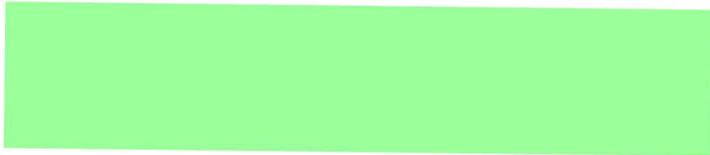


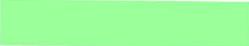


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **AUG 27 2013**

OFFICE: CALIFORNIA 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 Director, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on April 4, 2012. In the Form I-129 visa petition, the petitioner describes itself as a business involved in the publishing and licensing of video games that was established in 2003. In order to employ the beneficiary in what it designates as a project coordinator 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).<sup>1</sup>

The director denied the petition on October 22, 2012, 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. Counsel submitted a brief and additional evidence in support of this assertion.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.<sup>2</sup>

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

In this matter, the petitioner stated in the Form I-129 petition that it seeks the beneficiary's services as a project coordinator to work on a full-time basis. In a support letter dated March 19, 2012, the petitioner stated that the beneficiary will perform the following duties in the proffered position:

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<sup>1</sup> The AAO notes that in its March 19, 2012 letter, the petitioner indicated that it seeks to classify the beneficiary as "a non-immigrant of distinguished merit and ability." Prior to April 1, 1992, the H-1B category applied to persons of "distinguished merit and ability." The standard of "distinguished merit and ability" was defined in the regulations as "one who is a member of the professions or who is prominent in his or her field." On October 1, 1991, the *Immigration Act of 1990* ("IMMACT 90") deleted the term "distinguished merit and ability" from the general H-1B description; however, the implementation of this change was delayed until April 1, 1992. The *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991* ("MTINA"), which was enacted on December 12, 1991, restored the standard of "distinguished merit and ability" to the H-1B category, but only as the qualifying standard for fashion models. The petitioner has not indicated that the beneficiary is to be employed as a fashion model.

<sup>2</sup> The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

1. Plan, direct, and manage the overall execution of given projects with assistance of editor and supervision of management.
2. Communicate the status of project performance in the timely manner with various stakeholders such as senior managers, licensors of localized sources, and project teams using various communication tools and languages (English and Japanese).
3. Translate various localized source texts from Japanese to English as transformation of both meaning and intentions.
4. Take responsibility of project success, which includes, but not limited to: localization quality, budget, time, and specification with conformity. As for the localization quality, he or she must well cooperate with editor and share the responsibility of the quality of localization.

The AAO observes that the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

In its letter of support accompanying the initial I-129 petition, the petitioner stated that the proffered position requires the beneficiary to be "fully and functionally fluent in both English and Japanese." Notably, the petitioner did not state that the proffered position has any particular academic requirements.<sup>3</sup>

The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of her degrees and current work experience with the petitioner. The petitioner provided a copy of the beneficiary's diplomas and transcript from the [REDACTED] indicating that she was granted a Bachelor of Arts in Psychology and Social Behavior and a Bachelor of Arts in International Studies in June 2011.

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification "Interpreters and Translators" - SOC (ONET/OES) code 27-3091, at a Level I (entry level) wage.

Along with the Form I-129, the petitioner provided evidence in support of the petition, including documents the petitioner refers to as "Beneficiary's Sample Technical Materials"; and documents regarding the petitioners business operations (business license tax receipt, pages 12 and 13 of what appear to be financial statements, a brochure about the petitioner, and a list of the petitioner's

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<sup>3</sup> 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. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1).

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projects in North America).

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 30, 2012. The director outlined the evidence to be submitted. The AAO notes that the director specifically requested that the petitioner submit probative evidence to establish that the proffered position is a specialty occupation. In the request, the petitioner was asked to provide a more detailed description of the work to be performed by the beneficiary, along with the percentage of time to be spent on each duty, level of responsibility, hours per week of work, and the minimum education, training and experience necessary to do the job.

