



U.S. Citizenship
and Immigration
Services

D2

[Redacted]

DATE: **OCT 17 2012** OFFICE: CALIFORNIA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

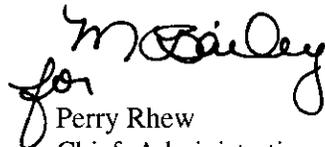
ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

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

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

Thank you,


for
Perry Rhew
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 visa petition, the petitioner describes itself as a tourism/transportation operations company established in 1973. In order to employ the beneficiary in what it designates as a technical writer position, the petitioner seeks to classify her 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 September 2, 2010, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. 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 the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director's decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education,

business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

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

In the petition signed on June 28, 2010, the petitioner indicates that it is seeking the beneficiary's services as a technical writer on a full-time basis at the rate of pay of \$36,000 per year. In the June 25, 2010 letter of support, the petitioner states that the beneficiary will be responsible for the following duties:

- Research, develop, and implement content to customers and vendors related to religious groups, including such services as church tours, weddings, seminars, retreats, and conventions which includes an extensive understanding and sensitivity to various religions and cultures to attract them to services of [the petitioner].
- Analyze and prepare [the petitioner's] instructional, safety, investment and promotional materials, brochures, and other written materials for customers containing unique business terminology and religious sensitivity specific to the Japanese tourism trade.
- Prepare [the petitioner's] complex promotional materials, layouts, and other materials for printed publications, [the petitioner's] website and other commercial media.
- Work with senior level executives to develop strategy for preparing complex safety, investment, and promotional material for customers and employees based on the high standards for [the petitioner's] operations and standards specific to the Japanese tourism business.
- Plan, formulate and implement company policies, quality standards, productivity, safety, sanitation, training, and communication with respect to preparation of employee and customer instructional and promotional materials.
- Communicate closely with clients, customers, vendors, employees, and company management to ensure that the high level of quality demanded by [the petitioner] is maintained in providing [the petitioner's] products and services.
- Implement and manage company strategies for the development of new markets involving Christian, Buddhist, Shinto, and other religious interests.

In addition, the petitioner states that "[c]andidates for the position of Technical Writer must possess at least an equivalency of a bachelor's degree from an accredited college or university in Communication, preferably along with a background in religious studies." The petitioner also

stated that "it is essential for [the petitioner's] employees to have knowledge of the Japanese culture and language."¹ With the initial petition, the petitioner submitted a copy of the beneficiary's Master of Arts degree in Communication and transcript from Hawaii Pacific University in Honolulu, Hawaii.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 13, 2010. The petitioner was asked to submit documentation to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted. The AAO notes that the director specifically requested the petitioner submit a more detailed description of the proffered position, to include the approximate percentage of time for each duty the beneficiary will perform.

On August 20, 2010, counsel for the petitioner submitted a brief with a more detailed description of the duties of the proffered position, and the percentage of time the beneficiary would spend performing the duties of the position.² In addition, counsel submitted, in part, (1) job vacancy announcements; (2) documentation regarding current tourist industry issues; and (3) brochures and promotional materials regarding the petitioner's services.

The director reviewed the information provided by the petitioner 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 September 2, 2010. Counsel submitted an appeal of the denial of the H-1B petition.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by

¹ A language requirement other than English in a petitioner's job offer generally is considered a special skill for all occupations, with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers. A foreign language requirement must be reflected in the wage-level for a petitioner's proffered position.

² It is noted that this expanded description of the duties of the proffered position is not probative evidence as the description was provided by counsel, not the petitioner. Counsel's brief was not endorsed by the petitioner and the record of proceeding does not indicate the source of the duties and responsibilities that counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

the AAO when determining these criteria include: whether the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³ The petitioner asserts in the Labor Condition Application (LCA) that the proffered position falls under the occupational category "Technical Writers."

The AAO reviewed the chapter of the *Handbook* entitled "Technical Writers," including the sections regarding the typical duties and requirements for this occupational category.⁴ However, the *Handbook* does not indicate that "Technical Writers" comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty.

The subchapter of the *Handbook* entitled "How to Become a Technical Writer" states, in part, the following about this occupation:

Education

Employers generally prefer candidates with a bachelor's degree in journalism, English, or communications. Many technical writing jobs require both a degree and knowledge in a specialized field, such as engineering, computer science, or medicine. Web design experience also is helpful because of the growing use of online technical documentation.

Work Experience

Some technical writers begin their careers not as writers, but as specialists or research assistants in a technical field. By developing technical communication skills, they eventually assume primary responsibilities for technical writing. In small firms, beginning technical writers may work on projects right away; in larger companies with more standard procedures, beginners may observe experienced technical writers and interact with specialists before being assigned projects.

³ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

⁴ For additional information regarding the occupational category "Technical Writers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Technical Writers, on the Internet at <http://www.bls.gov/ooh/media-and-communication/technical-writers.htm#tab-1> (last visited October 10, 2012).

Prospects for advancement generally include working on more complex projects, leading or training junior staff, and getting enough work to succeed as a freelancer.

Training

Many technical writers need short-term on-the-job training to adapt to a different style of writing.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Technical Writers, on the Internet at <http://www.bls.gov/ooh/media-and-communication/technical-writers.htm#tab-4> (last accessed October 10, 2012).

When reviewing the *Handbook*, the AAO must note that the petitioner designated the proffered position as a Level II position (out of four possible wage-levels). This designation is indicative that the beneficiary is expected to have a good understanding of the occupation and that she will perform moderately complex tasks that require limited judgment relative to others within the occupation.⁵ Thus, based upon the wage level designated by the petitioner in the LCA, the

⁵ Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." Level III and a Level IV wage rates are describes 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. Words such as 'lead' (lead analyst), 'senior' (senior programmer), 'head' (head nurse), 'chief' (crew chief), or 'journeyman' (journeyman plumber) would be indicators that a Level III wage should be considered.

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.

proffered position does not appear to be a particularly high-level or senior position.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty is normally the minimum requirement for entry into this occupation. The *Handbook* states that employers generally prefer candidates with a bachelor's degree in journalism, English, or communications for technical writing positions. Clearly, a *preference* by some employers is not an occupational, entry requirement. Thus, while a baccalaureate degree in journalism, English or communications may be a preference among employers of technical writers in some environments, the *Handbook* suggests that employers also hire employees without such academic credentials. The *Handbook* further states that many technical writing jobs require both a degree and knowledge in a specialized field, such as engineering, computer science, or medicine. The AAO notes that this statement of the *Handbook* does not specify any particular degree-level (e.g., associate's degree, baccalaureate, master's degree), and the *Handbook* does not indicate that such a degree must be in a specific specialty. The *Handbook* provides several examples of fields in which knowledge may be required. Notably, these are in wide-variety of disparate fields. The *Handbook* does not conclude that normally the minimum requirement for entry into these positions is at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the *Handbook* does not support the assertion that the proffered position falls under an occupational group that categorically qualifies as a specialty occupation.

The AAO reiterates that the *Handbook* does not denote that at least a bachelor's degree is a standard entry requirement for this occupation. However, assuming *arguendo* that the *Handbook* stated a requirement for at least a bachelor's degree for entry into this occupational category (which it does not), in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields (such as journalism, English, communications, engineering, computer science, and medicine) would not meet the statutory requirement that the degree be "in *the* specific specialty."⁶ Section 214(i)(1)(b) (emphasis added).

The *Handbook* indicates that working as a technical writer does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

⁶ Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty.

support the proffered position as being a specialty occupation. That is, the *Handbook* does not support the petitioner's claim that the proffered position falls under an occupational group that categorically qualifies as a specialty occupation.

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of the *Handbook* support on the issue. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that there is a categorical minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. 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 first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO reviews 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.

As stated earlier, 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 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

In support of the petitioner's assertion that the proffered position is a specialty occupation position, the record of proceeding contains four job announcements. However, upon review of the evidence,

the AAO finds that the petitioner's reliance on the job announcements is misplaced.

In the Form I-129, the petitioner stated that it is a tourism/transportation operations company established in 1973. The petitioner also stated that it has 211 employees and a gross annual income of \$14,689,482. In addition, the petitioner stated that it has a net annual income of \$402,762. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 487110.⁷ The AAO notes that this NAICS code is designated for "Scenic and Sightseeing Transportation, Land." See U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 487110 – Scenic and Sightseeing Transportation, Land, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed October 10, 2012).

For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, 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 the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. As previously mentioned, 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

The AAO notes that the petitioner did not provide any independent evidence of how representative the job advertisements are of the advertising employers' recruiting history for the type of jobs advertised. As the advertisements are only solicitations for hire, they are not evidence of the employers' actual hiring practices. Upon review of the documents, the AAO finds that they do not establish that a requirement for a bachelor's degree, in a specific specialty, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, counsel submitted copies of four advertisements in response to the RFE. Upon review of the documentation, the petitioner fails 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. For instance, the advertisements include positions with TPS, Inc. (a documentation services company), Sirius XM Radio, Inc. (a satellite radio company), and Flatter & Associates (a company designated under the government and military industry). Without further information, the advertisements appear to be for organizations

⁷ 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 viewed October 10, 2012).

that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. Furthermore, counsel submitted a job posting placed by a staffing company for which no information regarding the actual employer has been provided. Consequently, the record is devoid of sufficient information regarding the advertising organization to conduct a legitimate comparison of the organization to the petitioner. The petitioner and counsel failed to supplement the record of proceeding to establish that the advertising organization is similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organization.

