



U.S. Citizenship
and Immigration
Services

(b)(6)

[REDACTED]

DATE: **JUN 27 2013** OFFICE: VERMONT SERVICE CENTER [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a martial arts academy¹ established in 1999. In order to employ the beneficiary in what it designates as a Master Teacher position,² 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 the basis of his determination that the petitioner failed to demonstrate that the proffered position qualifies for classification as a specialty occupation.

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

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will remain denied.

The AAO will now address its determination that the evidence in the record of proceeding fails to establish that the proffered position is a specialty occupation.

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

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

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

¹ The petitioner provided an North American Industry Classification System (NAICS) Code of 711210. U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, NAICS Definition, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last searched Apr. 19, 2013).

² The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 39-9031, the associated Occupational Classification of "Fitness Trainers and Aerobics Instructors," and a Level III (experienced) prevailing wage rate.

The term “specialty occupation” is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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

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

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

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

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *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 rely simply upon a proffered position’s title. The specific duties of the position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. USCIS must examine the ultimate employment of the beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 384. The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In its January 12, 2012 letter of support, the petitioner claimed that the duties of the proffered position would include the following tasks:

- Using the petitioner’s established martial arts curriculum to teach taekwondo to beginning- to advanced-level students;
- Lecturing and demonstrating the principles, techniques, methods, and discipline of the martial arts;
- Developing and implementing a teaching curriculum for assigned clubs and classes in compliance with overall company guidelines;
- Developing and instituting student class schedules based on enrollment levels, age groups, and belt levels;
- Observing students while they practice in order to detect and correct mistakes regarding their form, position, and technique;
- Preparing students for competition;

Page 5

- Evaluating, recommending, testing, and grading students for belt promotion;
- Approving students for promotion to the next belt level;
- Explaining and enforcing safety and behavioral rules;
- Conducting assigned camps, clinics, and seminars at all belt-level promotion testing; and
- Reporting important matters to the Grand Master.

The petitioner claimed that the proffered position can only be filled by an individual possessing: (1) a bachelor's degree, or the equivalent, in athletics, martial arts, or a related field; and (2) a fourth Dan Taekwondo degree authorized by the [REDACTED]

As a preliminary matter, the AAO finds that the letters from [REDACTED] do not establish that the proffered position is a specialty occupation or that it meets any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) enumerated above.

As noted, the petitioner listed a fourth Dan Taekwondo degree authorized by the [REDACTED] as a minimum educational requirement for the proffered position. In his March 16, 2001 letter, [REDACTED] claims to be writing "[o]n behalf of the [REDACTED] of the [REDACTED] stated, in pertinent part, the following with regard to such degree-status:

The title of Master of Taekwondo is conferred to those practitioners of Taekwondo who hold the 4th level Dan Black Belt or higher. In order to be certified as a Dan Black Belt Master or higher who will teach or coach students, the individual must have a minimum of 12 years of full-time study, training[,] and experience in addition to successfully passing the rigorous series of promotion tests . . . Further, the Master of Taekwondo must have an academic college level degree because Taekwondo is a form of physical education and the Master who teaches or coaches it is the physical educator. . . .

Thus, [REDACTED] indicates that earning a fourth Dan Taekwondo degree authorized by the [REDACTED] (which the petitioner claims is required for the proffered position) requires an individual to both: (1) study Taekwondo for a period of at least 12 years; and (2) earn a college degree.

However, [REDACTED] letter does not establish that the proffered position meets any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) enumerated above. First, the AAO notes that this letter is more than twelve years old, and finds that the petitioner has failed to establish the continued relevance of the pronouncements made therein. Even if that were not the case, [REDACTED] letter would still not establish that the proffered position is a specialty occupation because, although he states that a college degree is required, he does not state that it must come from a specific specialty.

Moreover, as will be discussed below, [REDACTED] letter conflicts with [REDACTED] letter, which diminishes the evidentiary value of both letters.

