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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: DEC 0 2 2013 OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on June 5, 2012. In the Form I-129 visa petition, the petitioner describes itself as an enterprise engaged in athletic and martial arts training, that was established in 1984.[1] In order to employ the beneficiary in what it designates as an athletic trainer (taekwondo) position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on December 26, 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. The director further found that the petitioner failed to establish that the beneficiary qualifies for the proffered position. On appeal, counsel asserts that the director's bases for denial of the petition were erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's requests for evidence (RFE) dated June 12, 2012 and September 21, 2012; (3) the petitioner's response to the RFEs; (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 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. The petition will be denied.

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as an athletic trainer (taekwondo) to work on a full-time basis for $26,330 per year. In a letter dated June 4, 2012, the petitioner provided the following description of the duties of the proffered position:

> In the professional capacity of Athletic Trainer (Taekwondo) [the beneficiary] will be responsible for planning, implementing and reviewing daily training in different levels of Taekwondo and related athletic activities for [the] Taekwondo school. [The beneficiary] will plan and implement/teach separate training/athletic sessions for children/juniors, seniors and master (typically age 35+), competitors and recreational athletes in order to provide them with level, age, and goal-specific suitable Taekwondo and related athletic training program. To accomplish this he will evaluate each individual athlete/trainee to establish his/her level of current physical fitness, inquire about any medical conditions that may be relevant to the training the athlete/trainee is about to receive and learn about their desired training goals (e.g.

[1] The petitioner indicated that it was incorporated in 1997.

general physical fitness, relaxation, or competitive aspirations). He will also design special athletic/training programs for children aimed at making the training fun, safe and children friendly, while still ensuring desired pace of learning, and acquisition of positive qualities of athletic training such as motor skills, fitness, discipline and self-confidence. Additionally, [the beneficiary] will provide detailed technical and athletic instruction pertaining to various Taekwondo and related techniques and will explain technical and physical requirements for various levels of Taekwondo testing and progress. Furthermore, he will participate in club development planning sessions and will prepare individualized progress reports on each athlete/trainee to be presented to the athlete/trainee and/or his/her (in case of minors) parents.
Approximate percentage of time spent on these duties 65%

In cases where an athlete/trainee has an injury, [the beneficiary] will collaborate with the athlete's physician to coordinate recovery and rehabilitation process and activities and will conduct periodic evaluation of the athlete's athletic abilities which he will then report to the physician in order to continue coordination and/or modification of the athlete's recovery process. During the training and/or competition practices he will apply to athlete's ankles, fingers[,] wrists, and head protective or injury preventing aids and devices such as athlete's tape, shin and body protectors, braces and bondages. In case of an athletic injury during training or competition, he will conduct initial assessment of the injury to provide first response emergency care and will then ensure that athlete is examined, as soon as possible, by a physician. Finally, [the beneficiary] will also travel with athletes to sporting events and provide them with athletic and coaching guidance and support.
Approximate percentage of time spent on these duties 30%

Miscellaneous related duties
Approximate percentage of time spent on these duties 5%

(Emphasis in the original).

Further, the petitioner stated that "the position (and our company) requires that the incumbent has at a minimum a Bachelor's degree in a related field (i.e. Physical Education or closely related)." The petitioner did not claim any further requirements for the proffered position. The petitioner continued by stating that "[the beneficiary], who has a Bachelor's Degree in Physical Education, clearly satisfies the position requirements."

In support of the Form I-129, the petitioner submitted documents regarding its business operations, including the following:

- An unsigned 2011 U.S. Income Tax Return for an S Corporation;
- Oklahoma Small Business Corporation Income Tax Return;
- Certificate of Incorporation dated April 29, 1997;
- Deed for the business;
- Photographs of the petitioner's premises; and

- Printouts from the petitioner's website.

