



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: OCT 08 2013

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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 IN THE FORM I-129 PROCEEDING:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on September 27, 2011. In the Form I-129 visa petition, the petitioner describes itself as a skilled nursing care business established in 2004. In order to employ the beneficiary in what it designates as a budget analyst position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on October 27, 2012, finding that the petitioner failed to establish eligibility for the benefit sought. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. Counsel submitted a brief and additional evidence in support of this assertion.

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

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the record of proceeding, the AAO agrees with the director's conclusion that the petitioner has not established eligibility for the benefit sought. Thus, the appeal will be dismissed and the petition denied.

In this matter, the petitioner stated in the Form I-129 petition that it seeks the beneficiary's services as a budget analyst to work on a part-time basis of 20-25 hours per week. In a support letter dated September 14, 2011, the petitioner stated that the beneficiary will perform the following duties in the proffered position:

% of Time	Detailed Description of Duties and Responsibilities
25%	Prepare financial estimates and budget analysis for business operations to aid management of the company to determine operational costs and service pricing. Analyze current and past budgets, and allocate funds according to spending priorities to meet increased demand for our services. Analyze accounting records to determine financial resources required to implement programs and submit recommendations to the president for budget allocation. Advise the president on cost analysis and fiscal allocations.
25%	Prepare documents and files in order to perform a cost analysis for inclusion in budget determinations including costs of various recruiting endeavors, and training and preparation of candidate

	costs. Consider such factors as proposals for work, past service demands, and other documentation to prepare estimates, applying knowledge of specialized methodologies, techniques, principles and processes in business, finance, and budget analysis.
20%	Study company operations and procedures to determine existing work flow for processing of current personnel and the hiring of additional personnel to meet increasing demands. Review data to determine relevant requirements and prepare itemized lists.
20%	Compute cost factors and prepare estimates to be used for planning, organizing, and scheduling work and determining cost effectiveness in keeping with current budget allocations. Prepare and analyze proposals for future budgets including the options for opening of a new facility. Conduct special studies to develop and establish standard hour and related cost data or effect cost reductions
10%	Responsible for consulting with company and outside personnel to discuss and formulate estimates and resolve issues. Prepare statistical reports on current costs and prepare reports on existing practices and cost analysis. Establish methods of improving performance and time spent on specific tasks in order to reduce time and cost inefficiencies.

In its letter of support accompanying the initial I-129 petition, the petitioner initially stated that "the person filling the position of Budget Analyst with [the petitioner's] company must possess at least a Bachelor's degree in finance or business field or its equivalent through work experience." Thereafter, in the same letter, the petitioner asserted that "the person filling the position of Budget Analyst with [the petitioning] company must possess at least a Bachelor's degree in a business-related field or its equivalent through work experience." No explanation was provided for the variance.

The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of her foreign degree, and provided a copy of the beneficiary's diploma and transcript. The petitioner also provided an evaluation of the beneficiary's credentials performed by Educational Assessment, Inc., indicating that the beneficiary has earned the equivalent of "a four-year U.S. Bachelor of Science in Business Administration (BSBA) degree with a major in Finance."

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification "Budget Analysts" - SOC (ONET/OES) code 13-2031, at a Level I (entry level) wage.¹

¹ The AAO notes that the petitioner indicated on the LCA that the beneficiary will be working in Los Angeles County (Inglewood), California. The prevailing wage in Los Angeles County for "Budget Analysts" during the relevant time period was \$25.97 per hour. Notably, the petitioner provided a printout from the Foreign Labor Certification Data Center, Online Wage Library (All Industries Database for 7/2010 - 6/2011)

(b)(6)

Along with the Form I-129, the petitioner provided evidence in support of the petition. Specifically, the petitioner's submission included: (1) several job postings; (2) printouts from the Internet that provide general information regarding the petitioner; and (3) an excerpt from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*'s regarding the occupational category "Budget Analysts."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on February 27, 2012. The AAO notes that the director specifically requested that the petitioner submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the evidence to be submitted. The AAO notes that, among other evidence, the director requested that the petitioner provide a line-and-block organizational chart, listing all employees in the company including their names and job titles, and which identifies the proffered position.

On May 21, 2012, counsel responded to the director's RFE by providing a letter and additional evidence. Specifically, counsel provided tax returns; quarterly wage reports; copies of business licenses; several additional job postings; an organizational chart; copies of invoices; an excerpt from the petitioner's payroll register; and printouts of additional internet listings for the petitioner.

The director reviewed the information provided by counsel. Although the petitioner and counsel claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition on October 27, 2012. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition. In support of the appeal, counsel submitted a brief and additional evidence.

