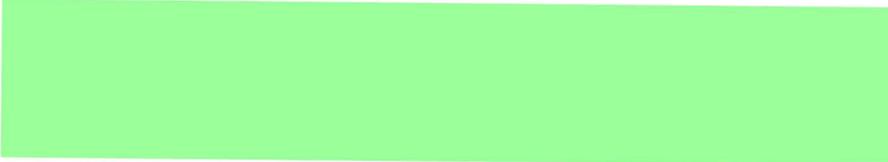
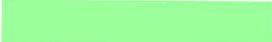


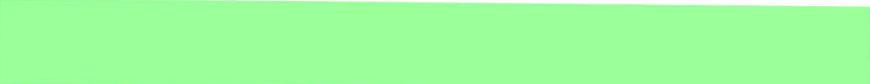
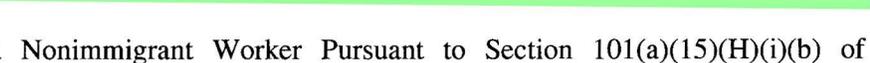


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: JUN 28 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:

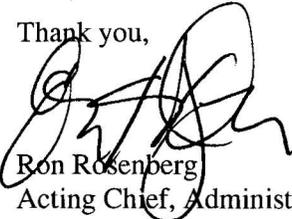


INSTRUCTIONS:

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

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

Thank you,

  
for 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 be denied.

On the Form I-129 visa petition, the petitioner describes itself as a [REDACTED] established in 2011. In order to employ the beneficiary in what it designates as a Master Teacher position,<sup>2</sup> the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of her 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 be 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 Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 713940, "Fitness and Recreational Sports Centers." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "713940 Fitness and Recreational Sports Centers," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed June 26, 2013).

<sup>2</sup> 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.

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

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

In its December 21, 2011 letter of support, the petitioner claimed that the duties of the proffered position would include the following tasks:

- Teaching Taekwondo and Hapkido to students of all levels who are enrolled in the petitioner's marital arts school;
- Carefully identifying the needs, abilities, and skills of individual students by evaluating each student's command of techniques;
- Assessing each student's knowledge of core Taekwondo and Hapkido principles;
- Lecturing and demonstrating the principles, techniques, methods, and discipline of the marital arts;
- Providing each student with an individualized teaching plan which focuses on physical techniques as well as cultural and philosophical aspects of Taekwondo and Hapkido;

- Continuously updating, revising, and developing the petitioner's program curriculum based upon the needs of the petitioner's students;
- Developing and organizing student class schedules based on enrollment levels, age groups, skills levels, etc.;
- Observing students during practice in order to identify and correct mistakes relating to form, position, and technique;
- Preparing students for competition as needed;
- Evaluating, testing, grading, and recommending students for belt promotion;
- Approving students for promotion or advancement to the next belt level;
- Explaining and enforcing safety and behavioral standards;
- Conducting clinics and seminars relating to belt-level promotion and testing;
- Participating in curriculum development with other Master Teachers and the petitioner's President; and
- Reporting directly to the petitioner's President under limited supervision.

The petitioner claimed that the proffered position can only be filled by an individual possessing a bachelor's degree in physical education or a related discipline

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

In his March 16, 2001 letter, [REDACTED] claims to be writing “[o]n behalf of the [REDACTED]” [REDACTED] stated, in pertinent part, the following:

The title of Master of Taekwondo is conferred to those practitioners of Taekwondo who hold the 4<sup>th</sup> 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. . . .

█ indicates that earning a fourth Dan Taekwondo degree that is authorized by the █ requires an individual to both: (1) study Taekwondo for a period of at least 12 years; and (2) earn a college degree.

However, █ 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, █ letter would still not establish that the proffered position is a specialty occupation because, although he states that a college degree is required in order to become a Master Teacher, he does not state that it must come from a specific specialty.

