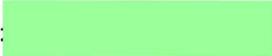




U.S. Citizenship
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Services

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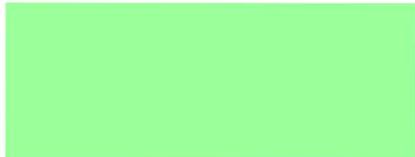


DATE: **JAN 09 2014** OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary:

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

ON BEHALF OF PETITIONER:

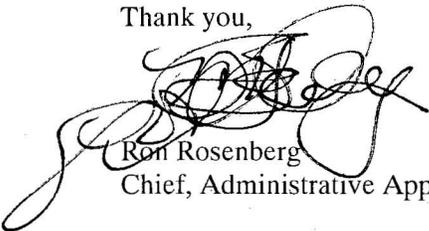


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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 Vermont Service Center on May 24, 2012. In the Form I-129 visa petition, the petitioner describes itself as a telecommunications and wireless services business established in 1996. In order to employ the beneficiary in what it designates as a graphics designer 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 December 17, 2012, 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 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 petitioner's 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.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

Later in this decision, the AAO will also discuss an additional, independent ground not identified by the director's decision, that the AAO finds precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the applicable statutory and regulatory provisions. Thus, the petition cannot be approved for this independent and alternative basis for denial of the petition.¹

In this matter, the petitioner stated in the Form I-129 petition that it seeks the beneficiary's services as a graphics designer to work on a full-time basis. In a support letter dated May 10, 2012, the petitioner stated that the beneficiary will perform the following duties in the proffered position:

- (1) create graphic designs, page layout, vector illustration, and digital photo manipulation, various websites using knowledge and experience in Adobe Photoshop, Illustrator, After Effects, Final Cut Pro, Flash, Autodesk Maya, Dreamweaver, PowerPoint, HTML/CSS, as well as Microsoft Office suites, and layout principles;

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

(2) determine size and arrangement of illustrative materials, select style and size, confer with clients to discuss and determine layout design; (3) develop graphics and layouts for product illustrations, company logo, and internet websites, and animation, and advertisements in newspapers, brochures, posters, and apps.; (4) enhance and optimize existing designs; (5) review final layouts and suggest improvements as needed; (6) maintain archive of images, photos and previous work products, utilizing advance technologies to generate new images; and (7) generate customized reports for management.

The AAO notes that the majority of these duties are nearly identical to those listed on the Occupational Information Network (O*NET) OnLine Summary Report for the occupation "Graphic Designers." See U.S. Dep't of Labor, Emp't & Training Admin., O*NET OnLine, 27-1024.00 – Graphic Designers, on the Internet at <http://www.onetonline.org/link/summary/27-1024.00> (last visited January 6, 2014).

In its letter of support accompanying the Form I-129 petition, the petitioner stated the education requirement for the proffered position as "a minimum of a bachelor's degree in graphic design, technology, design & technology, computer science, or [the] equivalent." The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of her academic credentials, as well as her professional background. The petitioner provided a copy of the beneficiary's transcript and diploma from [REDACTED] indicating that she was granted a Bachelor of Fine Arts in design and technology in May 2011. The petitioner also submitted the beneficiary's resume.

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 "Graphic Designers" - SOC (ONET/OES) code 27-1024, at a Level I (entry level) wage.

The petitioner provided evidence in support of the petition, including an employment agreement and copies of paychecks in the name of the beneficiary. No further documentation regarding the proffered position was provided by the petitioner and its counsel.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 19, 2012. The director asked that the petitioner submit probative evidence to establish that the proffered position is a specialty occupation. The director stated that such evidence may include a more detailed description of the work to be performed by the beneficiary, along with the percentage of time to be spent on each duty. Further, the director noted that the petitioner is a [REDACTED] services retailer, and requested documentation regarding the nature, scope, and activity of the petitioner's business operations along with evidence substantiating the need for the services to be performed by the beneficiary. The director outlined the evidence to be submitted.

