require experience playing a sport at the college or professional level. Employers look for applicants with a passion for sports and an ability to spot young players who have exceptional athletic ability and skills.

*Id.* at <http://www.bls.gov/ooh/entertainment-and-sports/coaches-and-scouts.htm#tab-4>.

The statements made by DOL in the *Handbook* regarding entrance into this occupational category do not support a finding that a bachelor's degree, or the equivalent, in a specific specialty is normally required. Although the *Handbook* indicates that coaches and scouts *typically* need a bachelor's degree, it also indicates that the degree can be in any subject for college and professional coaches, and further indicates that scouts may choose to get a degree in business, marketing, sales, or sports management. Therefore, the proffered position's inclusion in the Coaches and Scouts occupational group is not sufficient to establish that the position is one which normally requires for entry at least a bachelor's degree or the equivalent in a specific specialty.

The petitioner submitted a letter dated March 19, 2013 from [REDACTED] Ed.D, for consideration as an expert opinion in support of this criterion of the regulations. Additionally, the AAO notes that, on appeal, the petitioner submits a second letter from Dr. [REDACTED] also dated March 19, 2013, which is virtually identical to the first letter previously submitted in response to the RFE but includes three additional paragraphs on page 5.

In both letters, Dr. [REDACTED] states that he is the Director and Professor of the Sport Management program of the [REDACTED] College of Business and Economics at the [REDACTED]. Regarding the proffered position, Dr. [REDACTED] states in both letters: "[I]t is my professional and experienced opinion that the described job duties are of a professional nature and require preparation at the Bachelor's Degree level at a minimum." Finally, in the letter newly-submitted on appeal, Dr. [REDACTED] reviews the current staffing of the petitioner, as well as the *Handbook's* sections pertaining to Coaches and Scouts, and concludes that "it is evident that a Bachelor's Degree is a reasonable requirement for the position."

Dr. [REDACTED]'s opinion, however, is not based upon sufficient information about the position proposed here. 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).

Specifically, the content of Dr. [REDACTED]'s letters does not demonstrate that his opinion is based upon sufficient information about the particular position at issue. First, the letter reveals that his knowledge of the position is limited to the duties as described by the petitioner to USCIS. Although he claims to have reviewed the other coaching positions within the petitioner's organization, there is no indication that he reviewed the duties and requirements of these position beyond this general description. As we have noted above, the generalized and relatively abstract nature of these descriptions does not convey sufficient information to establish the substantive nature of those duties as they would actually be performed within the context of this petitioner's business



operations. 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.

Finally, we find that if Dr. [REDACTED]'s submissions merited any weight, it would constitute evidence against the petitioner's specialty occupation claim, as those letters suggest that attainment of any bachelor's degree, without limitation as to any specific specialty or group of closely related specialties, would be sufficient for the proffered position. This does not support a finding that the proffered position requires at least a bachelor's degree in a specialized course of study closely related to the proffered position. Therefore, the AAO accords no probative weight to this document towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO also notes that counsel on appeal further refers to two unpublished decisions in which the AAO determined that the positions in those matters qualified as specialty occupations. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Finally, the AAO notes that the petitioner submitted an LCA that had been certified for use with a job prospect for which a Level I wage-rate (the lowest of the four assignable wage-rate levels) would be appropriate. That wage-level designation is appropriate for a comparatively low, entry-level position relative to others within its occupation, and it signifies that the petitioner is attesting that the beneficiary is only expected to possess a basic understanding of the occupation.<sup>4</sup>

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<sup>4</sup> The *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

**Level 1** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].



Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in the Coaches and Scouts occupational category would be sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively 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 at 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* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Additionally, for the reasons already discussed, the AAO is not persuaded by counsel's argument on appeal that Dr. [REDACTED] submission has satisfied this criterion.