In his June 29, 2009 letter, [REDACTED] states that “individuals who qualify for the position of Master Teacher must have been granted 4th Dan status from [REDACTED] and as such, must have the equivalent to a U.S. Bachelor’s degree.” [REDACTED] elaborates as follows:

In order to have been granted a 4th degree black belt by [REDACTED] an individual must have successfully completed the requirements for the 1st degree black belt which requires at least six years of study and the successful completion of the skills required of a 1st degree black belt. To be promoted to a 2nd degree black belt, one must have successfully completed at least 1 additional year of study and successfully completed the skills test. Further, to attain a 3rd degree black belt, one must have successfully completed the minimum requirements of an additional 2 years’ study and have successfully completed the skills test. After successfully completing another 3 years’ study and successfully completing the skills test, one can attain a 4th degree black belt (4th Dan status). Thus, in order to achieve a 4th Dan black belt, from [REDACTED] one must have studied Taekwondo for a minimum of twelve years, which is equivalent to the attainment of a Bachelor’s degree.

[REDACTED] letter, therefore, conflicts with [REDACTED] letter. Although [REDACTED] agree that only an individual who holds at least a fourth-level Dan Black Belt can be a Master Teacher, their descriptions of the route to such status differ. According to [REDACTED] an individual must both: (1) study Taekwondo for a period of twelve years; and (2) earn a college degree. [REDACTED], on the other hand, does not indicate that a college degree is required in addition to those twelve years of Taekwondo study. To the contrary, he stated that those twelve years of Taekwondo study “are equivalent to the attainment of a Bachelor’s degree.” As noted above, this conflict alone diminishes the evidentiary value of both letters.

Even if this conflict were not present, the AAO would still find that [REDACTED] letter does not establish the proffered position as a specialty occupation. Again, [REDACTED] claims that the twelve required years of Taekwondo study an individual must undergo prior to becoming a Master Teacher are, in and of themselves, equivalent to a bachelor’s degree. However, he failed to explain by what objective standard this degree-equivalency was determined.

Nor does [REDACTED] June 2, 2008 letter establish the proffered position as a specialty occupation. In his letter, [REDACTED] who claims to be [REDACTED] makes assertions similar to those of [REDACTED], which also conflict with the assertions made by [REDACTED]. According to [REDACTED]

[I]n order to achieve a 4th Dan Degree Black Belt from a recognized Martial Arts/Taekwondo organization, one must have studies Martial Arts/Taekwondo for a minimum of twelve years.

As was the case with [REDACTED] indicates that a college degree is not required *in addition to* the requisite twelve years of Taekwondo training and study. Instead, he suggests that those twelve years of training and study are, in and of themselves, equivalent to a bachelor's degree. However, like [REDACTED] he also failed to explain by what objective standard this degree-equivalency was determined.³

Finally, the AAO turns to the assertions made by [REDACTED]. In his undated letter submitted on appeal, [REDACTED] states that he is the [REDACTED] and claims that he has operated more than thirty Taekwondo schools in the United States since 1971 and trained over 20,000 students. [REDACTED] states the following:

With my life[-]long experience in Taekwondo instruction, I personally get in touch with over 500 owners of Taekwondo instruction facilities in [the] USA and I can attest [that] more than 90% of them currently hires [sic] only those with at least a bachelor's degree in Taekwondo, physical education, or [a] related field. . . .⁴

* * *

There may be different levels of instructors within the job category . . . , but [a] Master Teacher of Taekwondo should be qualified with at least a Bachelor's degree in related fields.

However, the AAO finds that [REDACTED] professional status, as described by him, does not establish him as an individual with expert knowledge, or as one who has been accepted as a recognized authority, in the area in which he opines, namely, the academic requirements for performing the duties of a particular position within this occupational classification, as the petitioner submits no evidence to support any of [REDACTED] claims, regarding either: (1) his assertions regarding his own claimed experience and expertise; or (2) his assertions regarding the educational credentials required to perform the duties of the proffered position. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Finally, the AAO finds his submission superficial and conclusory, as it does not specify and discuss any studies, surveys, or other authoritative publications.

