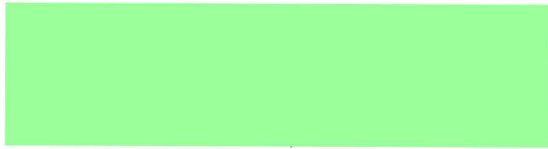




U.S. Citizenship
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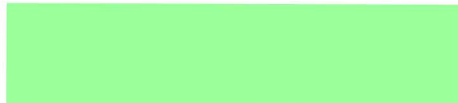


DATE: **NOV 06 2014**

OFFICE: VERMONT SERVICE CENTER

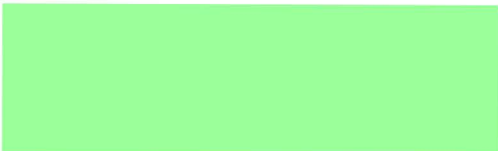
FILE: 

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:

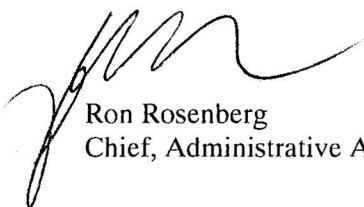


INSTRUCTIONS:

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

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

Thank you,



Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner describes itself as an auto sales and manufacturing support business that was established in [REDACTED]. In order to employ the beneficiary in what it designates as a manager 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, concluding that the petitioner failed to establish that the proffered position is a specialty occupation in accordance with the applicable statutory and regulatory provisions. Counsel for the petitioner subsequently filed an appeal. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us 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; (5) the Form I-290B, Notice of Appeal or Motion; (6) our summary dismissal of the appeal; (7) our notice reopening the proceeding *sua sponte*; and (8) counsel's submission in response to our notice. We reviewed the record in its entirety before issuing our decision.¹

For the reasons that will be discussed below, we agree with the director's decision that the petitioner has failed to establish 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. FACTURAL AND PROCEDURAL HISTORY

In the Form I-129 petition, the petitioner indicated that it is seeking the beneficiary's services as a manager on a full-time basis. In the letter of support, the petitioner stated that the beneficiary's job duties will include the following:

1. Luxury car dealers in the US: [The petitioner] sustains commercial relations with luxury car dealers that purchase parts and services. These relationships require constant attention and nursing. In this very competitive market, many vendors target the dealerships in an effort to search for stable sources of business. [The beneficiary] needs to keep these relationships operational by:
 - a. Keeping relations with owners and directors of these dealerships.
 - b. Making sure that the sale force of [the petitioner] keeps the dealerships constantly informed of product updates, new technologies and keeping them motivated with our products.

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

2. Dealer Network in Latin America: [The petitioner] has a strong and well established network of official dealers in Latin America. This network is instrumental in the success of [the petitioner] and provides a steady and reliable source of sales. This valuable network requires attention in the following areas:
 - a. Maintenance of a logistics system in order to ensure proper and expedited shipment to different jurisdictions with different legal and border protection regulations.
 - b. Adapting products and enhancing the engineering aspects, so they will properly work at different fuel grades, weather systems and heights. [The beneficiary] needs to keep constant contact with the manufacturers and suppliers in order to ensure that the product feedback from the dealers is transmitted about engineering needs and challenges.
 - c. Establishment of functional billing and collection processes based on the monetary and currency market challenges of every jurisdiction in Latin America. This requires sustaining proper banking relationships to ensure the safety of the transaction and compliance with the US regulations.
3. Retail Sales: Retail sales are the most profitable area of the business. They are carried out by the operations manager, sales representative, the technician and the freelance sales representatives. [The beneficiary] supervises that the proper service quality and profitability is considered in each sale. This is done after the sale is finished and the proper feedback of enhancement is given for the proper party.
4. Management of the Company: The operation of the company is not only ensured by the management of the outgoing process, but also by making sure that the internal function is properly handled. This requires:
 - a. Book keeping, controlling and cash flow analysis, review of the accounts payable and receivable, taxes and expenses preparations and follow up with the hired external audit company hired.
 - b. Human resources supervision and management follow up with sales representatives and technical personnel to ensure they follow up on the active leads and that the sales and contracts are followed through and completed in the most profitable way.
 - c. Banking and financial relationships to ensure proper management of bank and credit accounts.
5. Further development areas: Every business needs to grow and develop. [The beneficiary] is in charge of scouting and developing new business potential areas for development in:
 - a. Market research and dealer network growth.
 - b. Search for distribution agreements for new products and brands.
 - c. Search engine optimization.
 - d. Feasibility analysis for new opportunities.