On October 12, 2012, counsel responded to the director's RFE by providing a brief and additional evidence. In the brief, counsel submitted a revised description of the duties of the proffered position, along with the approximate percentage of time that the beneficiary will spend performing

each duty. Specifically, counsel provided the following revised description of the proffered position:

Approx. Percentage of Time Per Week for Each Duty the Beneficiary Will Perform
As Graphics Designer
20% Determine size and arrangement of illustrative materials, select style and size, and then confer with management to discuss and determine final layout designs
25% Create graphic designs, page layout, vector illustration, and digital photo manipulation, and design and implement and maintain and update corporate website by utilizing knowledge and experience in Adobe Photoshop, Illustrator, After Effects, Final Cut Pro, Flash, Autodesk Maya, Dreamweaver, PowerPoint, HTML/CSS, as well as Microsoft Office suites, and layout principles; and also designing/improving/updating specific Internet Apps. that can be downloaded by customers for various promotional purposes
25% Collaborate with the sales department and build/develop graphics and layouts for the product illustrations, company logo, and product website, and animation, and advertisements in newspapers, brochures, posters, and Internet apps
10% Enhance and optimize existing designs and then review the final layouts before production with manager and incorporate suggested improvements, as needed
10% Maintain and develop archives of images, photos, and previous work products, and also utilize these archival material when developing new images and displays
10% Prepare documentation and presentations to manager to plan various potential projects, as well as design and produce training materials for company representatives and staff members

Clearly, based on the detailed description of the duties and responsibilities that [the beneficiary] is expected to assume as Graphic Designer at [the petitioner] on H-1B status, a minimum of a baccalaureate degree is required to fill this position. This position requires more than just a general understanding of using computer software and applications. It also requires a specialized knowledge in design and presentation, as well as sales and marketing strategies, not to mention specific technical skill sets. The duties and responsibilities listed above clearly involve exercising complex and high-level decisions on behalf of the petitioning company.

Counsel claimed that the job description itself indicates that the proffered position qualifies as a specialty occupation.² In addition, the response to the RFE included the following: (1) invoices;

² Similarly to the job description provided with the initial petition, many of these job duties are recited from the O*NET OnLine Summary Report for the occupation "Graphic Designers." See U.S. Dep't of Labor, Emp't & Training Admin., O*NET OnLine, 27-1024.00 – Graphic Designers, on the Internet at <http://www.onetonline.org/link/summary/27-1024.00> (last visited January 6, 2014).

Further, it must be noted that the revised job description was submitted by counsel, not the petitioner. Counsel's brief was not signed by or endorsed by the petitioner. The record of proceeding does not indicate

(2) documents described by counsel as samples of the beneficiary's work product; and (3) printouts of several online job postings.

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 immediate duties 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. The director denied the petition on December 17, 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.³

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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. § 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, and the 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 AAO finds that the petitioner has not done so.

In the instant case, the AAO observes that the duties of the proffered position, as described by the petitioner in support of the Form I-129 petition and by counsel in response to the director's RFE, have been stated in generic terms that fail to convey the actual tasks the beneficiary will perform on a day-to-day basis. As previously noted, the AAO observes that the list of duties provided by the petitioner in its initial letter of support, dated May 10, 2012, as well as the revised list of duties

the source of the percentages of time allocated to each duty that counsel attributes to the proffered position. Moreover, counsel now claims that the educational requirement for the proffered position is a minimum of a baccalaureate degree (no specific specialty).

³ In the appeal brief, counsel emphasizes that "[the petitioner] needs someone who is not only well experienced in graphic design and programming, but also well versed in Korean language too."

provided by counsel in response to the RFE and on appeal, are nearly identical to those listed on the O*NET OnLine Summary Report for the occupation "Graphic Designers." The O*NET OnLine Summary Report for "Graphic Designers" contains the following "tasks":

- Create designs, concepts, and sample layouts based on knowledge of layout principles and esthetic design concepts.
- Determine size and arrangement of illustrative material and copy, and select style and size of type.
- Confer with clients to discuss and determine layout design.
- Develop graphics and layouts for product illustrations, company logos, and Internet websites.
- Review final layouts and suggest improvements as needed.
- Prepare illustrations or rough sketches of material, discussing them with clients or supervisors and making necessary changes.
- Use computer software to generate new images.
- Key information into computer equipment to create layouts for client or supervisor.
- Maintain archive of images, photos, or previous work products.
- Prepare notes and instructions for workers who assemble and prepare final layouts for printing.