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).

³ It is worth noting that [REDACTED] do not reference the petitioner, the beneficiary, or the particular position proffered here.

⁴ It is not clear whether this pronouncement by [REDACTED] is limited to Master Teachers.

For all of these reasons, the AAO finds that the letters from [REDACTED] are not probative evidence that the petitioner has satisfied any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.⁵ As noted above, the petitioner submitted an LCA certified for the SOC (O*NET/OES) Code 39-9031 and the associated Occupational Classification of "Fitness Trainers and Aerobics Instructors."

The *Handbook* states the following with regard to the Fitness Trainers and Instructors occupational classification:

Fitness trainers and instructors lead, instruct, and motivate individuals or groups in exercise activities. . . .

Fitness trainers and instructors typically do the following:

- Demonstrate how to carry out various exercises and routines
- Watch clients do exercises and show or tell them correct techniques to minimize injury and improve fitness
- Give alternative exercises during workouts or classes for different levels of fitness and skill
- Monitor clients' progress and adapt programs as needed
- Explain and enforce safety rules and regulations on sports, recreational activities, and the use of exercise equipment

⁵ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

- Give clients information or resources about nutrition, weight control, and lifestyle issues
- Give emergency first aid if needed

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Fitness Trainers and Instructors," <http://www.bls.gov/ooh/personal-care-and-service/fitness-trainers-and-instructors.htm#tab-2> (accessed Apr. 24, 2013).

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

Almost all trainers and instructors have at least a high school diploma before entering the occupation. An increasing number of employers require fitness workers to have an associate's or bachelor's degree related to a health or fitness field, such as exercise science, kinesiology, or physical education. Programs often include courses in nutrition, exercise techniques, and group fitness.

Id. at <http://www.bls.gov/ooh/personal-care-and-service/fitness-trainers-and-instructors.htm#tab-4>.

The *Handbook*, therefore, does not support a finding that a bachelor's degree, or the equivalent, in a specific specialty, is required to perform the duties of the proffered position.

While not dispositive, the AAO notes nonetheless that the Summary Report from DOL's Occupational Information Network (O*NET OnLine) for the occupational category "Fitness Trainers and Aerobics Instructors"⁶ designates it as a "Job Zone Three" category, and that a "medium" level of preparation is necessary. According to O*Net, "[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree." See Employment & Training Administration, U.S. Dep't of Labor, O*Net OnLine, Summary Report for Fitness Trainers and Aerobics Instructors, available at <http://www.onetonline.org/link/details/39-9031> (accessed Apr. 24, 2013).

According to O*Net OnLine, 25 percent of respondents reported possessing a bachelor's degree, 21 percent reported having completed some college coursework, but not attaining a degree, and 17 percent reported possessing a high school diploma or the equivalent. See *id.* These findings from O*Net OnLine do not support a finding that a bachelor's degree, or the equivalent, in a specific specialty is normally required to perform the duties of this position.⁷

⁶ Again, this was the occupational category selected by the petitioner on the LCA as best corresponding to the proffered position.

⁷ The relatively low educational requirements for the O*Net occupational category selected by the petitioner on the LCA as best corresponding to the proffered position elevates the importance of the wage-level designation selected by the petitioner on the LCA. As noted above, the LCA submitted by the petitioner was certified for a Level III (experienced) wage-level. The *Prevailing Wage Determination Policy Guidance*

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

(available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf (last accessed Apr. 24, 2013)) issued by DOL states the following with regard to Level III wage rates:

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

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

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

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

As indicated, a Level III wage-level designation is not the highest-possible wage-level designation. Pursuant to the DOL's guidance, such a wage-level designation should be considered when an employer requires "years of experience or educational degrees that are at the higher ranges indicated in the O*Net Job Zones." For the occupational category selected by the petitioner on the LCA, the "higher ranges indicated in the O*Net Job Zones" would be an associate's degree. See Employment & Training Administration at <http://www.onetonline.org/link/details/39-9031>. The wage-level designation selected by the petitioner – Level III which, again, is not the highest possible skill level – for the proffered position indicates that the proffered position does not fall within the highest reaches of the occupational category. Given that the highest-level range indicated by O*Net OnLine for this occupational category is an associate's degree, the petitioner's indication that the proffered position falls below that threshold indicates that a bachelor's degree in a specific specialty, or the equivalent, is not required. To the contrary, it indicates, at best, a requirement for an associate's degree.