On September 20, 2012, counsel responded to the director's RFE by providing a letter from himself and additional evidence. The AAO notes that in the letter, counsel provided a new description of the proffered position and stated that a "bachelor's degree is required for the [proffered position]."<sup>4</sup> The AAO reviewed the letter and observes that it was not endorsed by the petitioner and the record of proceeding does not indicate the source of the duties or minimum education requirement that counsel attributes to the proffered position. Moreover, counsel's signature line (on the letter) states his name, his email address, and "Attorney for [the beneficiary]." Thus, in the RFE response, counsel identified himself as representing the beneficiary. The AAO notes that a beneficiary of a petition is not a recognized party in such proceeding. 8 C.F.R. § 103.2(a)(3). The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) specifically states that a beneficiary of a visa petition is not an affected party and does not have any legal standing in a proceeding. 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).

In response to the RFE, counsel provided the following additional evidence: (1) a "List of Textual Types"; (2) a document entitled "Sample Localization Flow for [REDACTED]"; (3) several job advertisements; (4) documents related to the petitioner's other employees; (5) printouts from the petitioner's website; (6) e-mails from the beneficiary in a foreign language, dated January 5, 2012 through April 12, 2012; and (7) e-mail's from the beneficiary in English and a foreign language, dated July 2, 2012 through July 18, 2012.<sup>5</sup>

<sup>4</sup> Counsel does not claim that the proffered position require baccalaureate (or higher degree) in a *specific specialty*, or its equivalent, for the proffered position.

<sup>5</sup> Any document submitted 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. See 8 C.F.R. § 103.2(b)(3). Because the petitioner and counsel failed to comply with the regulations by submitting a certified translation of the documents, the AAO cannot determine whether the evidence supports the claims made by the petitioner and counsel. *Id.* Accordingly, the evidence that is in a foreign language is not probative and will not be accorded any weight in this proceeding. The AAO will not speculate as to the meaning of documents that are not accompanied by a full, certified English language translation. However, the AAO notes that all of the submitted e-mails dated prior to the issuance of the RFE are entirely in a foreign language, and those dated after the RFE was issued contain English statements that reference requests for translations. No explanation

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The director reviewed the information provided by counsel. Although the petitioner and counsel 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 October 22, 2012. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition. In support of the appeal, counsel submitted a brief and additional evidence.

The issue before the AAO 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, the AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

To ascertain the intent of a petitioner U.S. Citizenship and Immigration Services (USCIS) must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, 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."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through attainment of at least a baccalaureate degree in a specific discipline. The AAO finds that the petitioner has not done so.

While the petitioner has identified its position as that of a project coordinator, the description of the beneficiary's duties in the record of proceeding lack the specificity and detail necessary to support the petitioner's contention that the position is a specialty occupation. The job description fails to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. Moreover, the petitioner's assertion that the proffered position qualifies as a specialty occupation is conclusory and unpersuasive, as it is not supported by the job description or substantive evidence.

In the instant case, the AAO observes that the duties of the proffered position, as described by the petitioner in its March 19, 2012 letter, have been stated in generic terms that fail to convey the

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was provided by the petitioner or counsel.

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actual tasks the beneficiary will perform on a day-to-day basis.<sup>6</sup> The AAO notes that the job description provided by the petitioner does not adequately convey the specific tasks the beneficiary is expected to perform to establish eligibility for H-1B classification. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will "plan, direct, and manage the overall execution of given projects," without providing adequate explanation as to what specific tasks such "plan[ning], direct[ing], and manag[ing]" entails. One of the duties listed is "[c]ommunicate the status of project performance," which suggests a substantial emphasis on providing status updates to stakeholders. The petitioner has not identified any specific level of education required to provide these status updates. The petitioner further claims that the beneficiary will "[t]ake responsibility of project success," including, "localization quality, budget, time, and specification conformity." Again, the petitioner has failed to identify the specific tasks involved in performing this duty, and has failed to specify the education required to perform such tasks.