U.S. Dep't of Labor, Emp't & Training Admin., O*NET OnLine, 27-1024.00 – Graphic Designers, on the Internet at <http://www.onetonline.org/link/summary/27-1024.00> (last visited January 6, 2014).

In the RFE, the director notified the petitioner that the information regarding the proffered position that it had initially provided was inadequate to establish that the proffered position qualifies as a specialty occupation position, and requested that the petitioner provide a detailed statement regarding the duties and responsibilities of the proffered position. In response, counsel provided a list of duties, many of which were also copied from the O*NET OnLine Summary Report for the occupational category "Graphic Designers," with the addition of the percentage of time the beneficiary would spend performing each duty.

All descriptions of the proffered position that have been submitted in the instant case rely heavily on the generic duties of a graphic designer as they appear in O*NET. The AAO notes that providing job duties for a proffered position from O*NET is generally not sufficient for establishing H-1B eligibility. That is, while this type of description may be appropriate when defining the range of duties that may be performed within an occupational category, it generally cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval as this type of generic description fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations. In establishing a position as qualifying as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate a

legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Such generalized information does not in itself establish a correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. The AAO also observes, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the AAO finds the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position.

Moreover, the job descriptions in the record of proceeding fail 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. The petitioner's assertion with regard to the educational requirement for the position is conclusory and unpersuasive, as it is not supported by the job descriptions or probative evidence. That is, the job duties of the proffered position, as provided by the petitioner and counsel, do not convey the substantive nature of the actual work that the beneficiary would perform. Rather, the job descriptions convey, at best, only generalized functions of the occupation at a generic level. The totality of the evidence fails to establish the substantive nature of the proffered position such that the AAO can ascertain in what capacity the beneficiary will actually be employed. 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 on this basis alone.

Further, in the instant case, the record of proceeding also contains discrepancies between what the petitioner claims about the level of responsibility inherent in the proffered position set against the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of petition. That is, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Graphic Designers" at a Level I (entry level) wage. The LCA was certified on April 4, 2012 and signed by the petitioner's vice president of operations on May 21, 2012.

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

⁴ For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at

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.⁵ The U.S. Department of Labor (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 "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL 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.

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.

In the instant case, counsel claims that Korean language skills are integral to the duties of the proffered position. For instance, in response to the RFE, counsel states that the samples of the beneficiary's work product include "graphic designs in Korean, to attract local ethnic customers." On appeal, counsel reports that "[the petitioner] needs someone who is not only well experienced in graphic design and programming, but also well versed in Korean language too." Counsel further states that "[the petitioner] supports the majority, if not all, of its various outlet stores using both English, and Korean languages," and notes that the beneficiary is fluent in Korean. According to

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.

counsel, the petitioner needs to employ "a dedicated Graphics Designer to oversee the design and production of promotional and sales materials (both in English, as well as in Korean)." Counsel concludes, "[the petitioner] needs [the beneficiary's] graphic design expertise to affect those changes and modifications for the specialized clientele in both the English, as well as the Korean customer base that [the petitioner] services in northern New Jersey." On appeal, counsel provided a statement from the petitioner regarding the beneficiary's work as "graphic designer," which includes "**Graphics: Prints / Web / App in Korean and English**" and videos in Korean and English.

A language requirement other than English for a proffered position is generally considered a special skill for all occupations, with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers. In the instant case, the petitioner has not established that the foreign language requirement has been reflected in the wage-level for the proffered position. Specifically, the Level I (entry level) wage, as indicated on the LCA, does not reflect the petitioner's requirement for special skills, i.e., fluency in the Korean language.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The AAO notes that the prevailing wage designated by the petitioner on the LCA corresponds to a Level I position for the occupational category of "Graphic Designers" for [REDACTED], New Jersey.⁶ Notably, if the proffered position had been designated at a higher level, the prevailing wage at that time would have been significantly higher.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted. Thus, for this reason, even if it were determined that the petitioner overcame the director's basis for denial of the petition (which it has not), the petition could not be approved.