Based upon a complete review of the record of proceeding, the AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

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

for the occupational category "Budget Analysts" for [REDACTED] California. Moreover, the prevailing wage on the LCA corresponds to a Level I wage level for [REDACTED] California rather than the prevailing wage for a Level I position in [REDACTED], California. No explanation for the discrepancy was provided. The inconsistencies raise questions as to the accuracy of the information provided in the LCA, including where the beneficiary will actually be employed.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

§ 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through attainment of at least a baccalaureate degree in a specific discipline. The AAO finds that the petitioner and counsel have not done so. There are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

For instance, the AAO observes that on appeal, counsel provides a new description of proffered position.² Specifically, counsel expands the job duties (to include new, generic tasks), some of which appear irrelevant to the proffered position. For instance, counsel claims that the beneficiary will "[p]erform financial analysis on current and prospective customers, guarantors, principals from the *automobile industry* (emphasis added)." The petitioner claims to be a business involved in nursing care. Counsel provides no explanation as to the reason that the beneficiary would perform financial analysis with regard to parties involved in the *automobile industry*. Thus, the AAO must question whether the information provided is correctly attributed to this particular position and beneficiary.

In addition, counsel provided new academic requirements for the proffered position. The AAO notes that in the letter of support submitted with the initial petition, the petitioner initially stated that "the person filling the position of Budget Analyst with [the petitioner's] company must possess at least a Bachelor's degree in finance or business field or its equivalent through work experience." Thereafter, in the same letter, the petitioner asserted that "the person filling the position of Budget Analyst with [the petitioning] company must possess at least a Bachelor's degree in a business-related field or its equivalent through work experience." Notably, the requirements for the proffered position as stated by counsel do not correspond to either of the petitioner's stated requirements for the proffered position. Counsel claims that the minimum education for the proffered position is a "Bachelor degree in Accounting." No explanation was provided for altering the job requirements. Further, the record of proceeding does not indicate that the beneficiary possesses a bachelor's degree in accounting, or its equivalent. Accordingly, the beneficiary would not qualify to serve in the proffered position based upon counsel's stated requirements.

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

In the appeal, counsel also indicates *for the first time* that the beneficiary will be employed on a full-time basis (40 hours per week), which is contrary to the petitioner's statements in the Form I-129, LCA and letter of support indicating that the beneficiary will be employed on a part-time basis. Again, no explanation was provided by the petitioner or counsel for the inconsistency in the statements.

Moreover, it must be noted that in an appeal, a petitioner or counsel cannot make material changes to the proffered position (e.g., job duties, responsibilities, requirements) in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978).

Moreover, the AAO notes that it reviewed the petitioner's job description (as provided in its letter of support dated September 14, 2011); however, the description of the beneficiary's duties provided by the petitioner lacks the specificity and detail necessary to support the petitioner's contention that the position is a specialty occupation. That is, the job description fails to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. Moreover, the petitioner's assertion that the proffered position qualifies as a specialty occupation is conclusory and unpersuasive, as it is not supported by the job description or substantive evidence.

In the instant case, the AAO observes that the duties of the proffered position, as described by the petitioner have been stated in generic terms that fail to convey the actual tasks the beneficiary will perform on a day-to-day basis.³ The job description provided by the petitioner does not adequately convey the specific tasks the beneficiary is expected to perform to establish eligibility for H-1B classification. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will be "[r]esponsible for consulting with company and outside personnel to discuss and formulate estimates and resolve issues." The petitioner has not explained which internal and external personnel will be consulted, nor has it indicated what "issues" would be resolved, or what type of "estimates" would be formulated. Further, the petitioner claimed that the beneficiary will spend 20% of her time "[s]tudying company operations and procedures to determine existing work flow for processing of current personnel and the hiring of additional personnel to meet increasing demands." The beneficiary would then "[r]eview data to determine relevant requirements and prepare itemized lists." Thus, it appears that the petitioner intends for the beneficiary to learn how the company allocates work and hires personnel. The petitioner has not identified any specific level

³ As previously noted, the AAO observes that the list of duties provided on appeal was submitted by counsel, and the source of these duties has not been provided. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

of education required to "study" its operations and procedures, nor has it explained what would be on the "itemized lists" or what "relevant requirements" the beneficiary would "determine." In addition, the AAO observes that none of the duties reference any information specific to the petitioner's business operations as described elsewhere in the record. The petitioner's statements regarding the duties of the proffered position are generic and not persuasive in establishing that a genuine specialty occupation position exists for the beneficiary.