As so generally described, the duties do not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application. That is, the overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations. Thus, the petitioner has failed to demonstrate how the performance of the duties of the proffered position, as described by the petitioner, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

Further, in the instant case, the petitioner's requirements for the proffered position do not establish that the position qualifies as a specialty occupation. That is, with the initial petition, the petitioner asserted that the beneficiary "must have Japanese fluency in all the four fields—speak, listen, read, and write at the business letter," and further claimed that "it is crucial for [the beneficiary] to be fully and functionally fluent in both English and Japanese." However, the petitioner did not state that any particular minimum education requirement is associated with the proffered position. In response to the RFE counsel indicated that "a bachelor's degree is required for [the proffered position]." Counsel reiterated this requirement on appeal.<sup>7</sup> The AAO notes 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 position. See 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Thus, neither the petitioner nor counsel has stated a minimum education requirement for the proffered position that qualifies the position as a specialty occupation.

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that

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<sup>6</sup> As previously noted, the AAO observes that the list of duties provided in response to the RFE was submitted by counsel (who stated "Attorney for [beneficiary]"), and the source of these duties has not been provided. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

<sup>7</sup> The AAO again observes that the unsupported assertions of counsel do not constitute evidence. *Id.*

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the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. The petitioner has not established that the proffered position requires attainment of such a degree. Consequently, the petitioner has not demonstrated that the proffered position qualifies as a specialty occupation, and the appeal may be dismissed and the petition denied on this basis alone. Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO will continue its discussion of the proffered position and the evidence of record under the applicable statutory and regulatory provisions.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, as previously mentioned, 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."

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

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

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

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

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

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

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

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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 the proffered position qualifies as a specialty occupation, the AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). In the instant case, the petitioner has failed to establish nature of the proffered position and in what capacity the beneficiary will actually be employed. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nevertheless, assuming, *arguendo*, that the duties of the proffered position as described by the petitioner would in fact be the duties performed by the beneficiary, the AAO will analyze them and the evidence in the record of proceeding to determine whether the proffered position as described would qualify as a specialty occupation. To make its determination as to whether the employment described by the petitioner qualifies as a specialty occupation, the AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

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

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>8</sup> As previously discussed, the petitioner designated the proffered position in the LCA under the occupational category

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<sup>8</sup> All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

"Interpreters and Translators."<sup>9</sup>

The AAO reviewed the chapter of the *Handbook* entitled "Interpreters and Translators," including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that "Interpreters and Translators" 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 an Interpreter or Translator" states the following about this occupational category:

Although interpreters and translators typically need a bachelor's degree, the most important requirement is that they be fluent in English and at least one other language. Many complete job-specific training programs. It is not necessary for interpreters and translators to have been raised in two languages to succeed in these jobs, but many grew up communicating in both languages in which they work. Some interpreters and translators attain a degree in a specialty area, such as finance.

#### **Education**

The educational backgrounds of interpreters and translators vary, but it is essential that they be fluent in English and at least one other language.

High school students interested in becoming an interpreter or translator should take a broad range of courses that includes English writing and comprehension, foreign languages, and computer proficiency. Other helpful pursuits for prospective foreign-language interpreters and translators include spending time abroad, engaging in direct contact with foreign cultures, and reading extensively on a variety of subjects in English and at least one other language. Through community organizations, students interested in sign language interpreting may take introductory classes in ASL and seek out volunteer opportunities to work with people who are deaf or hard of hearing.

Beyond high school, people interested in becoming an interpreter or translator have many educational options. Although a bachelor's degree is often required for jobs, majoring in a language is not always necessary. An educational background in a particular field of study can provide a natural area of subject-matter expertise.

