



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **AUG 12 2014**

Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,


Ron Rosenberg

Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 8, 2013. In the Form I-129 visa petition and supporting documentation, the petitioner describes itself as a Japanese Restaurant established in 2003. In order to employ the beneficiary in what it designates as an administrative service manager 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 November 18, 2013, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the position is a specialty occupation.

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

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

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

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

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

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

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

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

The petitioner stated in the Form I-129 that it seeks the beneficiary's services as an administrative services manager to work on a part-time basis. In a letter dated April 3, 2013 the petitioner stated that the beneficiary will plan, organize and direct the daily administrative operations for the restaurant. The petitioner described the job as follows:

- Formulate or change policies for restaurant operation[s], and plan and control the use of materials and human resources.
- Plan, coordinate and direct a broad range of service[s] that make our restaurant [] operate efficiently, keep reputation and maximize profits.
- Plan and organize to centralize operations that meet the needs of multiple function[s] of restaurant, such as financial information, supply information, human resources data, promotion programs, government license/permit, safety of employees/facilities, health issue[s].
- Manage staff[], preparing work schedules and assigning specific duties.
- Determine staffing requirement[s] and interview, hire new employees or oversee those personnel processes.
- Ensure that restaurant kitchen, eating area, bar and other facilities meet environmental, health and security standards and comply with State, County, Township and other government regulations, like government health department inspection, fire inspection, liability insurance contract, liquor license related issues, labor law issues, etc.
- Plan for long-term maintenance, modernization and replacement [of] the restaurant.
- Develop and implement plans that incorporate energy efficiency into a facility's operations and structures.
- Examine energy saving alternatives, technology usage and information security.
- Integrate the principles of restaurant operation, information technology, and management report system.
- Planning for renovation/remodeling and landscape architecture.
- Execute administrative support to owner.
- Oversee budgets and ensure that resources are used properly and that programs are carried out as planned.
- Develop and implement policies, goals, objectives and procedures and set[] the overall direction to achieve the goal of restaurant conferring with owner as necessary.
- Control the quality of work, review the output and establish administrative procedures and policies.
- Coordinate with executive chef and other chefs, restaurant manager, supply manager, and financial clerk for efficient operation of restaurant and maximizing profits.

The petitioner stated the minimum requirement for the proffered position is a Bachelor's Degree,

and that the beneficiary is qualified to perform services in the proffered position by virtue of her Bachelor of Science with a major in Hospitality Management.¹

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the petition in which it classified the position in the occupational classification "Administrative Services Manager" - SOC (ONET/OES Code) 11-3011, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 4, 2013.

On August 26, 2013 the petitioner responded to the director's RFE. In a letter dated August 22, 2013 the petitioner stated that the beneficiary's duties are the same as those of a top executive. The petitioner described the beneficiary's job duties as follows:

Beneficiary directs and supervises the restaurant's Finance Manager, Operations Manager, Facility Compliance Manager, and Guest Manager, and performs task force for company's new investment in the expansion of current restaurant and opening of new separate franchisee restaurant upon conducting feasibility study and research.

In Beneficiary's duty overseeing the restaurant's Finance Manager, she supervises the following: planning and structuring of accurate budgets, improvements of financial controls in food costs, labor costs and other expenses, and meeting of sales goals and maximizing profits. To successfully perform these duties, the candidate must have knowledge in financial management in the hospitality industry and must accurately analyze financial data that are unique to the hospitality industry.

Beneficiary directs and supervises the Facility Compliance Manager to make sure the restaurant operations are in compliance with all federal, state, and local township laws, regulations and ordinances and that all licenses and permits are up-to-date. These include Liquor License, Department of Health inspection regulations, restaurant fire inspection regulation, insurance regulations, workers' compensation, unemployment insurance, liability insurance and casualty insurances. Beneficiary must be familiar with restaurant-related health regulations and food safety laws that are unique to the hospitality industry management field.

Beneficiary also directs the Guest Manager for the marketing strategy, based on various statistics about tourism, population, census demography, residents income level, ages, customer psychology, consumer behavior trends, organic [or] health food

¹ The record reflects that the beneficiary graduated from [REDACTED] an accredited United States university, [REDACTED] Utah on August 10, 2012. The beneficiary's qualifications are not at issue in these proceedings.

trends, reputation, relationship within the local community, taste marketing strategies, advertising, social media, public relations, promotions, event marketing, design specific, identifying target market, research the competition, and build your brand, etc. To ensure the restaurant meets its goals in sales growth and maximizes profits, restaurant marketing is the most important. Marketing in the hospitality industry is unique and different, and complex and requires specialized knowledge in the field of hospitality.

The director reviewed the information provided in the initial H-1B petition and in response to the RFE. Although the petitioner and counsel claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's duties would necessitate services at a level requiring the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent). The director denied the petition on November 18, 2013.

Counsel for the petitioner submitted an appeal of the denial of the H-1B petition. In support of the appeal, counsel submitted a brief.

The critical element is not the title of the position or 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.

To make its determination as to whether the employment described above qualifies as a specialty occupation, we turn first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors considered when determining this criterion include whether the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)*, on which we routinely rely for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty for entry into the occupational category.

We now turn to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) 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.