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

The AAO notes that in a declaration dated August 5, 2013, the petitioner's authorized representative in this matter has identified herself as [REDACTED] "Vice President of [the petitioner]." Ms. [REDACTED] claims that she signed the Form I-129 petition, LCA, Form G-28, and letter of support in her capacity as vice president of the petitioning company.

In the RFE, the director specifically requested that the petitioner provide a line-and-block organizational chart, listing all employees in the company including their names and job titles, and which clearly identifies the proffered position. In response to the RFE, the petitioner provided an organizational chart that lists over 20 positions. Notably, neither the position of "Vice President" nor the proffered position appears on the organizational chart. Moreover, [REDACTED] does not appear on the chart as serving in any position. Furthermore, [REDACTED] does not appear on the pay register submitted nor does she appear on the quarterly wage report provided in response to the RFE. In addition, many of the names on the petitioner's payroll do not match the names provided on the organizational chart. For instance, an individual by the name of [REDACTED] appears on the payroll as earning \$3,750 over a two week period (and on the quarterly report as earning \$18,749 per quarter). In addition, [REDACTED] is reported to earn \$26,245 per quarter. According to the documents provided by the petitioner, these are some of the highest salaries paid by the petitioner. However, the individuals do not appear on the organizational chart. The petitioner did not provide an explanation for the discrepancies.

Further, the petitioner and counsel refer repeatedly to the petitioner's "profitability." In a letter dated September 14, 2011, the petitioner indicated that it "experienced a gross annual profit of \$6.5 million USD for the fiscal year 2010," and requires the proffered position in order to "maintain profitability." In response to the RFE, counsel stated that "[e]mphasis should be made that the petitioner is a \$6.5 million enterprise despite a very poor economic condition." The AAO notes that the petitioner's gross receipts are not indicative of the company's overall "profitability." The petitioner's 2009 tax return indicates an overall loss of \$115,900, and its 2010 tax return indicates an overall loss of \$775,394.

Moreover, in the instant case, the petitioner's requirements for the proffered position do not establish that the position qualifies as a specialty occupation. That is, in the letter of support submitted with the initial petition, the petitioner initially stated that "the person filling the position of Budget Analyst with [the petitioner's] company must possess at least a Bachelor's degree in finance or business field or its equivalent through work experience." Thereafter, in the same letter, the petitioner asserted that "the person filling the position of Budget Analyst with [the petitioning] company must possess at least a Bachelor's degree in a business-related field or its equivalent through work experience." The petitioner did not provide an explanation for the variance. Nevertheless, the AAO notes that the petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the duties and responsibilities of the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a general-purpose degree (such as a degree in the "business field" or "business-related field" without further specification) does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

As previously mentioned, to demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree (including a degree in the "business field" or "business-related field") may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).⁴

Again, the petitioner has indicated that the duties of the proffered position can be performed by an individual who possesses a bachelor's degree in the "business field" or "business-related field." Thus, petitioner's assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

⁴ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. The petitioner has not established that the proffered position requires attainment of such a degree. Consequently, the petitioner has not demonstrated that the proffered position qualifies as a specialty occupation, and the appeal may be dismissed and the petition denied. Nevertheless, for the purpose of performing a comprehensive discussion of whether the proffered position qualifies as a specialty occupation, the AAO will continue to provide its assessment of the proffered position and the evidence of record under the applicable statutory and regulatory provisions.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, as previously mentioned, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

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

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the

(b)(6)

attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations.

These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

Nevertheless, assuming, *arguendo*, that the duties of the proffered position as described by the petitioner would in fact be the duties performed by the beneficiary, the AAO will nevertheless continue its discussion as whether the evidence in the record of proceeding establishes the proffered position qualifies as a specialty occupation. To make its determination as to whether the employment described by the petitioner qualifies as a specialty occupation, the AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

The petitioner stated that the beneficiary would be employed in a budget analyst position. However, 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.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁵ As previously mentioned, the

⁵ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available

petitioner asserted in the LCA that the proffered position falls under the occupational category "Budget Analysts."

The AAO reviewed the chapter of the *Handbook* entitled "Budget Analysts," including the sections regarding the typical duties and requirements for this occupational category.⁶ However, the *Handbook* does not indicate that "Budget Analysts" comprise an occupational group that requires at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation.

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

Education

Employers generally require budget analysts to have at least a bachelor's degree. However, some employers may require candidates to have a master's degree. Because developing a budget requires strong numerical and analytical skills, courses in statistics or accounting are helpful. For the federal government, a bachelor's degree in any field is enough for an entry-level budget analyst position. State and local governments have varying requirements but usually require a bachelor's degree in one of many areas, such as accounting, finance, business, public administration, economics, statistics, political science, or sociology.