However, interpreters and translators generally need specialized training on how to do the work. Formal programs in interpreting and translating are available at colleges

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<sup>9</sup> On appeal, counsel asserts that "[the director's] conclusion that this position is one of Interpreters and Translators is not based on the accurate analysis of the documents and information, which the petitioner has provided to your office." The AAO notes that the record reflects that the petitioner designated the proffered position under the occupational category of "Interpreters and Translators" on the LCA, which was certified on March 28, 2012 and signed by the petitioner's vice president on March 29, 2012. Thus, according to the petitioner, the proffered position falls under the occupational category "Interpreters and Translators."

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and universities nationwide and through nonuniversity training programs, conferences, and courses.

Many people who work as conference interpreters or in more technical areas—such as localization, engineering, or finance—have a master's degree. Those working in the community as court or medical interpreters or translators are more likely to complete job-specific training programs.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Interpreters and Translators, on the Internet at <http://www.bls.gov/ooh/Media-and-Communication/Interpreters-and-translators.htm#tab-4> (last visited August 26, 2013).

When reviewing the *Handbook*, the AAO notes that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. Wage levels should be determined only after selecting the most relevant Occupational Information Network (O\*NET) occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

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) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.<sup>10</sup> The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

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

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<sup>10</sup> A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

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methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

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

Thus, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. Furthermore, the AAO observes that DOL guidance indicates that a Level I designation may be appropriate for a research fellow, a working in training, or for an internship.

This passage of the *Handbook* reports that the educational backgrounds of interpreters and translators vary but that it is essential that they be fluent in English and at least one other language. The *Handbook* indicates that the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree. The *Handbook* states that beyond high school, people interested in becoming an interpreter or translator have many educational options. Further, the *Handbook* states that although a bachelor's degree is often required for jobs, it does not conclude that these positions normally require a bachelor's degree *in a specific specialty* for entry into the occupation.<sup>11</sup> This section of the *Handbook* describes several avenues for preparation for a career as an interpreter or translator, including studying abroad, participating in a formal "program" at a college or university, and attending "nonuniversity training programs, conferences, and courses." Thus, the *Handbook* indicates that there are many paths of academic and non-academic preparation for a career as an interpreter or translator. The *Handbook* does not indicate that attainment of a

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<sup>11</sup> For instance, the definition of "often" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "Many times: frequently." It cannot be found, therefore, that a particular degree that is "often" required for positions in a given occupation would equate to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner (which has been designated as a Level I entry position). Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "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." § 214(i)(1) of the Act.

bachelor's degree or higher in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers 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. As previously mentioned, 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is 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 by the petitioner 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, 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.

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. at 1102).

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, the AAO incorporates by reference the previous discussion on the matter. The record of proceeding does not contain any evidence from an industry professional association to indicate that a degree is a minimum entry requirement. The petitioner did not submit any letters or affidavits from firms or individuals in the industry.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner provided several job postings. The AAO

reviewed the evidence submitted, but finds that the documentation does not establish that the petitioner has met this prong of the regulations.<sup>12</sup>

In the Form I-129, the petitioner stated that it is a business engaged in publishing and licensing video games that was established in 2003.<sup>13</sup> The petitioner further stated that it has twenty-six

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<sup>12</sup> The AAO observes that counsel submitted two industry letters on appeal. The AAO further observes that in the RFE, the director specifically indicated that the petitioner could provide "letters or affidavits from firms or individuals in the industry that attest that such firms routinely [employ] and recruit only degreed individuals in a specific specialty." With regard to documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533. If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not consider the sufficiency of such evidence requested by the director in the RFE but submitted for the first time on appeal.

Nevertheless, the AAO reviewed the letters and will make a few brief observations. First, the AAO notes that there are substantial similarities in the wording of the letters (including grammatical and punctuation errors), calling into question their veracity. When affidavits are worded the same (and include identical errors), it indicates that the words are not necessarily those of the affiants and may cast some doubt on the validity of the affidavits. Moreover, the letters state that the companies "[r]outinely employ a Product Coordinator who has a bachelor's degree" and that a bachelor's degree is necessary for a product coordinator position. Notably, the letters do not indicate that such a degree must be in a *specific specialty* directly related to the duties of the position. Thus, the letters do not establish that the proffered position qualifies as a specialty occupation.