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based

⁶ For additional information regarding the prevailing wage for Graphic Designers in [REDACTED] see the All Industries Database for 7/2011 - 6/2012 for Graphic Designers at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at [http://www.flcdatacenter.com/OesQuickResults.aspx?code=\[REDACTED\]](http://www.flcdatacenter.com/OesQuickResults.aspx?code=[REDACTED]) (last visited January 6, 2014).

upon a complete review of the record of proceeding, and for the specific reasons described below, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes 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 attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

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

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

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

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 petitioner had adequately and accurately described the duties of the proffered position, the AAO provides the below analysis of the evidence of record to further describe why the proffered position does not qualify as specialty occupation in accordance with the applicable statutory and regulatory provisions. To make a determination as to whether the position proffered by the petitioner qualifies as a specialty occupation, the AAO first reviews the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), 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 AAO recognizes DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁷ As previously discussed, the petitioner designated the proffered position in the LCA under the occupational category "Graphic Designers." The AAO reviewed the section of the *Handbook* entitled "What Graphic Designers Do," and observes that the *Handbook* attributes the following duties to this occupational classification:

Duties

Graphic designers typically do the following:

- Meet with clients or the art director to determine the scope of a project
- Advise clients on strategies to reach a particular audience
- Determine the message the design should portray
- Create images that identify a product or convey a message
- Develop graphics and visual or audio images for product illustrations, logos, and websites
- Create designs either by hand or using computer software packages
- Select colors, images, text style, and layout
- Present the design to clients or the art director
- Incorporate changes recommended by the clients into the final design
- Review designs for errors before printing or publishing them

⁷ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The AAO hereby incorporates the excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational categories into the record of proceeding.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Graphic Designers, on the Internet at <http://www.bls.gov/oooh/arts-and-design/graphic-designers.htm#tab-2> (last visited January 6, 2014).

Although the petitioner has entitled the proffered position as a "graphic designer," counsel acknowledges on appeal that the original graphics utilized by the beneficiary are provided by the [REDACTED] corporate headquarters, which are then modified by the beneficiary to create posters, flyers, and other advertising materials tailored to the petitioner's clientele. The AAO thoroughly reviewed the entire record of proceeding, including the documents identified by the petitioner and counsel as samples of the beneficiary's work product, and a statement from the petitioner dated January 14, 2013 attesting to the beneficiary's work in the position of "graphic designer." Upon review, the AAO concludes that the evidence of record does not establish that the beneficiary would engage in duties such as "develop graphics and visual or audio images," "determine the message the design should portray," "advise clients on strategies to reach a particular audience," or "create images that identify a product or convey a message." Rather, from the evidence provided, it appears that the beneficiary's work product primarily involves reproduction and modification of stock images provided by the [REDACTED] corporate headquarters to create advertising and promotional materials for the petitioner and its franchisees.

The AAO reviewed the *Handbook*, and finds that the proffered position is more appropriately classified under the occupational category of "Desktop Publisher." According to the *Handbook's* section entitled "What Desktop Publishers Do," individuals in such positions perform the following duties:

Desktop publishers use computer software to design page layouts for newspapers, books, brochures, and other items to be printed or put online. They collect the text, graphics, and other materials they will need and format them into a finished product.

Duties

Desktop publishers typically do the following:

- Gather existing materials or work with designers and writers to create new artwork or text
- Find and edit graphics, such as photographs or illustrations
- Use scanners to turn drawings and other materials into digital images
- Import text and graphics into desktop publishing software programs
- Position artwork and text on the page layout
- Select formatting properties, such as text size, column width, and spacing
- Check proofs, or preliminary layouts, for errors and make corrections
- Convert files for printing or websites
- Send final files to a commercial printer or print the documents on a high-resolution printer

Desktop publishers use publishing software to create page layouts for print or web publication. Some desktop publishers may help to create web pages using Hypertext Markup Language (HTML), although this is usually the job of web designers.

* * *

In addition to designing pages, desktop publishers may edit or write text. Some desktop publishers might be responsible for correcting spelling, punctuation, and grammar or for writing original content themselves.

Desktop publishers' responsibilities may vary widely from project to project and employer to employer. Smaller firms typically use desktop publishers to perform a wide range of tasks, while desktop publishers at larger firms may specialize in one part of the publishing process.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Desktop Publishers, on the Internet at <http://www.bls.gov/ooh/office-and-administrative-support/desktop-publishers.htm#tab-2> (last visited January 6, 2014).