The petitioner did not indicate that there are any specific requirements for the proffered position.² With the initial petition, the petitioner submitted copies of the beneficiary's foreign academic credentials, as well as a credential evaluation from the Foundation for International Services, Inc.³

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "General and Operations Managers" - SOC (ONET/OES Code) 11-1021, at a Level II (qualified) wage.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE. The director outlined the specific evidence to be submitted. Counsel responded with additional evidence, including a job description for the position of "Director" from the petitioner.⁴

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on October 9, 2013. Counsel submitted an appeal of the denial of the H-1B petition.

II. PREPONDERANCE OF THE EVIDENCE STANDARD

² The petitioner does not claim that the position requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as the minimum requirement for entry into the occupation, as required by the Act.

³ A review of the academic credentials reveals that the evidence is in a foreign language and is not accompanied by an English translation. Notably, any document submitted to U.S. Citizenship and Immigration Services (USCIS) containing a foreign language must be accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English. Because the petitioner failed to submit a certified translation of the documents, we cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). We will not attempt to decipher or "guess" the meaning of documents that are not accompanied by a full, certified English language translation.

⁴ We note that the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original description of duties of the position, but rather only changed the job title.

In light of counsel's references to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow 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.

* * *

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

* * *

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.

As noted above, we conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find 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*, we find that the director's determinations in this matter were correct. Upon our 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, we find 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 us to believe that the petitioner's claims are "more likely than not" or "probably" true.

III. MATERIAL FINDINGS

The primary issue in this matter is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, we will make preliminary findings that are material to the determination of the merits of this appeal.

A. Requirements for the Proffered Position

When determining whether a proffered position qualifies as a specialty occupation, the applicable statutory and regulatory provisions must be read together. See 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) and (iii)(A). Accordingly, the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) is interpreted 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 at 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position").

Upon review of the record of proceeding, we note that the petitioner did not state that there are any particular requirements for the proffered position. The petitioner simply claims that the beneficiary is qualified for the position. However, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. Cf. *Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].") Here, the petitioner has not specified nor has it demonstrated that it requires at least a baccalaureate degree in a specific specialty, or its equivalent, for the proffered position.

B. Inconsistent Information regarding the Job Title of the Proffered Position

In addition, we observe that the petitioner has provided inconsistent information regarding the job title of the proffered position. For example, in the Form I-129 petition, the petitioner referred to the proffered position as "Manager." However, in the LCA, the petitioner referred to the proffered position as "General Manager." In addition, in the job description, submitted in response to the director's RFE, the petitioner referred to the proffered position as "Director." No explanation for this inconsistency was provided. Although we do not rely on the position's title when determining whether a position is a specialty occupation, any inconsistencies in title that suggest the petitioner is

ascribing a different or a higher level of responsibility to the position is material to an overall understanding of the position proffered.

C. Inconsistent Information regarding the Petitioner's Number of Employees

Further, we note that the petitioner has provided inconsistent information regarding its number of employees. For instance, in the Form I-129 petition, the petitioner indicated that it has two employees.⁵ However, in the letter of support, the petitioner claimed that it has an operations manager, sales representative, technician, and freelance sales representatives. In addition, in the petitioner's job description, submitted in response to the RFE, it indicated "NUMBER OF SUBORDINATES: THREE DIRECT, 10 FREELANCE SALES PEOPLE AND 12 DEALERS IN LATIN AMERICA." No explanation for the variances was provided.

IV. ISSUE ON APPEAL

As noted above, the director determined that the petitioner had not established that the position proffered here is a specialty occupation. Accordingly, the issue on appeal is whether the petitioner provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

A. The Law

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

⁵ We note that it is reasonable to assume that the size and/or scope of an employer's business has, or could have, an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as that size impacts upon the duties of a particular position. In matters where a petitioner's business is relatively small, USCIS reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in a position requiring the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent). In addition, when a petitioner employs relatively few people, it may be necessary for it to establish how the beneficiary will be relieved from performing non-qualifying duties. The petitioner did not address this issue, nor did it provide information regarding the duties and responsibilities of the other employee(s). Thus, without additional information, it cannot be ascertained how the beneficiary would be relieved from performing non-qualifying duties such that the performance of non-qualifying duties would not affect the primary duties of the occupational classification of the position.

