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



U.S. Citizenship  
and Immigration  
Services

DATE: **DEC 17 2014**

OFFICE: VERMONT 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg

Chief, Administrative Appeals Office

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

## I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a "Retail" business. Evidence in the record, however, indicates that the petitioner manages a [REDACTED] hotel. In order to continue to employ the beneficiary in what it designates as a "Sales Manager" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, we have determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

## II. THE LAW

The issue before us is whether the petitioner has demonstrated that the proffered position qualifies as a specialty occupation. 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 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 result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See*

*Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

### III. EVIDENCE

The visa petition states that the proffered position is a Sales Manager position. The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a Sales Manager position, and that it corresponds to Standard Occupational Classification (SOC) code and title 11-222, Sales Managers from the Occupational Information Network (O\*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

With the visa petition, counsel submitted evidence that the beneficiary received a bachelor's degree in chemistry, botany and zoology from [REDACTED] in India in 1978, and received a master's degree in hospitality administration from [REDACTED] in 2009.

Counsel also submitted: (1) a position evaluation, dated September 14, 2004, that also evaluates the beneficiary's qualifications; and (2) a letter, dated September 11, 2012, from the petitioner's president.

The September 14, 2014 evaluation evaluates the beneficiary's bachelor's degree and employment experience, considered together, as equivalent to at least a bachelor's degree in business administration. We observe, however, that since that evaluation was issued in 2004, the beneficiary received a master's degree in hospitality administration in 2009.

That evaluation also evaluated a "Purchase Manager" position and found it to require a minimum of a bachelor's degree in business or a related field, or its equivalent. We observe that the petitioner has

indicated that the proffered position is a Sales Manager position, rather than a Purchase Manager position. That portion of the evaluation, the evaluation of the position of purchase manager, has not been shown to be relevant to the instant visa petition.

In his September 11, 2012 letter, the petitioner's president stated that the petitioner is "an acquisition, management, and development firm, primarily in the business of managing hotel/motel services and other retail sales operations." The record contains no other evidence that the petitioner has other retail operations or manages any businesses other than a single hotel.

The petitioner's president further stated:

In this position, [the beneficiary's] specific duties will include: (i) planning, directing, and coordinating sales services of the organization; (ii) managing sales operations and seeking new corporate accounts; (iii) establishing sales territories, quotas and goals; (iv) establishing training programs for sales representatives; (v) analyzing sales statistics gathered by staff to determine sales potential and inventory requirements; (vi) monitoring the preferences of customers; (vii) managing client services, conferences, seminars, special events; (viii) preparing competitive research analysis; and (ix) assisting in budget management, cost efficiency, sales contracts, operating procedures, advertisement activities, and sales promotions.

The petitioner's president also stated that the proffered position requires a minimum of a bachelor's degree in hospitality management or a related field.

On February 21, 2013, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The service center provided a non-exhaustive list of items that might be used to satisfy the specialty occupation requirements.

In response, counsel submitted, *inter alia*, (1) an organizational chart of the petitioner's operations; (2) a list of the petitioner's employees; (3) 26 vacancy announcements; (4) the beneficiary's 2011 and 2012 Form W-2 Wage and Tax Statements; (5) the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2012; (6) pay statements pertinent to the beneficiary's pay during the months from August 2012 to February 2013; (7) the O\*NET OnLine Summary Report for Sales Managers; (8) the chapter of the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* pertinent to Sales Managers; (9) an evaluation, dated January 19, 2010, of the proffered position; (10) a diploma issued to [REDACTED] (11) a letter, dated May 14, 2013, from the petitioner's president; and (12) counsel's own letter, dated May 17, 2013.

Although the petitioner's president claimed, in his September 11, 2012 letter, that the beneficiary would supervise sales representatives, the petitioner's organizational chart indicates that the petitioner employs no sales representatives. The list of the petitioner's employees confirms that the petitioner employs no sales representatives.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record with independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* At 591-592.

As was noted above, the petitioner provided 26 vacancy announcements. They were apparently provided as evidence that the proffered position satisfies the criterion at the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), that is, to show that a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent is common to positions parallel to the proffered position with similar organizations in the petitioner's industry.