<sup>13</sup> The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 423910. 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 August 26, 2013).

According to the U.S. Department of Commerce, Census Bureau website, the NAICS code 423910, corresponding to "Sporting and Recreational Goods and Supplies Merchant Wholesalers," which is comprised of "establishments primarily engaged in the merchant wholesale distribution of sporting goods and accessories; billiard and pool supplies; sporting firearms and ammunition; and/or marine pleasure craft, equipment, and supplies." U.S. Dep't of Commerce, U.S. Census Bureau, 2007 NAICS Definition, 423910-Sporting and Recreational Goods and Supplies Merchant Wholesalers, on the Internet at

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employees. The petitioner reported its gross annual income as approximately \$9.5 million and its net annual income as approximately \$600,000.

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 an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

The AAO reviewed the job advertisements submitted by the petitioner. The petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

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.

More specifically, most of the advertisements do not state a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent. For example, the advertisement from [REDACTED] for a bilingual product specialist and a bilingual communications coordinator state requirements for an "undergraduate degree," but do not specify that the degree must be a bachelor's degree. It appears that an associate's degree may be acceptable. Further, both postings indicate that they require an undergraduate degree "or equivalent," but do not indicate what rubric is used to determine equivalency. Thus, the posting does not establish that the advertising organization calculates equivalency in the same manner as USCIS pursuant to the relevant regulations.<sup>14</sup> Moreover, the

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<http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed August 26, 2013). No explanation for this designation was provided by the petitioner or counsel.

<sup>14</sup> In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

posting from [REDACTED] for a localization project manager indicates that the advertising organization will accept "4 years of relevant experience" in lieu of a "BA/BS" degree. Similarly, the posting from [REDACTED] for a "QA Project Lead, Localization," requires a "BA or BS in Computer Science or Entertainment related area, or *equivalent interactive industry experience* (emphasis added)."

Further, some of the postings do not indicate that a specific specialty is required. The posting from [REDACTED] requires a "Bachelor's Degree," and the posting from [REDACTED] indicates that a "BA or BSc Degree" is required. 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 bachelor's degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

Moreover, as the petitioner has failed to adequately establish the duties of the proffered position, the AAO is unable to ascertain what duties render another position "parallel" to the proffered position. Further, none of the advertisements contain sufficient information regarding the advertising organizations such that the AAO can conduct a legitimate comparison of the organizations to the petitioner. Two of the postings are devoid of information regarding the advertising organizations, including the names of the companies offering the positions. 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.

The AAO observes that even if all of the job postings indicated that a requirement of bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations (which they do not), 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 organizations.<sup>15</sup> *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995).

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- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
  - (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
  - (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
  - (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
  - (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

<sup>15</sup> According to the *Handbook's* detailed statistics on Interpreters and Translators, there were approximately

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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").

Thus, even if the job announcements supported the finding that the position required a bachelor's or higher degree in a specific specialty, or its equivalent, for organizations that are similar to the petitioner, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty (or its equivalent) for entry into the occupation in the United States.

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 at least a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions to the proffered position, among similar organizations to the petitioner.

The documents provided do not establish that a requirement of a bachelor's degree (or higher) in a specific specialty, or its equivalent, is common to the industry for positions that are (1) parallel to the proffered position; and, (2) located in organizations 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.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner and counsel submitted various documents, including documents appearing to relate to the petitioner's business operations. For instance, the petitioner and counsel provided documentation identified as "Beneficiary's Sample Technical Materials," "List of Textual Types," and "Sample Localization Flow"; business license tax receipt; pages 12 and 13 of what appear to be financial statements; a brochure about the petitioner; a list of the petitioner's projects in North America; e-mails correspondence from and to the beneficiary; documents regarding the petitioner's other employees; and printouts of the petitioner's website. On appeal, counsel provided further evidence

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58,400 persons employed in this occupation in 2010. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Interpreters and Translators, on the Internet at <http://www.bls.gov/ooh/Media-and-Communication/Interpreters-and-translators.htm#tab-6> (last visited August 26, 2013).

regarding the petitioner's other employees and two similarly worded industry letters. The AAO reviewed the record of proceeding in its entirety. However, upon review of the record, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of accountant.