The petitioner also submitted documents regarding the beneficiary's credentials, including the following:

- Evaluation of Academics from which states that the beneficiary has the U.S. equivalent of a bachelor's degree in Physical Education;
- Certificate of Graduation and academic transcript from in South Korea, indicating that the beneficiary received a Bachelor of Physical Education in Taekwondo on February 18, 2011;
- Certificate of Taekwondo Poom/Dan Registration from which states that the beneficiary has 5th Dan as of August 28, 2009;
- Certificate of Qualification issued from that states that the beneficiary completed the qualification test for Taekwondo instructor;
- Certificate from which states that the beneficiary participated as a coach in seminar and "could teach more than 100 Slovak participants from kids to National team members";
- Referee Certification stating that the beneficiary has completed the referee qualification test; and
- Certificates of award and championship recognizing the beneficiary's achievement.

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 of "Athletic Trainers" – SOC (ONET/OES Code) 29-9091.[2] The petitioner designated the proffered position as a Level I (entry) position.[3]

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[2] The occupational category "Athletic Trainers" – SOC (ONET/OES Code) 29-9091 falls under the major occupational group 29-0000 which is designated for "Healthcare Practitioners and Technical Occupations."

It must be noted that, where a petitioner seeks to employ a beneficiary in two distinct occupations, it may be appropriate for the petitioner to file two separate petitions, requesting concurrent, part-time employment for each occupation. If a petitioner does not file two separate petitions and if only one aspect of a combined position qualifies as a specialty occupation, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. *See generally* 8 C.F.R. § 214.2(h). Furthermore, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation, such as the provision of certified LCAs for each occupation and the payment of wages commensurate with the hours worked in each occupation. Thus, filing separate petitions may help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion for the petitioner with regard to the proper classification of the position being offered.

[3] The "Prevailing Wage Determination Policy Guidance" issued by the U.S. Department of Labor (DOL) provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 12, 2012. The director noted that the petitioner did not submit sufficient documentation to support the conclusion that the proffered position qualifies as a specialty occupation. The director outlined the specific evidence to be submitted.

Counsel for the petitioner responded to the RFE by submitting several documents, including (1) a letter from (2) letters from business owners and operators of Taekwondo gyms/schools; (3) a letter from Young- (4) a letter issued by Administrative Director of ; and (5) a letter signed by members of the petitioner's association.

On September 21, 2012, the director issued a second RFE. The director noted that Chapter 25 of Title 435 of the Oklahoma Administrative Code requires a license for the employment of athletic trainers, and requested evidence that the beneficiary has the required license. Further, the director also found that the majority of the proposed duties are similar to that of a fitness trainer, which is not a specialty occupation. The director noted that the letters from owners/operators of Taekwondo centers specify that they "hire personnel under the title "Korean Taekwondo and Fitness Instructor." The director requested evidence to establish that the proffered position qualifies as a specialty occupation.

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

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.

Thus, upon review of the assertions regarding the proffered position, the AAO must question the level of complexity, independent judgment and understanding that are actually needed for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties, responsibilities and requirements as described in the record of proceeding conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the same occupation. In accordance with the relevant DOL explanatory information on wage levels, a Level I wage rate indicates that in comparison to other athletic trainer positions, the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. Furthermore, a Level I designation is appropriate for a position as a research fellow, a worker in training, or an internship.

Counsel for the petitioner responded to the RFE on December 17, 2012, and provided additional documents in support of the H-1B petition. The submission included (1) a letter from Associate Professor, Division of Physical Education and Dance, at the (2) a letter from Director of Licensing at the Board of and (3) a letter from Economic Development Specialist, at the

The director reviewed the record of proceeding, and determined that the petitioner failed to establish eligibility for the benefit sought. Thus, on December 26, 2012, the director denied the petition.[4] Counsel submitted an appeal of the denial of the H-1B petition.

Upon review of the record of proceeding, the AAO notes that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

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, U.S. Citizenship and Immigration Services (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, 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 H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or the equivalent, to perform the duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

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[4] The director noted that the majority of the duties of the position involve instructing and teaching Taekwondo, rather than the duties of a position falling under the occupational category "Athletic Trainers." Further, the director found that even assuming *arguendo* that the proffered position is an athletic trainer position, the beneficiary does not qualify for the position since he (1) does not have a license to be an athletic trainer; and (2) lacks sufficient credentials to qualify as an athletic trainer.

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.

