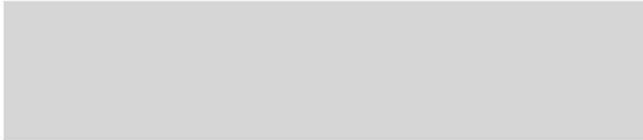




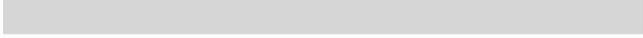
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 14 2015**

PETITION RECEIPT #: 

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

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

Ron Rosenberg
Chief, Administrative Appeals Office

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

I. PROCEDURAL BACKGROUND

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a "Grocery Retail/Distribution" company that was established in [REDACTED]. In order to employ the beneficiary in what it designates as a graphic designer position,¹ 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, finding that the evidence of record did not establish that the proffered position qualifies as a specialty occupation.

The record of proceeding 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 decision; and (5) the Notice of Appeal or Motion (Form I-290B) and supporting documentation. We reviewed the record in its entirety before issuing our decision.²

For the reasons that will be discussed below, we agree with the Director that the evidence of record has not established eligibility for the benefit sought. Accordingly, the Director's decision will not be disturbed. The appeal will be dismissed.

II. SPECIALTY OCCUPATION

The primary issue is whether the evidence of record has demonstrated by a preponderance of the evidence that the petitioner will employ the beneficiary in a specialty occupation position.³

¹ The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Graphic Designers" occupational classification, SOC (O*NET/OES) Code 27-1024, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

² We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

³ The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)).

A. Legal Framework

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 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 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 387. 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.

B. The Proffered Position

In the Form I-129, the petitioner indicated that it wishes to employ the beneficiary as a graphic designer on a full-time basis. In the support letter, the petitioner provided the following information regarding the duties of the proffered position:

The Graphic Designer will work under general supervision, produce visual solutions to our market advertising needs, using a combination of creative skills and commercial awareness. Specifically, the duties and responsibilities for the Graphic Designer position include the following, with our estimate of time to be spent performing each duty:

- Identify graphics needs, budget constraints, preferred media and styles, and reasonable deadlines for the projects; Analyze and interpret graphic requirements for [the petitioner's] newspaper advertisement and other promotional materials; Conceptualize, design, and produce computer based advertising materials/layouts for presentation in newspapers, magazines, catalogs, directories, brochures, flyers, and pamphlets utilizing computerized graphic design programs; Create computer-based original designs, concepts, and sample layouts and computer graphics for [the petitioner's] website based on knowledge of layout principles and esthetic design concepts, conduct research and analysis of our market competitor designs and graphics to insure originality and avoidance of trademark or copyright infringement - 25%;
- Determine appropriate size, placement, and arrangement of illustrative materials and copy, and select, colors, markings, style and size of type; Design and produce camera-ready advertising art - 15 %;
- Adjust and suggest improvement of designs as needed – 10%;
- Mark up, paste, and assemble final layouts to prepare layouts for printing or screening – 10%;
- Creating electronically-design page layouts and importing word processing files into page layouts, develop and produce web-based graphics as appropriate to the advertising project; Draw samples of finished layouts and present samples to management for approval – 10%;
- Use computer software to execute final designs, graphics, or illustrations – 15%;

- Work with printers, programmers, developers, or other technicians to complete the final product – 10%; and
- Other related duties as assigned - 5%.

(Errors in original.)

The petitioner also stated that it requires "a Bachelor's Degree in Graphic Design or other related field" for the proffered position.

C. Analysis

A baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position

We will now discuss the proffered position in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires the petitioner to demonstrate that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

USCIS recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴ The petitioner asserted in the LCA that the proffered position falls under the occupational category "Graphic Designers."⁵ We reviewed the section of the *Handbook* regarding this occupational category, including the section entitled "How to Become a Graphic Designer," which states the following:

Graphic designers usually need a bachelor's degree in graphic design or a related field. Candidates for graphic design positions should demonstrate their creativity and originality through a professional portfolio that features their best designs.

⁴ All of the references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational category are hereby incorporated into the record of proceeding.

⁵ Many of the described duties of the proffered position overlap with those of desktop publisher and web developers, as described in the *Handbook*. According to the *Handbook*, positions within these occupational categories do not require a bachelor's degree. See <http://www.bls.gov/ooh/office-and-administrative-support/desktoppublishers.htm#tab-4> and <http://www.bls.gov/ooh/computer-and-information-technology/webdevelopers.htm#tab-4> (last visited August 12, 2015).

Education

A bachelor's degree in graphic design or a related field is usually required. However, those with a bachelor's degree in another field may pursue technical training in graphic design to meet most hiring qualifications.

The National Association of Schools of Art and Design accredits about 300 postsecondary colleges, universities, and independent institutes with programs in art and design. Most schools include studio art, principles of design, computerized design, commercial graphics production, printing techniques, and website design. In addition, students should consider courses in writing, marketing, and business, all of which are useful in helping designers work effectively on project teams.

Many programs provide students with the opportunity to build a professional portfolio of their designs. This means collecting examples of their designs from classroom projects, internships, or other experiences. Students can use these examples of their work to demonstrate their design skills when applying for jobs and bidding on projects. A good portfolio often is the deciding factor in getting a job.