Moreover, some of the advertisements do not appear to be for parallel positions. For instance, counsel provided a posting for a technical writer with TPS, Inc., which requires a degree and a "[m]inimum of five years of technical writing/information development experience." Additionally, counsel submitted a job posting by Sirius XM Radio, which requires candidates to possess a degree and "5-10 years of writing experience, preferably in a technical field with an emphasis on technical documentation" as a minimum. Notably, the advertised position with Flatter & Associates requires candidates to possess a degree with six years of experience writing and editing technical documents. (As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level II position.) 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.

Additionally, contrary to the purpose for which the advertisements were submitted, some of the postings do not establish that at least a bachelor's degree in a specific specialty, or the equivalent, is required for the positions. For example, the postings with TPS, Inc. and Flatter & Associates state that a bachelor's degree is required, but they do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required. The AAO here reiterates 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, but such a degree in a *specific specialty* that is directly related to the specialty occupation claimed in the petition. Moreover, the AAO observes that the petitioner submitted an advertisement that indicates that a bachelor's degree in business is acceptable. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business, without further specification, does not support the assertion that a position is a specialty occupation.⁸ Cf. *Matter of Michael Hertz*

⁸ Although a general-purpose bachelor's degree, such as a degree in business, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. See, e.g., *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; cf. *Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited

Associates, 19 I&N Dec. 558 (Comm'r 1988).

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 similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.⁹

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).

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

Counsel repeatedly claims that the petitioner's business operations are complex and unique and that "the Technical Writer must have the communication skills necessary to manage this complex and culturally nuanced tourism sector." Counsel continues by stating that there is "complexity involved in maintaining and developing documentation, procedures and products" related to the petitioner's

analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

⁹ 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 error").

As such, even if the job announcements supported the finding that the position of technical writer for companies that are similar to the petitioner require a bachelor's or higher degree in a specific specialty or its equivalent, 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 for entry into the occupation in the United States.

business operations. In a brief submitted with the appeal, counsel claims that the proffered position is complex and/or unique because the technical writer "must refer to technical, legal and operations materials and summarize them in a manner [that is] quickly comprehensible." In support of these assertions, counsel submitted documentation regarding current issues in the tourism sector, as well information regarding the petitioner's services.

The AAO reviewed the totality of the evidence submitted by the petitioner, and finds that the petitioner has failed to establish that the petitioner's business operations, or any other factors, add any significant dimensions of complexity or uniqueness to the duties of the proffered position. Furthermore, the AAO finds that the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of technical writer. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level at a Level II wage. This designation is only appropriate for positions for which the petitioner expects the beneficiary to have a good understanding of the occupation to perform moderately complex tasks that require limited judgment relative to others within the occupation. Thus, the wage level designated by the petitioner in the LCA is not consistent with claims that the position would entail any particularly complex or unique duties. Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, 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."¹⁰

The petitioner failed to demonstrate how the duties of the proffered position, as described, require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While a few courses in communications may be beneficial in performing certain duties of a technical writer position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

Therefore, the evidence of record does not establish that this position is significantly different from other technical writer positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred courses acceptable, including coursework that may lead to degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

¹⁰ For additional information on Level IV wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

Consequently, as the petitioner fails to demonstrate how the proffered position of technical writer is so complex or unique relative to other technical writer positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has 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, or the equivalent, in a specific specialty for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by 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, or the equivalent, in a specific specialty.

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding

certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In response to the RFE, counsel states that the proffered position is a new position. Thus, the petitioner did not submit any documentation regarding employees who have previously held the position. In addition, the petitioner did not submit any documentation regarding its recruiting and hiring practices. The record is devoid of information to satisfy this criterion of the regulations.

The AAO reviewed the record of proceeding but finds that the petitioner has not provided evidence to establish that it normally requires at least a bachelor's degree, or the equivalent, in a specific specialty 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.

In a letter dated August 19, 2010, counsel stated that the technical writer position is a new position created by the petitioner to address the specialized and unique overseas markets to which the petitioner caters. Counsel claims the duties of the position are specialized and complex because the technical writer must analyze and process feedback from customer, vendors, and business partners and prepare published materials that communicate the petitioner's goals and policies. In addition, counsel claims that the technical writer must prepare safety and training materials which effectively communicate procedures and concepts in a manner easily understandable by people from a variety of cultural backgrounds. Moreover, counsel claims that the petitioner must be able to communicate to a diverse and multi-cultural audience. To support these assertions, counsel provided documentation regarding various issues relating to tourism, along with information regarding the petitioner's services.

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided sufficient 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. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than technical writer positions that are not usually associated with a degree in a specific specialty. Moreover, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level II position (out of four possible wage-levels). Without further evidence, it is simply 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 IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, 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" and

requires a significantly higher wage.

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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