Sometimes, budget-related or finance-related work experience can be substituted for formal education.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Budget Analysts, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/budget-analysts.htm#tab-4> (last visited October 1, 2013).

When reviewing the *Handbook*, the AAO must note that the petitioner designated the wage level of the proffered position as a Level I (entry) position in the LCA (the lowest of four assignable wage-levels).⁷ This designation is indicative of a comparatively low, entry-level position relative to

online.

⁶ For additional information regarding the occupational category "Budget Analysts," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Budget Analysts, on the Internet at <http://www.bls.gov/ooh/business-and-financial/budget-analysts.htm#tab-1> (last visited October 1, 2013).

⁷ Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

others within the occupation.⁸ That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. According to DOL guidance, a statement that the job offer is for a worker in training or an internship is indicative that a Level I wage should be considered.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty is normally required for this occupational category. The *Handbook* states that budget-related or finance-related work experience can be substituted for formal education. Notably, the *Handbook* does not indicate that such work experience must be the equivalent to a bachelor's degree in a specific specialty. Furthermore, although the *Handbook* states that employers generally require budget analysts to have at least a bachelor's degree, the *Handbook* does not state that a baccalaureate or higher degree *in a specific specialty* (or its equivalent) is normally the minimum requirement for entry into these positions. According to the *Handbook*, courses in statistics or accounting are helpful for entry into budget analyst positions. The *Handbook* continues by stating that for jobs in the federal government, a bachelor's degree in any field is enough for an entry-level budget analyst position. The *Handbook* further states that state and local governments have varying requirements but usually require a bachelor's degree in one of many areas, such as accounting, finance, business, public administration, economics, statistics, political science, or sociology. The *Handbook* does not conclude that normally the minimum requirement for entry into these positions is at least a bachelor's degree *in a specific specialty*, or its equivalent. Thus, the *Handbook* does not support the assertion that the proffered position falls under an occupational group that categorically qualifies as a specialty occupation.

The AAO reiterates that the *Handbook* does not denote that at least a bachelor's degree is a standard entry requirement for this occupation. However, assuming *arguendo* that the *Handbook* stated a requirement for at least a bachelor's degree for entry into this occupational category (which it does

⁸ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

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

Id.

not), in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

Here, the *Handbook* states that "courses in statistics or accounting are helpful" for budget analyst positions. The *Handbook* further indicates that "a bachelor's degree in any field is enough for an entry-level budget analyst position" in the federal government, and "[s]tate and local governments have varying requirements but usually require a bachelor's degree in one of many areas, such as accounting, finance, business, public administration, economics, statistics, political science, or sociology" for entry into budget analyst positions. Thus, courses of study in a wide-range of disparate fields are considered relevant for entry into the occupation. Notably, these dissimilar courses of study fail to delineate a specific specialty. The *Handbook* does not demonstrate that a bachelor's degree in a specific specialty or its equivalent is required for entry into the occupation of budget analyst and does not, thereby, demonstrate that a position so designated is a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. As previously mentioned, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding by the petitioner do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Next, the AAO will review the record regarding the first of the two alternative prongs of 8 C.F.R.

§ 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a standard industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. The record of proceeding does not contain any evidence from an industry professional association to indicate that a degree is a minimum entry requirement. The petitioner did not submit any letters or affidavits from firms or individuals in the industry.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner provided several job postings. The AAO reviewed the evidence submitted, but finds that the documentation does not establish that the petitioner has met this prong of the regulations.

In the Form I-129 and supporting documents, the petitioner stated that it is a skilled nursing care business established in 2004. The petitioner further stated that it has 80 employees and a gross annual income of \$6.5 million. Although requested in the Form I-129 petition, the petitioner did not state its net annual income. The tax returns provided by the petitioner indicate an annual net loss. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 623110.⁹ The AAO notes that this NAICS code is designated for "Nursing Care Facilities." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments primarily engaged in providing inpatient nursing and rehabilitative services. The care is generally provided for an extended period of time to individuals requiring nursing care. These establishments have a permanent core staff of registered or licensed practical nurses who, along with other staff, provide nursing and continuous personal care services.

U.S. Dep't of Commerce, U.S. Census Bureau, 2007 NAICS Definition, 623110 – Nursing Care

⁹ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. *See* <http://www.census.gov/eos/www/naics/> (last visited October 1, 2013).

Facilities, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited October 1, 2013).