The AAO notes that the petitioner submitted a number of letters from similar organizations in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position

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The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. By submitting an LCA in support of the petition that has been certified only for use with a Level I wage-level job opportunity, the petitioner conveys that it evaluates the position as actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate is to be used when the beneficiary would only be required to possess a basic understanding of the occupation; would be expected to perform routine tasks requiring limited, if any, exercise of judgment; would be closely supervised and would have his or her work closely monitored and reviewed for accuracy; and would receive specific instructions on required tasks and expected results.

are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Specifically, the petitioner submitted the following documents:

- Letter from [REDACTED] of [REDACTED] Inc. dated March 20, 2013
- Letter from [REDACTED] of [REDACTED] dated March 20, 2013
- Letter from [REDACTED] of [REDACTED] dated March 20, 2013
- Letter from [REDACTED] of [REDACTED] dated March 18, 2013
- Letter from [REDACTED] of [REDACTED] dated March 18, 2013
- Letter from [REDACTED] of [REDACTED] dated March 18, 2013
- Letter from [REDACTED] of [REDACTED] dated March 20, 2013
- Letter from [REDACTED] of [REDACTED] dated March 20, 2013
- Letter from [REDACTED] of [REDACTED] dated March 21, 2013

While the AAO acknowledges that these letters are from companies generally considered similar to the petitioner, they lack additional evidence to support the claims for which they are proffered.

The author of each letter states his organization's hiring policy for what the author describes as a position similar to the petitioner's Director of Sports Science and Technical Development, the subject of this petition. The letters differ slightly in the range of minimum credentials that they their organization would require:

- Some specify "a Bachelor's Degree in Sports Science or a related area" or "the equivalent in experience in Sports Science."
- Others specify "a Bachelor's Degree in Sports Science or a related area" or "the equivalent in experience and/or education."

None of the letters are accompanied by documentary evidence of the positions that the authors see as similar to the proffered position or by a chronology of the persons who have held such positions and their particular credentials at the time of hiring. Further, the letters do not describe any objective measures by which the hiring organization determined a candidate's education and/or experience to be in a "related area," that is, in an area related to Sports Science. Consequently, the letters fail to establish the actual areas of knowledge that would be acceptable to the authors' organizations and whether those areas would be consistent with a specific specialty closely related to the proffered position. Further still, the letters fail to identify by what subjective, objective, or mixed measures the hiring organizations determined equivalency in education and/or education to at least a bachelor's degree in "Sports Science or a related area." Consequently, the letters lack sufficient detail and supporting documentation to merit probative value towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Additionally, none of the writers explain what designates the petitioner's proffered position in this matter as more complex or unique as to require more than a general bachelor's degree in any



subject, as indicated as sufficient by the *Handbook*. Moreover, none of the writers of these letters provides documentary evidence to support their attestations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The petitioner also provided copies of approximately 21 advertisements from 2012 and 2013 for various job openings in support of the contention that a common degree requirement exists in parallel positions within organizations that are similar to the petitioner.

The AAO first notes that, while the majority of the postings require a bachelor's degree, this requirement is not restricted to a specific specialty, such as sports science. In fact, all postings except one, which state a degree requirement, simply state "bachelor's degree required." The remaining postings state that a bachelor's degree is "preferred" or is "a plus." Finally, while one posting, by PRO Sports Club, states that a bachelor's degree in Education, Psychology, Exercise Science or a related area is preferred, this does not equate to a standard requirement within the petitioner's industry.

Further, the petitioner has not submitted any evidence to demonstrate that the positions being advertised in these vacancy announcements are "parallel" to the position proffered here, or that any of these advertisements is from a company "similar" to the petitioner. In the Form I-129 petition, the petitioner describes itself as a "premier provider of sports education" established in 2005 with 12 employees. The AAO notes 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 611620 – "Sports and Recreation Instruction."<sup>5</sup> The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This U.S. industry comprises establishments, such as camps and schools, primarily engaged in offering instruction in athletic activities to groups of individuals. Overnight and day sports instruction camps are included in this industry.

See U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 611620 – Sports and Recreation Instruction, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited May 12, 2014).