The petitioner and its counsel repeatedly claim that the proffered position falls under the occupational category "Athletic Trainers." Further, the title of the proffered position, as stated by the petitioner in the Form I-129 petition, LCA, and letter of support is "Athletic Trainer (Taekwondo)." The petitioner submitted opinion letters in support of the assertion that the proffered position is an athletic trainer position. In response to the RFE and in the appeal, counsel asserts that a license is not required for the proffered position. However, upon review of the Oklahoma Athletic Trainers Act, the AAO is not persuaded by counsel's assertion.

The record of proceeding indicates that a necessary attribute of the proffered "Athletic Trainer (Taekwondo)" position is that, through the job title, the beneficiary would be represented as providing and rendering services as an athletic trainer.[5] In the Form I-129 petition and supporting documents, the petitioner stated that the beneficiary will be employed in the State of Oklahoma.

The Oklahoma Athletic Trainers Act reserves the use of the term "athletic trainer" and the legal right to use the term. More specifically, it indicates the following:

> No person shall hold himself or herself out as an athletic trainer without first being licensed under the provisions of this act.

Section 527 of the Oklahoma Athletic Trainers Act. Thus, it is a violation for a person to use a designation indicating that he or she is an athletic trainer unless the individual has been granted licensure under the provisions of the act. *Id.* The Oklahoma Athletic Trainers Act also states the requirements to be eligible for licensure, as follows:

> A. An applicant to be eligible for an athletic trainer license must meet one of the following qualifications:
>
> 1. Has successfully completed the athletic training curriculum requirements of an accredited college or university approved by the Board and provide proof of graduation;
>
> 2. Be licensed or certified in physical therapy and has spent at least eight hundred (800) hours working under the direct supervision of a licensed athletic trainer; or

[5] The petitioner does not claim, nor did it provide any evidence to suggest, that the beneficiary possesses a license as an athletic trainer in any state or territory of the United States.

3. Holds a four-year degree from an accredited college or university and has completed at least two (2) consecutive years of supervision, military duty excepted, as an apprentice athletic trainer under the direct supervision of a licensed athletic trainer.

B. An applicant for an athletic trainer license shall submit an application to the Board and submit the required examination fee. The applicant is entitled to an athletic trainer license if he is qualified as provided in subsection A of this section, satisfactorily completes the examination administered by the Board, pays the applicable license fee, and has not committed an act which constitutes ground for denial of a license under Section 8 of this act.

Section 530 of the Oklahoma Athletic Trainers Act.

The following information is provided regarding violations and penalties:

Violation of any provision of this act shall be a misdemeanor and conviction shall be punishable by a fine of not less than Twenty-five Dollars ($25.00) nor more than Two Hundred Dollars ($200.00).

Section 533 of the Oklahoma Athletic Trainers Act. Accordingly, a violation resulting in a conviction is a misdemeanor and will result in a fine. *Id.*

The record of proceeding indicates that a necessary attribute of the proffered "Athletic Trainer (Taekwondo)" position is that the beneficiary would be represented as being an athletic trainer through the job title. Thus, in accordance with the Oklahoma Athletic Trainers Act, the beneficiary must be licensed as an athletic trainer in order to represent himself as serving in the petitioner's "Athletic Trainer (Taekwondo)" position.[6]

On appeal, counsel references "letters from the Oklahoma State Board of Medical Licensure and the Oklahoma Department of Commerce, both organizations charged with the licensing of professionals

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[6] The Commission on Accreditation of Athletic Training Education (CAATE) website emphasizes the importance of "ensuring safe and effective patient care by developing, maintaining, and promoting appropriate minimum education standards for quality athletic training programs." The website indicates that the accreditation standards are to "protect the public and ensure that the practice of athletic training is ONLY performed by Athletic Trainers (AT) credentialed by state regulatory agencies or students enrolled in accredited professional programs who are appropriately supervised by state credentialed ATs." It continues by stating that individuals have a responsibility to report the unregulated practice of athletic training to the appropriate regulatory authorities, and that suspected violations should be reported to the CAATE, and that all reports will be investigated by the CAATE and reported to the appropriate state regulatory agencies for further investigation *See* Commission on Accreditation of Athletic Training Education, Strategic Alliance Releases Statement: Legal and Ethical Responsibility to Report Unregulated Practice, at http://www.caate.net/ (last visited on December 2, 2013).