Moreover, as will be discussed below, █ letter conflicts with █ testimony, which diminishes the evidentiary value of both individuals' testimony.

In his June 29, 2009 letter, █ states that "individuals who qualify for the position of Master Teacher must have been granted 4<sup>th</sup> Dan status from █ and as such, must have the equivalent to a U.S. Bachelor's degree." █ elaborates as follows:

In order to have been granted a 4<sup>th</sup> degree black belt by █, an individual must have successfully completed the requirements for the 1<sup>st</sup> degree black belt which requires at least six years of study and the successful completion of the skills required of a 1<sup>st</sup> degree black belt. To be promoted to a 2<sup>nd</sup> 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 3<sup>rd</sup> 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 4<sup>th</sup> degree black belt (4<sup>th</sup> Dan status). Thus, in order to achieve a 4<sup>th</sup> Dan black belt, from █ one must have studied Taekwondo for a minimum of twelve years, which is equivalent to the attainment of a Bachelor's degree.

█ June 29, 2009 letter, therefore, conflicts with █ letter. Although █ and █ 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 █, an individual must both: (1) study Taekwondo for a period of twelve years; and (2) earn a college degree. █, 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 █ letter does not establish the proffered position as a specialty occupation. Again, █ claims that the twelve required years of Taekwondo study an individual must undergo prior to becoming a Master Teacher

Page 7

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.

offers further details regarding the training that is involved with the pursuit of a fourth-level Dan Black Belt in his June 19, 2012 letter. However, he does not cure the deficiencies identified above.

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

[I]n order to achieve a 4<sup>th</sup> 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 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 he also failed to explain by what objective standard this degree-equivalency was determined.<sup>3</sup>

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).

For all of these reasons, the AAO finds that the letters from 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)(I), which is satisfied by establishing that a baccalaureate or higher degree in a specific specialty, or its equivalent, 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

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<sup>3</sup> It is worth noting that do not reference the petitioner, the beneficiary, or the particular position proffered here.

variety of occupations it addresses.<sup>4</sup> 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
- 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 June 26, 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

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<sup>4</sup> 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.

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 in a specific specialty, or its equivalent, 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"<sup>5</sup> 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 June 26, 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 in as specific specialty, or its equivalent, is normally required to perform the duties of this position.<sup>6</sup>

<sup>5</sup> Again, this was the occupational category selected by the petitioner on the LCA as best corresponding to the proffered position.

<sup>6</sup> 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* (available at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf) (last accessed June 26, 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:

Nor is the AAO persuaded by the petitioner's submission of an excerpt from the DOL's *Dictionary of Occupational Titles* (the *DOT*) and its implicit argument regarding the value of an SVP rating of 7. The *DOT* does not support the assertion that assignment of SVP ratings of 7 is indicative of a specialty occupation, which is obvious upon reading Section II of the *DOT*'s Appendix C, Components of the Definition Trailer, which addresses the Specialized Vocational Preparation (SVP) rating system,<sup>7</sup> and which states, in pertinent part, the following:

## II. SPECIFIC VOCATIONAL PREPARATION (SVP)

Specific Vocational Preparation is defined as the amount of lapsed time required by a

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**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, gain, 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 its 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.

<sup>7</sup> U.S. Dep't of Labor, Office of Administrative Law Judges, OALJ Law Library, *Dictionary of Occupational Titles*, <http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTAPPC.HTM> (accessed June 26, 2013).