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

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

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

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

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

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

§ 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 387. 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 and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, directly related to the duties and responsibilities of the particular position fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

B. Analysis

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.

We recognize the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereafter the *Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. As previously discussed, the petitioner attested in the LCA that the proffered position falls under the occupational category "General and Operations Managers."

The chapter of the *Handbook* entitled "Top Executives" addresses "General and Operations Managers." We reviewed this chapter of the *Handbook*, including the sections regarding the typical

duties and requirements for this occupational category.⁶ However, the *Handbook* does not indicate that "General and Operations Managers" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

The subchapter of the *Handbook* entitled "How to Become a Top Executive" states the following, in part, about this occupational category:

Although education and training requirements vary widely by position and industry, many top executives have at least a bachelor's degree and a considerable amount of work experience.

Education

Many top executives have a bachelor's or master's degree in business administration or in an area related to their field of work. Top executives in the public sector often have a degree in business administration, public administration, law, or the liberal arts. Top executives of large corporations often have a master of business administration (MBA). College presidents and school superintendents typically have a doctoral degree in the field in which they originally taught or in education administration.

Work Experience in a Related Occupation

Many top executives advance within their own firm, moving up from lower level managerial or supervisory positions. However, other companies may prefer to hire qualified candidates from outside their organization. Top executives that are promoted from lower level positions may be able to substitute experience for education to move up in the company. For example, in industries such as retail trade or transportation, workers without a college degree may work their way up to higher levels within the company to become executives or general managers.

Chief executives typically need extensive managerial experience. Executives are also expected to have experience in the organization's area of specialty. Most general and operations managers hired from outside an organization need lower level supervisory or management experience in a related field.

Some general managers advance to higher level managerial or executive positions. Company training programs, executive development programs, and certification can

⁶ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online. We hereby incorporate into the record of proceeding the chapter of the *Handbook* regarding "Top Executives."

often benefit managers or executives hoping to advance. Chief executive officers often become a member of the board of directors.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Top Executives, on the Internet at <http://www.bls.gov/ooh/management/top-executives.htm#tab-4> (last visited November 5, 2014).

When reviewing the *Handbook*, we must also note that the petitioner designated the proffered position as a Level II position (out of four possible wage-levels). This designation is appropriate for a beneficiary that is expected to have a good understanding of the occupation and who will perform moderately complex tasks that require limited judgment relative to others within the occupation.⁷

The *Handbook* does not state that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. While "many" top executives may have a bachelor's or master's degree, the *Handbook* does not indicate that such a degree is normally the minimum requirement for entry into this occupational category. Rather, the *Handbook* describes an array of preparatory paths to the occupational category of top executives, including the observation that in some industries "workers without a college degree may work their way up to higher levels in the company to become executives or general managers." Thus, the *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty (or its equivalent) is normally the minimum requirement for entry into this occupational category.

In response to the RFE and on appeal, counsel referenced the O*NET OnLine Summary Report for the occupational category "General and Operations Managers." The O*NET indicates that the occupational category "General and Operations Managers" has a designation of Job Zone 3, which indicates that medium preparation is needed.⁸ It also indicates that most occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree. See

⁷ The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level II wage rate is described by DOL 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.

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.

⁸ We observe that in the letter dated September 14, 2014, submitted in response to the director's RFE, counsel mistakenly stated that the occupational category "General and Operations Managers" has a designation of Job Zone 4.

O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3. Nevertheless, even if the occupation was designated a Job Zone 4 or higher, the O*NET information is insufficient to establish that the position qualifies as a specialty occupation normally requiring at least a bachelor's degree in a specific specialty, or its equivalent. The O*NET does not specify that a bachelor's degree in any *specific specialty* is required, and does not, therefore, demonstrate that a position so designated qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Therefore, despite counsel's assertion to the contrary, the O*NET is not probative evidence that the proffered position qualifies as a specialty occupation.

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

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

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)).

As previously 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 for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the petitioner did not submit any letters or affidavits from similar firms or individuals in the petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals."

In response to the director's RFE and on appeal, counsel submitted copies of job advertisements in support of the assertion that the degree requirement is common to the petitioner's industry in

parallel positions among similar organizations. However, upon review of the documents, we find that counsel's reliance on the job announcements is misplaced.