(when applicable)." Counsel claims that "[b]oth of these agencies confirmed that a license is not required to perform the duties of the subject job offered."

The AAO reviewed both of the letters, and notes that the letter from the State of Oklahoma's Board of Medical Licensure and Supervision (dated December 7, 2012) states that it "does not regulate or license Tae Kwon Do instructors or personal instructors." The letter from the Oklahoma Department of Commerce (dated December 6, 2012) states the following:

> This letter is in response to your request to our agency for assistance. Your inquiry is whether a person hired in Oklahoma to provide Taekwondo (martial arts) training to the general public is required to have a state license.
>
> States across the U.S. may have different requirements. However, to the best of our knowledge, in Oklahoma, a person providing Taekwondo training or instruction is not required to have a license to do so.

Upon review of the letters, there is insufficient evidence to establish that the petitioner notified the State of Oklahoma's Board of Medical Licensure and Supervision and the Oklahoma Department of Commerce that the job title for the proffered position is "Athletic Trainer (Taekwondo)" and that the petitioner claims that the duties and responsibilities of the proffered position fall under the occupational category "Athletic Trainers." There is no indication that the job title and duties of the proffered position as presented to USCIS were provided to the organizations.[7] Rather, it appears that the petitioner's inquiries to the organizations were limited to whether "Tae Kwon Do instructors or personal instructors" require licensure and whether an individual who "provide[s] Taekwondo (martial arts) training to the general public" is required to possess a license.[8]

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[7] For instance, the letters do not address the fact that the petitioner has designated the proffered position as an "athletic trainer," and that the legal right to use the term is reserved in the State of Oklahoma for persons who are licensed under the provisions of the Oklahoma Athletic Trainers Act. *See* sections 526 and 527 of the Oklahoma Athletic Trainers Act. Without this information, the petitioner has not demonstrated that organizations possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine any licensure requirements.

[8] The petitioner and counsel also submitted letters from organizations that counsel claims are "similarly situated." The letters refer to "Korean taekwondo and fitness instructors" rather than athletic trainers. It must be noted that the letters do not contain sufficient information regarding the day-to-day duties, complexity of the job duties, supervisory duties (if any), independent judgment required, or the amount of supervision received within the context of the employers' business operations to make a legitimate comparison of the positions to the proffered position. Further, the inclusion of the letters and their claimed relevancy to the instant matter suggests that the proffered position is that of a "Korean taekwondo and fitness instructor" rather than an athletic trainer. The writers state the requirements for their positions, but do not address the licensure requirement for athletic trainers in the State of Oklahoma.

Moreover, portions of the letters contain identical language to each other, including grammatical and punctuation errors. When affidavits are worded the same (and include identical errors), it indicates that the words are not necessarily those of the affiant and may cast some doubt on the validity of the affidavit.

Neither of the letters addresses the instant circumstances, specifically, in which the petitioner wishes to employ an individual who will hold himself out as an athletic trainer and who (according to the petitioner and counsel) will render services falling under this occupation.[9] The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

Fundamentally, it appears that (1) the petitioner claimed to the State of Oklahoma's Board of Medical Licensure and Supervision and the Oklahoma Department of Commerce that the proffered position is a Taekwondo instructor/trainer position; and (2) the petitioner stated to USCIS that the position is an athletic trainer in order to fortify its assertion that the position qualifies as a specialty occupation. The AAO finds that, fully considered in the context of the entire record of proceeding, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, the AAO observes another aspect of the petition that raises questions with regard to the duties and responsibilities of the proffered position. More specifically, in the Form I-129, the petitioner indicated that it was established in 1984 and currently has one employee.[10] Although specifically requested on the Form I-129, the petitioner failed to provide its gross annual income and net annual income.[11] No explanation was provided for failing to include the information on the Form I-129 as requested. The petitioner submitted an unsigned copy of its tax return, which indicates that it did not pay any salaries and wages (line 8) in 2011. The tax return indicates that the compensation of its officer was $24,000 (line 7). Thus, the beneficiary's proposed salary is approximately $2,300 more than the amount of compensation paid to the petitioner's officer.