However, most of those positions are not in the petitioner's industry and others have not been demonstrated to be in the petitioner's industry.<sup>1</sup> Further, some of the vacancy announcements counsel submitted state that the positions announced require a bachelor's degree, but not that the requisite degree must be in any specific specialty. They are not, therefore, evidence that the positions they announce require a minimum of a bachelor's degree in a specific specialty or its equivalent.

Additionally, some of the vacancy announcements require a bachelor's degree in business. An otherwise unspecified bachelor's degree in business is not a bachelor's degree in a specific specialty or its equivalent. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). As such, an educational requirement that may be satisfied by an otherwise undifferentiated bachelor's degree in business administration is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

Even further, the petitioner stated, on the LCA, that the proffered position is a Level I position, that is, an entry-level position for an employee who has only basic understanding of the occupation.<sup>2</sup> However, most of the vacancy announcements provided are for positions that require experience,

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<sup>1</sup> Some of those vacancy announcements were placed for positions with a supplier of structural steel and tubing, a credit union, a home remodeler, a supplier of dust collection equipment and maintenance services, a packaging division of a large automotive parts manufacturer, a lawn care company, an automobile insurance company, a "provider of document services technology, a cleaning and restoration company, a consumer package goods manufacturer, a manufacturer of products for industrial, hydraulic, and aerospace applications, a producer of food and beverages, a security and surveillance firm, a manufacturer of LED light fixtures, and an otherwise unidentified "Retail Co." Further, one of the vacancy announcements was placed by a recruitment firm for a position with an unidentified firm in an unspecified industry.

<sup>2</sup> See U.S. Dept'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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

and some require a considerable amount of very specific experience. As such, they do not appear to be Level I positions, and do not appear to be positions parallel to the proffered position.

Finally, even if all of the vacancy announcements were for parallel positions with organizations similar to the petitioner and in the petitioner's industry and required a minimum of a bachelor's degree in a specific specialty or its equivalent, the petitioner has failed to demonstrate what statistically valid inferences, if any, can be drawn from 26 announcements with regard to the common educational requirements for entry into parallel positions in similar organizations.<sup>3</sup>

The beneficiary's 2011 and 2012 Form W-2 Wage and Tax Statements show that the petitioner paid the beneficiary gross wages of \$37,589.95 and \$37,330.96 during those years, respectively. The petitioner's quarterly returns further specify that the petitioner paid the beneficiary gross wages of \$8,895.24, \$10,395.24, \$8,895.24, and \$9,145.24 during the four quarters of 2012, respectively. The pay statements provided show that the petitioner paid the beneficiary gross wages of \$3,000 during each of the months from August 2012 to February 2013.

The O\*NET OnLine Summary Report for Sales Managers indicates that such positions are in Job Zone Four, and that most such positions require a bachelor's degree, but some do not. It does not indicate that even those positions that require a bachelor's degree require a bachelor's degree in any specific specialty. The *Handbook* chapter provided also indicates that most sales managers have a bachelor's degree, but does not indicate that most have a bachelor's degree in any specific specialty.

The January 19, 2010 evaluation of the proffered position concludes, "the position of Sales Manager is clearly a specialty occupation, and requires the services of someone with advanced training through a Bachelor's program in Hospitality Management or a closely related field."

The May 14, 2013 letter from the petitioner's president reiterates the list of duties he previously provided in his September 11, 2012 letter, including the duties related to the petitioner's staff of sales representatives, but without explaining the lack of any sales representatives on the petitioner's staff. He further stated that the proffered position, "would normally be filled by a graduate with a minimum of a Bachelor's Degree in Business Administration, Hospitality Administration, or a related area."

<sup>3</sup> USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

[REDACTED] diploma shows that she received a bachelor's degree in interdisciplinary studies. In his own undated letter, counsel stated that [REDACTED] previously performed the duties of the proffered position. Counsel did not state any basis for that assertion, which is not corroborated by any evidence in the record.

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). No evidentiary weight may be accorded counsel's assertion that Karen Fisher has performed the duties of the proffered position.