The AAO reviewed the chapter of the *Handbook* entitled "Desktop Publishers," including the section regarding the requirements for this occupational category.⁸ However, the *Handbook* does not indicate that "Desktop Publishers" 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 Desktop Publisher" states, in part, the following about this occupation:

Desktop publishers have a variety of educational backgrounds, but most complete some form of postsecondary education, such as an associate's degree. Workers also usually learn some of their skills on the job. Computer skills, including knowledge of desktop publishing software, are important.

Education

Desktop publishers can prepare for the occupation in several ways. Many workers earn an associate's degree. Others earn a bachelor's degree. Still others qualify with a postsecondary non-degree award. Experience can sometimes substitute for education.

Those who earn a degree usually study a field such as graphic design, graphic arts, or graphic communications. Community colleges and trade and technical schools also may offer desktop publishing courses. These classes teach students about desktop publishing software used to format pages and how to import text and graphics into electronic page layouts.

⁸ For additional information regarding the occupational category "Desktop Publishers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Desktop Publishers, on the Internet at <http://www.bls.gov/ooh/office-and-administrative-support/desktop-publishers.htm> (last visited January 6, 2014).

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Desktop Publishers, available on the Internet at <http://www.bls.gov/ooh/office-and-administrative-support/desktop-publishers.htm#tab-4> (last visited January 6, 2014).

The *Handbook* indicates that there are many avenues of preparation for a career as a desktop publisher. The *Handbook* reports that most individuals in this occupational category "complete some form of postsecondary education, such as an associate's degree." The *Handbook* continues by stating that workers usually learn some of their skills on the job, and that computer skills are important. The *Handbook* also states that some desktop publishers qualify for positions with a postsecondary non-degree award and that experience can sometimes substitute for education. The narrative of the *Handbook* indicates that individuals who obtain a degree (associate's or bachelor's degree), usually study a field such as graphic design, graphic arts, or graphic communications. According to the *Handbook*, community colleges and trade and technical schools also offer related courses. Upon review, 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 occupational category.

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)(1).

Next, the AAO will review the record of proceeding 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 of 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. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

In the Form I-129, the petitioner stated that it is a telecommunications/wireless services business that was established in 1996, and has 12 employees. The petitioner stated its gross annual income as approximately \$11 million. Although requested on the Form I-129, the petitioner did not provide its net annual income. The petitioner did not provide an explanation for failing to provide this information. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 517310.⁹ The AAO notes that this NAICS code is designated for "Telecommunications Resellers." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments primarily engaged in purchasing access and network capacity from owners and operators of the networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate and maintain telecommunications switching and transmission facilities.

U.S. Dep't of Commerce, U.S Census Bureau, 2002 NAICS Definition, 517310 – Telecommunications Resellers, on the Internet at <http://www.naics.com/censusfiles/ND517310.HTM> (last visited January 6, 2014).

The AAO notes that under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must establish that "the degree requirement is common to *the industry in parallel positions among similar organizations* (emphasis added)." That is, this prong requires the petitioner to establish that a requirement of a bachelor's 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 response to the RFE, the petitioner and counsel submitted several job announcements. However, the

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 January 6, 2014).

documentation does not establish the proffered position qualifies as specialty occupation under this criterion of the regulations. For instance, the petitioner has not established that the advertising organizations are similar to the petitioner. The record of proceeding contains job postings for [REDACTED] "a leading North American content agency" and [REDACTED] ("a global leader in the RF and wireless communications, power conversion and renewable energy markets" that focuses on "meet[ing] the total engineering needs of each customer"). The petitioner failed to specify what characteristics it believes it shares with these organizations. When determining whether the petitioner and an organization share the same general characteristics, such factors may include information regarding the nature or type of organization, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. 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. 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Additionally, some of the advertisements appear to be for dissimilar positions and/or for more senior positions. For example, the posting from [REDACTED] for a user interface developer requires a degree and a "minimum of 10 years in Coding, Engineering, IT, or Product Development." The posting from [REDACTED] for a "Senior User Experience Designer" requires a degree and "5+ years of user interface design experience with consumer applications." The posting for a graphics designer II at [REDACTED] requires a degree and a "[m]inimum 7 years of design experience in an agency and/or retail setting." [REDACTED] seeks an individual with a degree and "6+ years of experience designing GUI components" to fill its senior interactive designer position. As previously discussed, the petitioner has classified the proffered position as a Level I (entry level) position, the lowest of four possible designations. According to DOL guidance, a Level I wage is appropriate for a worker in training or an internship. Notably, some of the advertisements do not contain sufficient information regarding the day-to-day duties, complexity of the job duties, supervisory duties (if any), independent judgment required, or the amount of supervision received within the context of the advertising employers' business operations to make a legitimate comparison of the advertised positions to the proffered position.