Given the petitioner's multiple assertions regarding the necessity of a bachelor's degree for the proffered position – which exceeds the higher ranges indicated by O*Net – it is unclear why the petitioner did not select a Level IV (fully competent) wage-level on the LCA.

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common 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 at 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. As evidence of such an industry-wide standard, the petitioner submits letters from [REDACTED]. However these letters do not 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 his August 31, 2012 letter, [REDACTED] states that he currently employs two martial arts instructors, and that both of them possess bachelor's degrees in related areas. However, this letter does not satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the record contains no evidence to demonstrate that [REDACTED] enterprise is "similar" to the petitioner in terms of size, scope, and scale of operations, student composition, or other fundamental dimensions. Nor does [REDACTED] submit evidence to establish that the martial arts instructor positions he references are "parallel" to the Taekwondo Master Teacher position proffered here.⁸ Nor does the record contain evidence documenting his assertion that his company actually employs the two individuals whose credentials he submits. As noted above, 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 at 165. Finally, it is noted that the record contains no objective evidence to establish that these two individuals' foreign degrees are equivalent to bachelor's degrees in a specific specialty, or the equivalent, from a United States institution of higher education.

⁸ For example, [REDACTED] did not indicate whether he requires his employees to have been granted a fourth-degree Dan Black Belt authorized by the [REDACTED]

Page 12

In his August 20, 2012 letter, [REDACTED] states that he has employed a Master Martial Arts Teacher since December 28, 2011, and submits evidence indicating she earned a bachelor's degree in South Korea. However, this letter does not satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), either. As with the submission from [REDACTED], the record contains no evidence to demonstrate that [REDACTED] enterprise is "similar" to the petitioner in terms of size, scope, and scale of operations, student composition, or other fundamental dimensions. Nor does [REDACTED] submit evidence to establish that the position he references is "parallel" to the one proffered here.⁹ Nor does the record contain evidence documenting his assertion that his company actually employs the individual whose credentials he submits. Again, 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 at 165. Finally, it is noted that the record contains no objective evidence to establish that this individual's foreign degree is equivalent to bachelor's degrees in a specific specialty, or the equivalent, from a United States institution of higher education.

In his September 4, 2012 letter, [REDACTED] states that he currently employs a full-time Master Teacher. However, this letter does not satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), either. As with the submissions from [REDACTED] the record contains no evidence to demonstrate that [REDACTED] establishment is "similar" to the petitioner in terms of size, scope, and scale of operations, student composition, or other fundamental dimensions. Nor does [REDACTED] submit evidence to establish that the position he references is "parallel" to the one proffered here.¹⁰ Nor does [REDACTED] submit any evidence regarding the qualifications of the individual he claims to employ as a Master Teacher.¹¹ Once again, 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 at 165.

As the record of proceeding contains no other evidence regarding an industry-wide requirement for at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

⁹ [REDACTED] did not indicate whether he requires his employees to have been granted a fourth-degree Dan Black Belt authorized by the [REDACTED], either.

¹⁰ [REDACTED] did not indicate whether he requires his employees to have been granted a fourth-degree Dan Black Belt authorized by the [REDACTED], either.

¹¹ Although [REDACTED] submits information regarding the credentials of two individuals, neither of them is the individual identified in his letter as the one he currently employs as a Master Teacher. In his letter, [REDACTED] states that he has employed [REDACTED] as a Master Teacher since January 18, 2012. However, the record contains no information regarding this individual's credentials. Instead, attached to [REDACTED] letter are credentials relating to: (1) [REDACTED] and (2) an individual identified only as [REDACTED].