USCIS recognizes DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.² As previously discussed, the petitioner asserts that the proffered position falls under the occupational category "Administrative

² All of the references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational categories are hereby incorporated into the record of proceeding.

Services Managers." We reviewed the section of the *Handbook* regarding the occupational category "Administrative Services Managers," including the section entitled "How to Become an Administrative Services Manager," which describes the following preparation for the occupation:

Educational requirements vary by the type of organization and the work they do. They must have related work experience.

Education

A high school diploma or a General Educational Development (GED) diploma is typically required for someone to become an administrative services manager. However, some administrative services managers need at least a bachelor's degree. Those with a bachelor's degree typically study business, engineering, or facility management.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Management Analysts, on the Internet at <http://www.bls.gov/ooh/management/administrative-services-managers.htm#tab-4> (last visited August 3, 2014).

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Rather, the *Handbook* indicates that a high school diploma or a GED diploma is a sufficient academic credential for entry into the occupation.

In addition to the original duties, in response to the RFE the petitioner asserted that in the proffered position, the beneficiary will direct and supervise the Finance Manager, the Guest Manager and the Facilities Manager. The petitioner stated that the beneficiary will work on the petitioner's proposed investment in the expansion of the current restaurant, conduct a feasibility study and research about opening a separate franchise restaurant. The petitioner also stated that the beneficiary will develop the marketing strategy for the petitioner. The petitioner indicated that the beneficiary must have knowledge in financial management and marketing strategies unique to the hospitality industry. The petitioner specified that the position requires not just a bachelor's degree, but a bachelor's degree in hospitality management.

The petitioner did not provide any explanation for failing to provide these additional duties that include primary and essential duties in its initial submission. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. 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). The information provided by the petitioner in its response to the director's request for

further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new, additional duties to the job description.

On appeal, the petitioner reiterated the proposed job duties and stated that the duties are the combined function of financial analyst/manager and facility manager, which consist of 90% of the beneficiary's total work, both of which are specialty occupations. The petitioner stated that the beneficiary would oversee renovation projects, and research possible franchise openings in other towns.

The record does not contain any information about the petitioner's proposed expansion, renovation projects, financial status, business operations or other indicia that might indicate the beneficiary will be performing the duties of a financial manager or facilities manager. On the petition, the petitioner indicated that it has 23 employees. The record reflects that the petitioner has a General Manager/Co-Owner, but does not demonstrate that any of the petitioner's employees is a Finance Manager, Facilities Manager or Guest Manager, or the education level of any of such managers. There are no photographs of the restaurant, news articles, an organizational chart or other documentation to indicate that the petitioner's operations are so complex that performance of the duties would require a degree in hospitality management.

In the RFE, the director requested the petitioner to submit documentary examples such as press releases, business plans, promotional materials, advertisements, patents, critical reviews, articles, photographs or prototypes, etc. that substantiate claims of complexity and specialization above that experienced in the industry or the field. In response, the petitioner did not submit any supporting documentary evidence. On appeal, the petitioner, through counsel, described several of the proposed duties that, because of their complexity, would qualify the position as a specialty occupation. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). 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 objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding 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 has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we 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. The petitioner did not submit documentation from the industry's professional association indicating that it has made a degree a minimum entry requirement. The petitioner did not submit job listings or any letters or affidavits from similar firms or individuals in the petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals." Thus the petitioner has not established that a bachelor's degree in a specialty is common in the petitioner's industry.

We 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 has not submitted any evidence regarding its business operations. Without evidence establishing the context and the environment within which the beneficiary will perform the duties of an administrative service manager, we cannot conclude that the beneficiary's tasks are so complex or unique that only a specifically degreed individual could perform them.

We note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. In designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation.

The wage level for the proffered position in the LCA corresponds to a Level I (entry) position. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.³ The LCA was certified on March 26,

³ The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. *See* Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Office of Foreign Labor

2013 and signed by the petitioner on April 3, 2013. By completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.⁴

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) position 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.⁵ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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

Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

⁴ For additional information regarding prevailing wage determinations, 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.

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

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.

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.

The petitioner has represented in the LCA that the proffered position is a Level I (entry level) position. As described above, a Level I designation is appropriate for entry-level employees such as a worker in training or an individual undertaking an internship. Thus, 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.

The petitioner has indicated that the beneficiary's education will help her to perform 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 qualifies as a specialty occupation. In the instant case, the petitioner has not established 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 has not 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, USCIS reviews the petitioner's past recruiting and hiring practices, information regarding employees who previously held the position, as well as any other documentation submitted by a petitioner in support of this criterion of the regulations.

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. 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. 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.

In response to the RFE and on appeal, counsel argues that the beneficiary's duties qualify the position as a specialty occupation. The petitioner did not provide evidence of its recruiting and hiring practices, information regarding employees who previously held the position, or other documentation to establish that it normally requires a bachelor's degree in a specific specialty for the position. Upon review of the record, the petitioner has not provided evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

Counsel asserts that the nature of the specific duties of the position in the context of its business operations is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The record, as noted above, does not establish the relative complexity of the petitioner's business operations, or that the nature of the specific duties 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. We, therefore, conclude that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, the proffered position is not a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

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

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