Also, the petitioner has not submitted any evidence to demonstrate that any of these advertisements is from a company "similar" to the petitioner. Fourteen of the postings submitted are from four-year colleges or universities, including Loyola University Chicago, Hood College, and the University of Texas at Dallas. Given that the petitioner is engaged in youth soccer instruction, it is unclear how

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<sup>5</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 7, 2014).



these postings would accurately reflect a common hiring standard under this criterion. The remaining seven postings appear to be from organizations more akin to the petitioner. These seven postings include:

- Skyline Soccer Association – Intermediate Director
- Lonestar Soccer Club – Soccer Coach
- Carmel United Soccer Club – Director of Coaching and Soccer operations
- Firebirds Futbol Club – Director of Coaching
- TriCity Soccer Club – Director of Coaching
- PRO Sports Club - Pavilion Sports Camp Coach
- TriCity Soccer Club – Director of Coaching (duplicate postings)

Although it appears that the nature of each of these businesses may be similar to that of the petitioner's organization, the petitioner has submitted insufficient evidence to establish that any of these advertisers are similar to the petitioner in size, scope, scale of operations, business efforts, expenditures, or other fundamental dimensions. Most of these postings provide little to no information regarding the size and scope of the poster's business, although the posting by Lonestar Soccer Club indicates that employs around 40 full-time coaches and serves more than 8,000 players, thus suggesting it differs from the smaller scale of the petitioner's operations. Moreover, as previously stated, not all of these postings required a bachelor's degree. For example, the posting by Carmel United Soccer Club simply states that "A Bachelor's degree from an accredited university or college is a plus." Finally, although some of these postings specifically require a bachelor's degree, it is as a generically stated requirement without mention of any specific specialty. Although the posting by PRO Sports Club states that "a bachelor's degree in Education, Psychology, Exercise Science or a related area is preferred," this represents a preference, not a requirement, and further demonstrates the organization's willingness to accept a degree in a variety of areas. Additionally, the petitioner does not submit any evidence regarding how representative these advertisements are of the industry's usual recruiting and hiring practices of the petitioner's industry with regard to the position advertised. Again, simply 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.<sup>6</sup>

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as 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.

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<sup>6</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.

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary would perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty. The duties proposed for the beneficiary are similar to those outlined in the *Handbook* as normally performed by coaches and scouts, and the petitioner's description of the duties which collectively constitute the proffered position lacks the detail and specificity required to establish that the proffered position surpasses or exceeds typical positions in the pertinent occupation in terms of complexity or uniqueness. As noted above, the *Handbook* indicates that the performance of duties attributed to coaches and scouts do not normally require a person with a bachelor's degree, or the equivalent, in a specific specialty.

We also incorporate by reference this decision's earlier comments and findings regarding the generalized level of the descriptions of the proposed duties and the position that they are said to comprise. The AAO finds further that, even outside the context of the *Handbook*, the petitioner has simply not established relative complexity or uniqueness as attributes of the proffered position, let alone as attributes with such an elevated degree as to require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Also, the AAO incorporates here by reference and reiterates its earlier discussion regarding the LCA and its indication that the proffered position is a low-level, entry position relative to others within the occupation. Based upon the Level I wage rate specified in the LCA, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate is indicative of a position where the beneficiary would perform routine tasks that require limited, if any, exercise of independent judgment; would be closely supervised and monitored; would receive specific instructions on required tasks and expected results; and would have his work reviewed for accuracy.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties constitute a position so complex or unique it can be performed only by an individual with at least a bachelor's degree, or the equivalent, in a specific specialty.

Consequently, as it did not show that the particular position for which it filed this petition is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.



The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and with regard to employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. 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 proffered position.<sup>7</sup> 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, or the equivalent, in a specific specialty.

While a petitioner may believe and assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's 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 employer 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 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. See section 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 actual performance requirements of the position necessitate a petitioner's history of requiring a particular degree in its recruiting and hiring for the position. See generally *Defensor v. Meissner*, 201 F. 3d at 387. 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 proposed 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

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<sup>7</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within the occupation.

States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner contends that it has previously employed two individuals in related positions to that of the proffered position in this matter.

First, the petitioner contends that it employed [REDACTED] in the position of Technical Director from September 2010 to August of 2011, and submits copies of his Wage and Tax Statements (IRS Form W-2) for 2010 and 2011. The petitioner submits documentation demonstrating that Mr. [REDACTED] received a Bachelor of Arts degree in English and History from the [REDACTED] at Newcastle.