It is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a

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[9] The AAO observes that in the RFE dated September 21, 2012, the director notified the petitioner that a substantial number of the proposed duties are similar to that of a fitness instructor, for which the *Handbook* indicates that a "high school diploma or the equivalent is required." In response, counsel asserted that the RFE "contains **erroneous**, subjective and unfounded assertion that the offered position is (should be as per US CIS) classified under the O[*]NET Code of Fitness Trainer and not Athletic Trainer as listed on the certified LCA, described in the Petitioner's support letter . . . ."

[10] From the information provided by the petitioner, it appears that its one employee is the president/owner.

[11] The petitioner submitted a copy of its 2011 U.S. Income Tax Return for an S Corporation, which indicates that the gross income for 2011 was $163,052 and the net income was $35,826. The total assets were $13,548.

petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's business is relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in a specific specialty, or its equivalent. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties. In the instant case, the petitioner claims (on the Form I-129) to have one employee, however, the record of proceeding does not contain a job description for the petitioner's other employee. The petitioner and counsel did not address or provide probative documentation as to how the beneficiary would be relieved from performing non-qualifying duties. Thus, the record of proceeding does not sufficiently establish the nature of the proffered position and in what capacity the beneficiary would actually be employed.

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)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 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.

Based upon a complete review of the record of proceeding, the AAO finds that the petitioner has failed to establish (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty. There are inconsistencies with regard to the proffered position that preclude a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

That is, 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 is a specialty occupation under 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 entry into 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. Thus, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the applicable provisions. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

Section 214(i)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(2)(A), states that an alien applying for classification as an H-1B nonimmigrant worker must possess "full state licensure to practice in the occupation, if such licensure is required to practice in the occupation." According to the Oklahoma Athletic Trainers Act, an individual may not hold himself or herself out as an athletic trainer without first being licensed under the provisions of the act. Section 527 of the Oklahoma Athletic Trainers Act.

Pursuant to the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A), where, as here, a state or local license is required for an individual to fully perform the duties of an occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that credential prior to approval of the petition. The regulation states:

> *General.* If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the

> petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

8 C.F.R. § 214.2(h)(4)(v)(A). There are regulatory exceptions for situations where a jurisdiction allows for temporary but full performance of duties pending the award of a full license. The regulation at 8 C.F.R. § 214.2(h)(4)(v)(B) addresses situations where the beneficiary has been issued temporary licensure. It states:

> *Temporary licensure.* If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

As the petitioner has not indicated, or provided any evidence, to suggest that a temporary license is available to the beneficiary, this provision is not relevant to the appeal.

The AAO acknowledges the USCIS policy of provisionally approving H-1B petitions for a one-year period where the only impediment to required licensure is the overseas alien beneficiary's lack of a social security number, *see* Memorandum from Thomas E. Cook, Acting Assistant Commissioner, INS Office of Adjudications, *Social Security Cards and the Adjudication of H-1B Petitions,* HQ 70/6.2.8 (November 20, 2001) (hereinafter referred to as the Cook Memo). The Cook Memo's continuing applicability is acknowledged in the Memorandum from Donald Neufeld, Deputy Associate Director, Domestic Operations, *Adjudicator's Field Manual Update: Accepting and Adjudicating H-1B Petitions When a Required License Is Not Available Due to State Licensing Requirements Mandating Possession of a Valid Immigration Document as Evidence of Employment Authorization,* HQISD 70/6.2.8 (March 21, 2008) (hereinafter referred to as the Neufeld Memo). The Neufeld Memo amends the *Adjudicator's Field Manual (AFM)* to instruct adjudicators to approve an H-1B petition for a one-year validity period if the object of the petition is a specialty occupation that requires licensure and the beneficiary has met all of the licensing jurisdiction licensure requirements except USCIS approval of the H-1B petition.