A review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. The petitioner has not established that the duties of the proffered position require at least a baccalaureate degree in a specific specialty, or its equivalent. Furthermore, the petitioner has not established why a few related courses or industry experience alone is insufficient preparation for the proffered position. Additionally, the AAO finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition.

More specifically, the LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For 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."<sup>16</sup>

The petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or is equivalent. Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position. Specifically, the petitioner fails to demonstrate how the duties of the 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 it may believe are so complex and unique. While a

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<sup>16</sup> For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf)

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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. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background, her language skills, and her prior experience working for the petitioner will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner fails to demonstrate 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. Consequently, 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 in a specific specialty, or its equivalent, for the position. To this end, 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 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. Upon review of the record of proceeding, the petitioner has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

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

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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.

The petitioner stated in the Form I-129 petition that it has 26 employees and that it was established in 2003 (approximately nine years prior to the H-1B submission). In a letter dated September 18, 2012, Counsel claimed that the petitioner "has a past practice of hiring persons with a bachelor's degree, or higher, in a special specialty to perform the duties of the proffered position." Counsel stated that [REDACTED] have served as project coordinators for the petitioner. In support of this assertion, counsel provided business cards, resumes, and a Form I-797 (Notice of Action) regarding an H-1B petition on behalf of [REDACTED]<sup>7</sup> On appeal, counsel provided payroll documents and copies of diplomas for [REDACTED] as well as a 2011 Form W-2, Wage and Tax Statement, for [REDACTED]

The AAO observes that petitioner failed to provide the job duties and day-to-day responsibilities of the positions that counsel claims are the same as the proffered position. The petitioner did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, aside from job title, it is unclear whether the duties and responsibilities of these individuals were the same or related to the proffered position. Moreover, the documentation indicates that wages paid to Mr. [REDACTED] are significantly higher than the offered salary to the beneficiary. Thus, it appears that Mr. [REDACTED] may serve in a different or more senior position. Furthermore, the petitioner did not provide the total number of people it has employed to serve in the proffered position. Consequently, it

<sup>17</sup> The AAO notes that only [REDACTED] resume indicates that he has worked for the petitioner. Notably, the duties, as described by Mr. [REDACTED] are not indicative of a position whose performance would require the theoretical and practical application of at least a bachelor's degree level of knowledge in specific specialty. Rather, they relate generic functions for which the particular level of knowledge to be applied is not self-evident.

cannot be determined how representative counsel's claim regarding *three individuals over a nine-year period* is of the petitioner's normal recruiting and hiring practices.

Additionally, the AAO again notes that the petitioner has not stated that a bachelor's degree in a specific specialty is required to perform the duties of the proffered position. Rather, the petitioner's represented that the requirements of the proffered position are limited to "Japanese fluency in all the four fields—speak, listen, read, and write at the business letter," and "[full and functional] fluen[cy] in both English and Japanese."

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

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

The AAO acknowledges that the petitioner may believe that the nature of the specific duties of the position in the context of its business operations 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. The AAO reviewed the evidence, including the documents appearing to relate to the petitioner's business operations (documents identified as "Beneficiary's Sample Technical Materials," "List of Textual Types," and "Sample Localization Flow"; business license tax receipt; pages 12 and 13 of what appear to be financial statements; a brochure about the petitioner; a list of the petitioner's projects in North America; e-mails correspondence from and to the beneficiary; documents regarding the petitioner's other employees; and printouts of the petitioner's website). The AAO finds that the petitioner's statements and the submitted documentation fail to support the assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, the AAO also reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." 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 significantly higher prevailing wage. For instance, as previously mentioned, 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 this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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, 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.