The petitioner also contends that it employed [REDACTED] in the position of Director of Sports Science Girls Academy from February 2011 to August 2011, and submits copies of her Form W-2 for 2011 in support of this contention. The petitioner also submits evidence demonstrating that she received a Bachelor of Science degree in Sport and Exercise Science from [REDACTED] in 2007.

While the AAO acknowledges this documentation as demonstrating that the petitioner previously employed two degreed individuals, there is insufficient evidence to establish that (1) these individuals were employed in the same position currently proffered to the beneficiary; and (2) such positions required a bachelor's degree in sports science or a related field. First, Mr. [REDACTED] was employed in the position of Technical Director, which differs in title from the proffered position in this matter, which the petitioner identifies as "Director of Sports Science and Technical Development." There is no evidence submitted to outline the nature of this position and its associated duties, such that the AAO could determine whether the position of Technical Director held by Mr. [REDACTED] is the same as the proffered position in this matter. In fact, Mr. [REDACTED]'s June 22, 2013 letter not only indicates some distinct differences, but also indicates that over 60% of Mr. [REDACTED]'s time was spent in duties not related to the proffered position, namely, being "primarily responsible for managing the office while we were looking to hire a full-time manager." Further, the record indicates that Mr. [REDACTED] holds a bachelor's degree in English and History, not in sports science or a related field.

Furthermore, although Ms. [REDACTED] holds a bachelor's degree in sport and exercise science, there is insufficient evidence demonstrating that her position, identified as "Director of Sports Science Girls Academy," is akin to the proffered position in this matter. The minimal information provided suggests that Ms. [REDACTED] worked with the girls division, whereas the petitioner claims that the beneficiary will work with boys in the U15-U18 age group. Moreover, there is no indication that Ms. [REDACTED] was also the director of technical development, another tasks attributed to the beneficiary in the proffered position herein. However, the evidence submitted herein does not correspond to the proffered position as described, and cannot be deemed reflective of a routine hiring standard imposed by the petitioner.



Finally, the AAO notes the submission of the letter from [REDACTED], Senior Partner of the petitioner, dated March 6, 2013. Mr. [REDACTED] states that there is no copy of a vacancy announcement for the proffered position that would demonstrate the petitioner's minimum educational requirements, since he never formally advertised for the proffered position and simply relied on referrals from his network of colleagues in the industry to find acceptable candidates. Although he contends that "it was my policy to only hire individuals with a minimum of a Bachelor's Degree in Sports Science, or a related area," the record lacks evidence of a history of recruiting and hiring practices that would establish what the petitioner "normally requires."

As the evidence of record does not demonstrate a history of recruiting and hiring for the proffered position only persons with a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The AAO here incorporates by reference into this discussion its earlier comments and findings regarding the generalized and generic level at which the proffered position and its duties are described, which reflect that the evidence of record does not develop the nature of the proposed duties with sufficient detail to establish the level of complexity and specialization required to satisfy this criterion.

Additionally, we observe that both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level I is indicative of duties of relatively low complexity.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

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

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, Level II wage rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

**Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

**Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.



Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

It is noted that, on appeal, counsel for the petitioner points out that the beneficiary's proposed annual salary of \$40,000 conforms to a Level III wage designation, pointing out that the prevailing Level III wage at the time of certification was \$37,983. Counsel asserts, therefore, that this demonstrates that the true nature of the position is actually that of a more experienced employee as described under this designation. For the reasons outlined above, this contention is not acceptable. The petitioner certified the LCA for the lowest assignable wage level, which corresponded to duties associated with an entry-level position. Had the petitioner wanted to designate the position as a Level III position, it should have done so at the time the LCA was filed.

The AAO also finds that, separate and apart from the petitioner's submission of an LCA with a wage-level I designation, the petitioner has also failed to provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

For all of these reasons, the evidence in the record of proceeding fails to establish that the nature of the proposed duties meets the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

## V. CONCLUSION

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

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.