For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

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

Upon review of the documentation, the petitioner fails to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

It must first be noted that many of the printouts do not contain the full job announcements. No explanation was provided for failing to include the entire job postings. Moreover, none of the advertisements contain sufficient information regarding the advertising organizations such that the AAO can conduct a legitimate comparison of the organizations to the petitioner. Nevertheless, the AAO observes that the submission includes postings from: (1) the [REDACTED] (2) Resources for [REDACTED] (for which a description of the company is not provided); (3) College of [REDACTED] (4) [REDACTED] (5) [REDACTED] (for which a description of the company is not provided); (6) [REDACTED] ("a healthcare staffing and management services company"); (7) [REDACTED] for which a description of the organization is not provided; (8) [REDACTED] (for which a description of the company is not provided); and (9) [REDACTED] (for which a description of the company is not provided). None of the advertising organizations appear to be for nursing care facilities. In response to the RFE, the petitioner provided several job advertisements for hospitals; however, the petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations. It is not apparent from the evidence provided that the advertising organizations are properly considered "similar" to the petitioner.

In addition, several of the postings do not state a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent. For example, the posting for a finance and strategy analyst at

requires a "Master's degree (M.A.) or equivalent; or four to six years related experience and/or training; or equivalent combination of education and experience." As previously noted, a general-purpose degree such as an "M.A.," does not satisfy the requirement for a degree in a specific specialty. Since there must be a close correlation between the required specialized studies and the position, the requirement of a general-purpose degree does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558. Further, the AAO notes that the advertising organization will accept "four to six years related experience and/or training" in lieu of a master's degree. The AAO observes that four to six years of specialized study is not considered by USCIS to be equivalent to at least a bachelor's degree.¹⁰

In addition, the AAO notes that the postings from all request a bachelor's degree in business or business administration. As previously noted, although a general-purpose bachelor's degree (including a degree in business or business administration) may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. The AAO observes that the postings provided by the petitioner from and Mt. do not state an education requirement.

¹⁰ In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

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

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

Moreover, as the petitioner has failed to adequately establish the duties of the proffered position, the AAO is unable to ascertain what duties render another position "parallel" to the proffered position. To the extent the duties of the proffered position were described, the AAO notes that some of the advertised positions do not appear to be parallel to the proffered position. The advertisement for a senior budget analyst at College of [REDACTED] seeks an individual to manage several academic budgets and to provide information on academic endowments and grants. The AAO notes that the proffered position does not involve budgeting for an academic institution with several departments, nor does the proffered position involve endowments or grants. Further the AAO observes that the petitioner designated the proffered position as a Level I (entry-level) position, which is appropriate for an individual performing an internship, or a worker-in-training. A Level I designation indicates that the proffered position is not a "senior" position as is the position advertised here. The part-time budget analyst advertised by Resources for Human Development does not provide a sufficient description of duties to make a full comparison to the proffered position; however, the AAO notes that the advertised position appears to contain duties more closely associated with bookkeepers, such as "petty cash reconciliations."

The AAO observes that even if all of the job postings indicated that a requirement of bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹¹ See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

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

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. The evidence does

¹¹ According to the *Handbook's* detailed statistics on Budget Analysts, there were approximately 62,100 persons employed in this occupation in 2010. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Budget Analysts, on the Internet at <http://www.bls.gov/ooh/business-and-financial/budget-analysts.htm#tab-6> (last visited October 1, 2013).

not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions to the proffered position, among similar organizations to the petitioner.

The documents provided do not establish that a requirement of a bachelor's degree (or higher) in a specific specialty, or its equivalent, is common to the industry for positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner and counsel submitted various documents, including documents related to the petitioner's business operations. For instance, the petitioner and counsel provided tax returns and quarterly wage reports; copies of business licenses; an organizational chart; printouts from the petitioner's payroll; copies of invoices; internet listings for the petitioner; as well as related documents. The AAO reviewed the record of proceeding in its entirety. However, upon review of the record, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

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

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

employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹²

The petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or is equivalent. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background and prior experience will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner fails to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, the AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. Upon review of the record of proceeding, the petitioner has not established a prior history of recruiting and hiring for the

¹² For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf

proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

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

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

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

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

(b)(6)

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

The AAO acknowledges that the petitioner and counsel may believe that the nature of the specific duties of the position in the context of the petitioner's business operations is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO reviewed the evidence, including the documents related to the petitioner's business operations (tax documents for the petitioner; copies of business licenses; an organizational chart; printouts from the petitioner's payroll; copies of invoices; and internet listings for the petitioner, and related documents). The AAO finds that the petitioner's statements and the submitted documentation fail to support the assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, the AAO also reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, as previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

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

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

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

(b)(6)

NON-PRECEDENT DECISION

Page 23

ORDER: The appeal is dismissed.