Students interested in graphic design programs should take basic art and design courses in high school, if the courses are available. Many bachelor's degree programs require students to complete a year of basic art and design courses before being admitted to a formal degree program. Some schools require applicants to submit sketches and other examples of their artistic ability.

Graphic designers must keep up with new and updated computer graphics and design software, either on their own or through formal software training programs. Professional associations that specialize in graphic design, such as AIGA and the Graphic Artists Guild, offer courses intended to keep the skills of their members up to date.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Sales Engineers, available at <http://www.bls.gov/ooh/arts-and-design/graphicdesigners.htm#tab-4> (last visited August 12, 2015).

The *Handbook* does not state that a baccalaureate or higher degree, in a specific specialty, or its equivalent is normally the minimum requirement for entry into the proffered position. Although the *Handbook* states that a bachelor's degree in graphic design or a related field is usually required, it continues to state that individuals with a bachelor's degree in another field may pursue unspecified "technical training" in graphic design to meet most hiring qualifications. The *Handbook* does not indicate that such "technical training" must be the equivalent of a bachelor's degree in a specific specialty. Accordingly, as the *Handbook* indicates that working as a graphic designer does not normally require at least a bachelor's degree in a specific specialty or its

equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation.

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. 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'l Comm'r 1972)).

Furthermore, the duties of the proffered position as described by the petitioner do not convey the actual tasks the beneficiary will perform on a day-to-day basis. The duties listed by the petitioner 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" lists 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, available at <http://www.onetonline.org/link/summary/27-1024.00> (last visited August 12, 2015).

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, the petitioner submitted, inter alia, a copy of the *Handbook's* summary page for the Graphic Designers occupational category, a copy of *Young China Daily v Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989), and examples of the petitioner's advertisements. However, the petitioner provided no further description of the duties of the proffered position.

All descriptions of the proffered position that have been submitted in the instant case rely heavily on generic graphic designer duties similar to those that appear in O*NET. However, providing generic job duties for a proffered position similar to ones listed in 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 does not 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. 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, we find the proposed duties do not provide a sufficient factual basis for conveying the substantive matters, 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.

The job descriptions in the record of proceeding do not 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, 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.

Counsel relies on *Young China Daily v Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989), asserting that the position of graphic designer is "well established as a 'specialty occupation.'" As discussed above, absent any independent documentary evidence to support a finding that the duties to be performed by the beneficiary in relation to the petitioner's claimed operations are sufficiently complex, or that a degree requirement is common to the industry, the petitioner's reliance on *Young China Daily* is not persuasive. Regardless, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719. Nor are the petitioner's citations to unpublished AAO decisions persuasive. The petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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. Thus, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

*The requirement of a baccalaureate or higher degree in a specific specialty,
or its equivalent, is common to the industry in parallel
positions among similar organizations*

Next, we will review the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) 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 independent, authoritative source) reports a standard industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate 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. Nor does the record of proceeding contain any other types of evidence for our consideration under this criterion. The petitioner has not provided evidence establishing 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 (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The particular position is so complex or unique that it can be performed only by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent

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

In the instant case, the petitioner did not sufficiently develop relative complexity or uniqueness as an aspect of the proffered graphic designer position. Specifically, the record does not demonstrate how the graphic designer position described requires 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.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry) wage, which is the lowest of four assignable wage levels.⁶ Without further information, the evidence of record does not demonstrate that the proffered position is complex or unique as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing

⁶ The wage-level of the proffered position indicates that (relative to other positions falling under this occupational category) the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

wage.⁷ 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."⁸ The evidence of record does not establish that this position is significantly different from other positions in the occupational category such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty, or its equivalent is not required for the proffered position.

The petitioner claims that the beneficiary is well qualified for the position, and references her qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The employer normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the position

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

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. While a petitioner may assert that a proffered position requires a specific degree, that statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS

⁷ The issue here is that the petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

⁸ For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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.

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.

The petitioner submitted several advertisements and magazines as examples of the type of projects upon which the beneficiary would work. However, the petitioner did not identify the names and educational attainment of the individuals who designed them. Furthermore, the record does not contain documentary evidence demonstrating that these designers were employees of the petitioner. We find these advertisements insufficient to demonstrate the petitioner's hiring history. As the record of proceeding does not demonstrate that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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 in a specific specialty, or its equivalent

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.

We have reviewed and evaluated the petitioner's statements regarding the proffered position and its business operations in light of this criterion. The relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

We further incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level I position (the lowest of four assignable wage-levels) relative to others within the occupational category. Without more, the position is one not likely distinguishable by relatively specialized and complex duties. That is, without further evidence, the petitioner's has not demonstrated that its proffered position is one with specialized and complex duties as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a substantially higher prevailing wage.⁹

Although the petitioner asserts that the nature of the specific duties is specialized and complex, the record lacks sufficient evidence to support this claim. Thus, the petitioner has not satisfied the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied.¹⁰

III. CONCLUSION AND ORDER

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.

⁹ As previously discussed, 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" and requires a significantly higher wage.

¹⁰ Since the identified basis for denial is dispositive of the petitioner's appeal, we will not address other grounds of ineligibility we observe in the record of proceeding.