In the Form I-129 petition, the petitioner stated that it is an auto sales and manufacturing support business established in [REDACTED] with two employees.⁹ The petitioner claims that it has a gross annual income of over \$1 million. The petitioner did not provide its net annual income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 335312.¹⁰ This NAICS code is designated for "Motor and Generator Manufacturing." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This U.S. industry comprises establishments primarily engaged in manufacturing electric motors (except internal combustion engine starting motors), power generators (except battery charging alternators for internal combustion engines), and motor generator sets (except turbine generator set units). This industry includes establishments rewinding armatures on a factory basis.

U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 335312 – Motor and Generator Manufacturing, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited November 5, 2014).

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 organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

In this matter, counsel submitted advertisements for organizations that do not appear to be similar to the petitioner. More specifically, the advertisements include positions with [REDACTED] ("a leading indirect automobile finance company"); [REDACTED] ("manufacturer of industrial testing instruments"); and [REDACTED] (a company that specializes in loading dock equipment). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. In

⁹ As previously discussed, the petitioner has provided inconsistent information regarding its number of employees. No explanation for this inconsistency was provided.

¹⁰ According to the U.S. Census Bureau, the North American Industry Classification System (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 <http://www.census.gov/eos/www/naics/> (last visited November 5, 2014).

addition, counsel submitted two job postings that indicate "Confidential Posting" for which little or no information regarding the employers is provided. Consequently, the record is devoid of sufficient information regarding these advertising employers to conduct a legitimate comparison of the organizations to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations. Again, the petitioner must demonstrate the degree requirement is common to the industry in parallel positions among similar organizations.

Furthermore, the petitioner has not established that the advertisements are for parallel positions. For instance, counsel provided a posting for an international sales manager position, which requires a candidate to possess a degree and "[m]inimum [of] 5 years in sales and marketing field." Another submission is for an international sales team manager, which requires a candidate to possess a degree and "three to five years [of] related experience." As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level II position (out of four possible wage-levels). The advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

In addition, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, two of the postings (specifically, the [REDACTED] posting and Confidential Posting for the international sales manager position) state that a bachelor's degree is required, but they do not provide any further specification. We reiterate that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree in any field, but such a degree in a *specific specialty* that is directly related to the specialty occupation claimed in the petition. The petitioner also submitted a posting for an international sales team manager position, which states that a "Bachelor's degree (B.A.) from [a] four-year college or university (preferably in Business, Marketing, Engineering or Industrial Distribution" is required. However, a *preference* for a degree in these fields is not an indication of a minimum *requirement*.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. The evidence does not establish that the proffered position qualifies as a specialty occupation under this criterion of the regulations.¹¹

¹¹ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of

Thus, based upon a complete review of the record, the petitioner has not established 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. 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.

To begin with and as discussed previously, the petitioner itself does not require a baccalaureate or higher degree in a specific specialty, or its equivalent. In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner and its counsel submitted documents regarding the petitioner's business operations, including printouts from the petitioner's website and printouts from the petitioner's Facebook page. Upon review, we find that the petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them.¹²

The petitioner has indicated that the beneficiary's educational background and work experience in the field will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation. In the instant case, the petitioner has not established which of the duties, if any, of the proffered position would be so

error").

Further, without more, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States.

¹² Again, we note that the petitioner designated the proffered position on the LCA at a Level II wage level. This designation indicates that the proffered position is a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. Such a designation is inconsistent with a claim that the duties of the position are complex and unique as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage.

complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. 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 satisfy 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 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 assert that a proffered position requires a specific degree that opinion alone without corroborating evidence cannot establish the position qualifies 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* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

The petitioner stated in the Form I-129 petition that it has two employees and was established in 2009 (approximately four years prior to the filing of the H-1B petition). However, upon review of the record, the petitioner did not provide any documentary evidence regarding current or past recruitment efforts for this position. Furthermore, the petitioner did not submit any information regarding employees who currently or previously held the position. 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.

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

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is

usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

Upon review of the record of the proceeding, we note that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

Furthermore, we reiterate our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level II position (out of four possible wage-levels). This designation is only appropriate for positions for which the petitioner expects the beneficiary to have a good understanding of the occupation and to perform moderately complex tasks that require limited judgment relative to others within the occupation. The designation of the proffered position as a Level II position is not consistent with claims that the nature of the specific duties of the proffered position is specialized and complex. Without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or 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." The petitioner has submitted inadequate probative evidence to satisfy the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

V. CONCLUSION AND ORDER

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.