Further, contrary to the purpose for which they were submitted, the advertisements do not demonstrate that a bachelor's degree in a specific specialty (or its equivalent) is common in the petitioner's industry. For instance, the posting from [REDACTED] indicates that the advertising organization will accept "3-5 years related experience and/or training" in lieu of a bachelor's degree. Thus, the posting does not establish that the advertising organization calculates equivalency in the same manner as USCIS pursuant to the relevant regulations.¹⁰ The posting from [REDACTED] indicates

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

that a "[d]egree in Graphic/Communications Design" or a related field is "[r]equired," and that a "[b]achelor's degree" in one of several fields is "[p]referred." A preference for a bachelor's degree does not indicate a requirement for the same. It appears that the advertising organization will accept an associate's degree as sufficient academic preparation for the posted position. Further, the posting from [REDACTED] indicates that the advertising organization seeks an individual with a bachelor's degree in one of a variety of disparate fields, including electrical engineering, graphic design, and computer animation. To qualify as a specialty occupation, a position must require a bachelor's degree in a specific specialty (or its equivalent) that is directly related to the duties of the position.

Furthermore, the petitioner fails to establish the relevancy of the provided examples to the issue here.¹¹ That is, 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.¹²

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.

¹¹ 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.

¹² Furthermore, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these few job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that 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, based upon a complete review of the record of proceeding, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, 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 submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted copies of invoices and documents described as the beneficiary's work product, which includes advertisements for the petitioner's products and services. On appeal, the petitioner provided a description of the beneficiary's projects performed while the beneficiary was employed with the petitioner under Optional Practical Training (OPT) status. The AAO reviewed the record of proceeding in its entirety. However, upon review of the record, the AAO finds that the petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position.

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

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

closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. Without further evidence, it is 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."¹³ Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position.

The petitioner fails to demonstrate how the duties of the position as described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. 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, her language skills, and her prior experience with the petitioner 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

¹³ For additional information regarding wage levels as defined by DOL, see U.S. Dept 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

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 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.

In response to the director's RFE, counsel indicated that the duties of the prior position were previously performed by Ms. [REDACTED] the petitioner's Vice President of Operations, who has a "background in business." Counsel further stated that "Ms. [REDACTED] decided that it was no longer

practical for her to shoulder most of the graphic design and desktop publication of various promotion and product materials all by herself and her sales staff."

On appeal, counsel states that prior to hiring the beneficiary, "the company's graphic design work have [sic] been the responsibility of [the petitioner's] general sales staff, as supervised by Ms. [REDACTED]. Counsel further states that "Ms. [REDACTED] background is in an unrelated field (her background is not IT – or design related; she has a journalism background from overseas), as the company continues to grow with new customers . . . [the petitioner] and Ms. [REDACTED] understandably decided that it is not practical from Ms. [REDACTED] sales staff to be solely in charge of the graphic design and desktop publication of various promotional and product materials." Thus, the petitioner has not established that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. Rather counsel and the petitioner represent that prior to hiring the beneficiary, the duties of the proffered position were performed by 1) Ms. [REDACTED] who has an unrelated degree, and 2) the sales staff, whose education and training has not been established. Further, the petitioner and counsel represent that the proffered position is a new position.

Upon review of the record, the petitioner has not provided sufficient 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.

The AAO acknowledges that the petitioner may believe 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 AAO reviewed all of the evidence in the record, including the documents described as the beneficiary's work product, which include advertisements and promotional materials for the petitioner's products and services. The AAO also considered petitioner's statement of work previously completed by the beneficiary. However, the AAO finds that the submitted documentation fails 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).

For the reasons related in the preceding discussion, 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.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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.