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that “an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree.”

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary would perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor’s degree, or the equivalent, in a specific specialty. The general information contained in the *Handbook* regarding the educational qualifications necessary to enter the occupational classification selected by the petitioner on the LCA does not indicate that a bachelor’s degree, or the equivalent, is normally required for entry into it. Nor, as discussed above, does the evidence submitted by the petitioner regarding what it asserts to be similar positions establish that a bachelor’s degree, or the equivalent, is normally required, and the petitioner’s description of the duties which collectively constitute the proffered position does not establish that they surpass or exceed the duties of the positions described in the *Handbook* or in the materials submitted by the petitioner relating to so-called similar positions in terms of complexity or uniqueness.

Furthermore, with specific regard to fourth-degree Dan Black Belt status, which the petitioner claims as a prerequisite to performing the duties of the proffered position, the petitioner has not established that the requisite twelve-year period of Taekwondo study is comparable to a U.S. bachelor’s degree in a specific specialty.

Finally, the AAO notes again that both the occupational category and wage-level designation made by the petitioner on the LCA indicate a requirement for, at most, an associate’s degree. The LCA, therefore, further undermines any claim that the proffered position is so complex or unique that it can be performed only by an individual with a degree.

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

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

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor’s degree, or the equivalent, in a specific specialty for the position.¹²

¹² On appeal counsel argues that H-1B approvals granted to other petitioners for similar positions mandate approval of the petition under this criterion. However, the inquiry under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) is not whether *other employers* normally require a bachelor’s degree, or the equivalent, in a specific specialty for the position, but whether the *petitioner* has such a requirement.

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

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. The record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* § 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 at 387. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proposed position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United 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.

As evidence of eligibility under this criterion, the petitioner submits evidence regarding two of its employees, including information regarding their fourth-degree Dan Black Belt status and college degrees earned in South Korea. Both individuals appear to have earned college degrees in physical education in South Korea. However, the petitioner has submitted no evidence to establish that these

degrees are equivalent to degrees awarded by an accredited United States institution of higher education.¹³ This evidence, therefore, does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

As the petitioner has failed to demonstrate a history of recruiting and hiring only individuals with a bachelor's degree, or the equivalent, in a specific specialty for the proffered position, it has failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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

In reviewing the record of proceeding under this criterion, the AAO reiterates its earlier discussion regarding the *Handbook's* entry for the occupational classification "Fitness Trainers and Instructors" and O*Net's Summary Report for the occupational category "Fitness Trainers and Aerobics Instructors," which was the one selected by the petitioner as aligning best with the duties of the proffered position. Again, neither resource indicates that a bachelor's degree, or the equivalent, in a specific specialty is required to perform the duties of this position.

With specific regard to fourth-degree Dan Black Belt status, which the petitioner claims as a prerequisite to performing the duties of the proffered position, the petitioner has not established that the requisite twelve-year period of Taekwondo study is comparable to a U.S. bachelor's degree in a specific specialty.

Finally, the AAO notes again that both the occupational category and wage-level designation made by the petitioner on the LCA indicate a requirement for, at most, an associate's degree. The LCA, therefore, further undermines any claim that the duties of the proffered position are so complex or unique that they can be performed only by an individual with a degree.

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

Finally, the AAO is not persuaded by counsel's reference to prior approvals granted to other petitioners for allegedly the same position as the one being offered to the beneficiary here. First, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished service center decisions he references. Also, it is noted that while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Furthermore, if the previous nonimmigrant petitions referenced by counsel were approved based on the same description of duties and assertions that are contained in the current record, they would

¹³ One of these individuals appears to have earned a master's degree in Divinity from a United States institution of higher education. However, the petitioner has never claimed a master's degree in Divinity as a prerequisite for this position. Nor is it clear whether the institution which awarded this degree is accredited.

constitute material and gross error on the part of the director. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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

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

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