Counsel also stated that the proffered position, "would normally be filled by a graduate with a minimum of a Bachelor's Degree in Business Administration, Hospitality Administration, or a related area, or the equivalent."

The director denied the petition on July 31, 2013, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, the director found that the petitioner had satisfied none of the supplemental criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, in addition to the Form I-290B, counsel submitted, *inter alia*: (1) four letters from other people in the petitioner's industry; (2) an evaluation, dated August 28, 2013, of the proffered position; (3) a letter, dated August 30, 2013, from the petitioner's president; (4) an undated letter from the petitioner's president; and (5) a brief.

The letters from others in the petitioner's industry were apparently provided as evidence that the proffered position satisfies the criterion at the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), that is, to show that a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent is common to positions parallel to the proffered position with similar organizations in the petitioner's industry.

Of the industry letters provided, however, three are from people who state that their duties include general manager duties at their hotels. They are clearly not, therefore, sales manager positions. If the proffered position were shown to be a sales manager position as alleged, those letters would not be from people in parallel positions.

The fourth writer indicates that he has duties pertinent to multiple hotels, but does not state how many. That position has not been shown, therefore, to be with an organization similar to the petitioner.

Two of the writers stated that they have bachelor's degrees, but do not identify the subjects in which they possess degrees. Another did not state his educational qualifications for his position. They are

not, therefore, evidence that the positions they hold require a minimum of a bachelor's degree *in a specific specialty* or its equivalent. The fourth letter writer stated that he has a bachelor's degree in education and a master's degree in public school administration. Because he does not hold a position closely related to education or public school administration, that letter is also not evidence that the position that writer holds requires a minimum of a bachelor's degree or its equivalent in a specific specialty closely related to the duties of the position.

One of the industry letters provided states that "education is important" to the position it discusses, but does not state any specific educational requirement. The other three letters state that the positions they discuss require a bachelor's degree, but not that the degree must be in any specific specialty. As such, none of those letters are evidence that the positions they discuss require a minimum of a bachelor's degree *in a specific specialty* or its equivalent.

The August 28, 2013 evaluation reiterates the duties originally provided in the September 11, 2012 letter from the petitioner's president. It does not reconcile the assertion that the beneficiary will establish training programs for the petitioner's sales representatives with the fact that the petitioner appears to employ no such sales staff. The evaluator stated that those duties require "a minimum of a Bachelor's degree in Sales Management, Business Administration, Hospitality Management, or a related area, or the equivalent."

In his August 30, 2013 letter, the petitioner's president stated, *inter alia*:

As [the beneficiary's] employer I am willing to make amendment to his salary and submit his pay stubs as evidence that would show a gross income of \$5000.00 per month when he starts working again. We would still be providing free accommodations with all bills paid.

In the past, before the extension was denied, [the beneficiary's] monthly salary was \$3000.00 and we provided him with free accommodations with all bills paid, which would have totaled to approximately \$5000.00 per month.

An undated letter from the petitioner's president indicated that the beneficiary has been a very productive member of the petitioner's team of employees.

In the appeal brief, counsel asserted that the proffered position requires a minimum of a bachelor's degree in hospitality administration or a closely related field, or the equivalent, that the beneficiary is qualified for the proffered position, and that the visa petition should therefore be approved.

#### IV. ANALYSIS

As a preliminary matter, the petitioner has not alleged that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent.

That is, in his September 11, 2012 letter, the petitioner's president stated that the proffered position requires a minimum of a bachelor's degree in hospitality management or a related field, but did not identify the fields that would be considered sufficiently closely related to the proffered position that a degree in one of those fields would be a sufficient educational qualification for the proffered position. Counsel echoed that requirement on appeal but, again, without identifying the fields closely related enough to the proffered position that a degree in any one of those fields would be a sufficient educational qualification for the proffered position.

However, the May 14, 2013 letter from the petitioner's president clarifies that issue somewhat by stating that a minimum of a bachelor's degree in business administration, hospitality administration, or a related area would be a sufficient qualification for the proffered position. Thus, although it does not indicate that business administration and hospitality administration is an exhaustive list of the subjects sufficiently closely related to the duties of the proffered position, it does make clear that a bachelor's degree in business administration, without further specification, would be a sufficient educational qualification for the proffered position.