As noted at section A.1.1 in DOL's Employment and Training Administration's Clearance Package Supporting Statement to the Office of Management and Budget, which is accessible on the Internet at [http://www.onetcenter.org/dl\\_files/omb2011/Supporting\\_StatementA.pdf](http://www.onetcenter.org/dl_files/omb2011/Supporting_StatementA.pdf), "The O\*NET data supersede the U.S. Department of Labor's (DOL's) *Dictionary of Occupational Titles* (*DOT*)," and the *DOT* "is no longer updated or maintained by DOL." It should also be noted that the *DOT* was last updated more than 20 years ago, in 1991. See <http://www.oalj.dol.gov/libdot.htm>, the homepage of DOL's Office of Administrative Law Judges (OALJ), online edition of the *DOT*'s Fourth Edition, Revised in 1991.

typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

- a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);
- b. Apprenticeship training (for apprenticeable jobs only);
- c. In-plant training (organized classroom study provided by an employer);
- d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);
- e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years

**Note: The levels of this scale are mutually exclusive and do not overlap.**

(emphases in original.)

Thus, an SVP rating of 7 does not indicate that at least a four-year bachelor's degree is required to perform the duties of the proffered position or, more importantly, that such a degree must be in a specific specialty closely related to the requirements of that occupation. Therefore, the information from the *DOT* is not probative of the proffered position as being a specialty occupation.

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."

As the evidence in the record of proceeding does not establish that a baccalaureate degree in a specific specialty, or its equivalent, 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 June 21, 2012 letter, [REDACTED] states that his establishment currently employs a Master Teacher, and that this Master Teacher possesses a foreign degree that has been equated to a bachelor's degree in physical education awarded by an accredited institution of higher education in the United States. 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 position he references is “parallel” to the Taekwondo Master Teacher position proffered here. Nor does the record contain evidence documenting his assertion that his company actually employs the individual 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.

In his June 13, 2012 letter, [REDACTED] states that his company’s Master Teachers are required to possess a four-year degree.<sup>8</sup> 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 positions he references are “parallel” to the one proffered here. Nor does the record contain evidence documenting his assertions that his company employs Master Teachers or that those individuals possess bachelor’s degrees. 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.

The AAO turns next to the assertions of [REDACTED]. In his undated letter submitted on appeal, [REDACTED] states that he is the President of the [REDACTED] and states the following:

Over the years, as the Taekwondo martial art has evolved, approximately half of Taekwondo masters in the US academies held bachelor’s degrees, while the other half was not. Today, the number of masters with four-year degrees or higher has increased significantly as Taekwondo has become much more sophisticated and departmentalized.

[REDACTED] letter does not satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), either, as the record of proceeding contains no evidence to support his assertions. 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.

Nor do the six job-vacancy announcements submitted into the record satisfy the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). First, counsel has not submitted any evidence to demonstrate that these advertisements are from companies “similar” to the petitioner in size, scope, and scale of operations, business efforts, expenditures, or other fundamental dimensions.<sup>9</sup> Second,

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<sup>8</sup> [REDACTED] also discussed the qualifications of the beneficiary to perform the duties of the proffered position. However, the director did not question the beneficiary’s qualifications to perform the duties of the proffered position.

<sup>9</sup> As noted, the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) 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 her October 18, 2012 decision the director stated the following with regard to the six job-vacancy announcements submitted by the petitioner:

[T]here is not enough information from the [job-vacancy announcements] to determine whether the employers advertising for the position[s] [are] similar to the petitioner's organization.

Citing to *Young China Daily v. Chappell*, 742 F.Supp. 2d 552, 554 (N.D. Cal. 1989), counsel argues on appeal that the director erred in making this statement. According to counsel, "courts have consistently held that the size of the organization should not be determinative when concluding that organizations are comparable for purposes of adjudicating H-1B petitions."

Counsel's argument has no merit. First, the director made no mention of the petitioner's size, thus rendering counsel's argument irrelevant. Second, counsel has not explained how USCIS is to determine whether a position is located in an organization that is "similar" to a petitioning entity when adjudicating a position under the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) if the agency is precluded from determining whether such an organization is "similar" to a petitioning entity. If accepted, counsel's argument would preclude application of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Third, *Young China* does not stand for the proposition cited by counsel. In *EG Enterprises, Inc. v. Department of Homeland Security*, 467 F. Supp. 2d 728, 737 (E.D. Mich. 2006), the court stated the following:

What [the petitioner] fails to grasp is that the duties of the proffered position, *combined with* the position title and business size, are all components in the H-1B visa petition analysis [emphasis in original] . . . the Sixth Circuit, in an unpublished case, had also determined that the size of the employer is a relevant consideration, although not determinative:

[The court in *Young China*], on which [the petitioner] relies for this allegation of error, made only the narrow ruling that the duties of a graphic designer at a small newspaper do not necessarily differ from those of a graphic designer at a major newspaper. This leads neither to the general conclusion that the skills required to be a manager of a small company are necessarily the same as those required to be a manager at a large company, nor to the specific conclusion that the size of [the petitioner's] business is not relevant to the nature of the duties of its manager. *China Chef, Inc. v. Puelo*, 12 F. 3d 211 (table), 1993 WL 524276 at 2 (6<sup>th</sup> Cir. Dec. 15, 1993). . . .

[R]eliance in this case on *Young China* does not lead the court to the specific conclusion that the size of [the petitioner's] business is not relevant to the nature of [the beneficiary's] proffered duties. Although USCIS should not rely exclusively on the size of the employer's business when making a determination as to whether a position qualifies as a "specialty occupation," the Court does not find it an abuse of discretion for USCIS to consider size as just one factor in its analysis. It is reasonable to assume that the size of an employer's business has an impact of the duties of a particular position. . . .

the petitioner has submitted no evidence to establish that these six positions are “parallel” to the proffered position. Nor do all of these employers require a bachelor’s degree in a specific specialty. Nor does the petitioner submit any evidence regarding how representative these advertisements are of the industry’s usual recruiting and hiring practices with regard to the types of positions advertised. 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)).<sup>10</sup>

As the record of proceeding contains no other evidence regarding an industry-wide requirement for at least a bachelor’s degree in a specific specialty, or its equivalent, 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.

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

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For all of these reasons, counsel’s argument has not merit.

<sup>10</sup> Furthermore, according to the *Handbook* there were approximately 251,400 persons employed as fitness trainers and aerobics instructors in 2010. *Handbook* at <http://www.bls.gov/ooh/personal-care-and-service/fitness-trainers-and-instructors.htm#tab-6> (last accessed June 26, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the six submitted vacancy announcement with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that these advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that “[r]andom selection is the key to [the] process [of probability sampling]” and that “random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error”).

As such, even if these six job-vacancy announcements established that the employers that issued them routinely recruited and hired for the advertised positions only persons with at least a bachelor’s degree in a specific specialty closely related to the positions, it cannot be found that these six job-vacancy announcements which appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. 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 in a specific specialty, or its equivalent, is normally the minimum requirement 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 in a specific specialty, or its 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 indicates is a prerequisite to performing the duties of the proffered position,<sup>11</sup> 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 in a specific specialty, or its equivalent.

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 in a specific specialty, or its equivalent, 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 in a specific specialty, or its equivalent, for the position.

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

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<sup>11</sup> The letters submitted into the record of proceeding by the petitioner as expert testimony dedicate a significant percentage of space to discussion of fourth-degree Dan Black Belt status.

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 in a specific specialty, or its equivalent.

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.

In its letter of support, the petitioner conceded that this is a newly-created position. While a first-time hiring for a position is not in itself generally a basis for precluding a position from recognition as a specialty occupation, certainly an employer that has never recruited and hired for the position would not be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position.

As the petitioner has failed to demonstrate a history of recruiting and hiring only individuals with a bachelor's degree in a specific specialty, or its equivalent, 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 a specific specialty, or its equivalent.

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 in a specific specialty, or its equivalent, is required to perform the duties of this position.

With specific regard to fourth-degree Dan Black Belt status which, again, the petitioner indicates is also 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 once 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 specialized and complex that they can be performed only by an individual with a baccalaureate or higher degree in a specific specialty.

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).

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 be 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 is denied.