As is evident from the following excerpts from the Cook and the Neufeld Memos, USCIS allows for provisional approval of a petition for a one-year period, in order to allow a beneficiary to travel to the United States to obtain licensure, in the very limited circumstances where the beneficiary has met all of the pertinent State's licensure requirements except possession of a social security number or possession of a valid immigration document to establish his or her authorization to work in the United States. The Cook Memo states, in part:

> Certain states require that an H-1B nonimmigrant be issued a social security card before the state or local licensing authority will issue a professional license to the alien to work in that jurisdiction. According to the regulations of the Social Security Administration (SSA), an H-1B alien is not able to obtain a social security card unless they [sic] are physically present in the United States. Some H-1B petitions in

> these cases have been denied because the alien beneficiary has not yet received his or her license.
>
> Most recently, this issue has arisen regarding the adjudication of H-1B petitions filed for certain public high school teachers. In the case of the teachers, the Immigration and Naturalization Service (INS) has been receiving H-1B petitions filed on behalf of public school teachers that are not supported by the required license. The teachers are unable to obtain licensure solely because they cannot obtain a social security card because they are not physically present in the United States.
>
> In order to avoid this situation and accommodate the needs of H-1B petitioners, INS [now USCIS] officers involved in the adjudication of H-1B petitions are instructed to use the following guidance. An H-1B petition filed on behalf of an alien beneficiary who does not have a valid state license shall be approved for a period of 1-year provided that the only obstacle to obtaining state licensure is the fact that the alien cannot obtain a social security card from the SSA. Petitions filed for these aliens must contain evidence from the state licensing board clearly stating that the only obstacle to the issuance of state licensure is the lack of a social security card. In addition, the petitioner must establish that all other regulatory and statutory requirements for the occupation have been met. At the time an extension application is filed by the alien, the adjudicator should determine that the required license was obtained. If it has not been obtained at that time the application should be denied.

The Neufeld Memo amends the *Adjudicator's Field Manual (AFM)* to instruct adjudicators to approve an H-1B petition for a one-year validity period if the object of the petition is a specialty occupation that requires licensure and the beneficiary has met all of the licensing jurisdiction licensure requirements except USCIS approval of the H-1B petition. The Neufeld Memo states, in part:

> This AFM update instructs adjudicators to approve an H-1B petition for a **one-year** validity period if a State or local license to engage in the profession is required and the appropriate licensing authority will not grant such license to an alien absent evidence that the alien has been granted H-1B status. As a condition to approving such a petition, the alien must demonstrate that he or she has filed an application for such license in accordance with State or local rules and procedures. Further, prior to approving an H-1B petition under such circumstances, adjudicators should verify that the alien beneficiary is fully qualified to receive the State or local license, meaning that all educational, training, experience, and other substantive requirements must be met (where appropriate, the adjudicator may issue a request for evidence). It should be noted that the approval of any such H-1B petition shall not constitute approval by USCIS for the alien beneficiary to engage in any activity requiring possession of such State or local license. Any petition that requests an extension of stay on behalf of an alien who has been granted H-1B status under this provisional measure must show that the alien has obtained the requisite license. If

> the alien has not obtained the requite license at the time the petition and extension are filed, such petition will be denied.

In this matter, however, the record of proceedings fails to establish that a lack of a social security number or a valid immigration document is the only impediment to the beneficiary attaining the licensure required to practice as an athletic trainer in the State of Oklahoma. Thus, upon review of the record of proceeding, the AAO finds that the petitioner (1) has not demonstrated that the beneficiary is licensed to perform the duties of the job offered or is exempt from the requirement; or (2) submitted sufficient evidence to demonstrate that a license is not required for the petitioner's proffered position.[12] The petitioner has not established eligibility for the requested benefit under Section 214(i)(2)(A) of the Act. Therefore, the appeal must also be dismissed for this reason.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.[13] 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.

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[12] The AAO does not need to examine the issue of the beneficiary's qualifications further, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position qualifies as a specialty occupation.

[13] As the grounds discussed above are dispositive of the petitioner's eligibility for the benefit sought in this matter, the AAO will not address and will instead reserve its determination on the additional issues and deficiencies that it observes in the record of proceeding with regard to the approval of the H-1B petition.