A degree with a generalized title, such as business administration, without further specification, is not a degree in a specific specialty. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). As such, an educational requirement that may be satisfied by an otherwise undifferentiated bachelor's degree in business administration is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent. The statement of the petitioner's president is tantamount to an admission that the proffered position does not require a minimum of a bachelor's degree in a specific specialty or its equivalent and does not, therefore, qualify as a specialty occupation position. The visa petition must be denied for this reason alone.

We also note that the petitioner has asserted that the duties of the proffered position will include: "planning, directing, and coordinating sales services of the organization," "manag[ing] sales operations," "establishing sales territories, quotas and goals," establishing training programs for sales representatives, and "analyzing sales statistics gathered by staff." Those duties indicate that the petitioner has a sales staff that includes, at least, sales representatives.

However, the petitioner's organizational chart and employee list indicate that the petitioner has maintenance, front desk, housekeeping, laundry, transportation, and food service personnel, in addition to the beneficiary's position, a general manager, two night auditors, and one position labelled "In Charge Accounts/Purchase." None of those positions appear to be sales representatives.

The petitioner has not demonstrated that it has sales representatives for the beneficiary to supervise. The evidence is therefore insufficient to show that, if the visa petition were approved, the beneficiary would perform the duties the petitioner claims he would perform. Further, given that the evidence is insufficient to show that the beneficiary would perform those duties, the substantive nature of the duties of the proffered position has not been established.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for 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.

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.

#### V. REQUIRED WAGE TO BE PAID TO THE BENEFICIARY

We note that the petitioner previously filed a visa petition [REDACTED] for the beneficiary. It was approved for employment from June 28, 2010 to December 1, 2012 at an annual wage of \$57,720 per year. We observe that equates to \$14,430 per quarter, or \$4,810 per month.

As was observed above, the beneficiary's 2011 and 2012 W-2 forms indicate that the petitioner paid him \$37,589.95 and \$37,330.96 during those years, respectively. The petitioner's quarterly returns further indicate that the petitioner paid the beneficiary gross wages of \$8,895.24, \$10,395.24, \$8,895.24, and \$9,145.24 during the four quarters of 2012, respectively. The pay statements provided show that the petitioner paid the beneficiary gross wages of \$3,000 during, *inter alia*, each month from August 2012 to December 2012. In short, the record indicates that the petitioner has never paid the beneficiary the full amount of the proffered wage during any period for which evidence was provided.

The record contains a letter, dated August 30, 2013, from the petitioner's president. That letter states, in pertinent part:

As [the beneficiary's] employer I am willing to make amendment to his salary and submit his pay stubs as evidence that would show a gross income of \$5000.00 per month when he starts working again. We would still be providing free accommodations with all bills paid.

In the past, before the extension was denied, [the beneficiary's] monthly salary was \$3000.00 and we provided him with free accommodations with all bills paid, which would have totaled to approximately \$5000.00 per month.

The regulations at 20 C.F.R. § 655.731(c)(2) and (3) require that all payments to the beneficiary in satisfaction of the required wage obligation must, *inter alia*, be "shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due" and "reported to the Internal Revenue Service (IRS) as the employee's earnings . . . ." The petitioner's president's letter contains an admission that the petitioner did not pay the beneficiary the proffered wage "cash in hand" as required by the salient regulation. Furthermore, the W-2 forms do not appear to include the claimed accommodations and bills paid by the petitioner. Therefore, based on this information, even if the petitioner had overcome the basis upon which the instant petition was denied, the petition still could not be approved because there is insufficient evidence in the record that the beneficiary will be paid the required wage during the requested validity period.<sup>4</sup>

#### IV. CONCLUSION

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.

<sup>4</sup> We observe that the petitioner's president did not indicate that the petitioner subsequently paid the beneficiary the balance of the wages due to him pursuant to the terms and conditions of his H-1B employment from June 28, 2010 to December 1, 2012.