



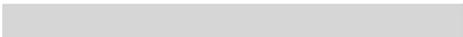
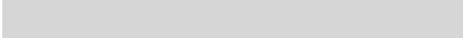
U.S. Citizenship
and Immigration
Services

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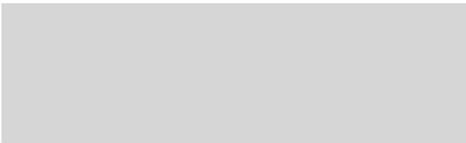
DATE: AUG 26 2015

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:



INSTRUCTIONS:

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,

Ron Rosenberg
Chief, Administrative Appeals Office

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

I. PROCEDURAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a single-employee organization providing "Asian American cultural programs, including Asian folk music." In order to employ the beneficiary in what it designates as a part-time "Instructor of Taiko Drumming" 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, finding that the evidence of record did not establish that the proffered position constitutes a specialty occupation. The petitioner now files this appeal, asserting that the Director's decision was erroneous.

The record of proceeding includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the Director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the Director's decision denying the petition; and (5) the petitioner's appeal and submissions on appeal.

As will be discussed below, we find that the evidence of record is insufficient to establish that the proffered position constitutes a specialty occupation.¹ Accordingly, the appeal will be dismissed, and the petition will be denied.

II. THE PROFFERED POSITION

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position corresponds to Standard Occupational Classification (SOC) code and occupation title "25-3099, Teachers and Instructors, All Other" from the Occupational Information Network (O*NET).

In a letter dated March 5, 2014, the petitioner described itself as "a non-profit organization . . . [whose] mission is to build a vital, self-empowered Asian American community in the () area by advancing the understanding and profile of Asian and Asian American cultures through the traditional and contemporary cultural arts." The petitioner stated that it is "dedicated to creating productive relationships with artists, community and institutions in order to produce high quality arts programs that accurately reflect the multi-cultural, multi-ethnic reality of () and the nation."

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

The petitioner explained that it seeks to employ the beneficiary as an Instructor of Taiko Drumming. The petitioner explained that "'Taiko' describes both a range of traditional Japanese percussion instruments as well as a drumming method associated with these instruments." The petitioner further stated that the beneficiary "will teach students at various levels, but will particularly focus on teaching groups of children at the elementary-school level." The petitioner elaborated upon the specific duties of the proffered position, as follows:

1. **Researching.** [The beneficiary] will research online and in print various aspects of taiko drumming on an ongoing basis. This includes research into specific musical compositions, musical techniques, historical background, pedagogical techniques, etc. She will spend approximately ten percent (10%) of her time on this task.
2. **Planning Lessons.** As with all instructors, [the beneficiary] will spend considerable effort designing lessons. Because of her focus on providing instruction to elementary-age students, [the beneficiary] will incorporate pedagogical techniques for children to a great extent. However, she will also need to design lessons for students of different ages as well as different levels. The lessons will incorporate the research [the beneficiary] has done and will be designed to achieve a particular goal. For example, one lesson may provide a broad overview of taiko drumming in general, another lesson may focus on phonetic transcription of Taiko drumming (kuchi-soga), while another lesson may focus on bodily movement and drumming technique associated with taiko, etc. She will spend approximately twenty percent (20%) of her time on this task.
3. **Conducting Educational Programming.** The core of [the beneficiary's] duties will be instruction, particularly through our funded Educational Program as part of Tsukasa Taiko. She will lead lessons in group or individual settings for students of various ages and abilities. She will assess student ability, provide feedback, and work with individual students to overcome difficulties. From time to time, she will engage with parents and other educators to gain insight into the abilities of her students and to provide guidelines for further development. For some students, she will provide continuing support and feedback, building to greater proficiency and skill development. She will ensure that students understand not only the techniques necessary to make the sounds of the drum (and in so doing will use the kuchi-soga phonetic transcript system), but also the theory and history behind the drumming. She will spend approximately fifty percent (50%) of her time on this task.
4. **Performing Pedagogically and Artistically.** [The beneficiary] will need to ensure that her own musical abilities remain sharp. To do this, she will providing short demonstration performances as part of lessons for pedagogical reasons.

From time to time she will also provide performances for purely artistic reasons. She will spend approximately twenty percent (20%) of her time on this task.

With regard to the minimum educational requirement for the proffered position, the petitioner attested that the proffered position "certainly requires a bachelor's degree in education." In a separate statement, the petitioner stated:

The position of Instructor of Taiko Drumming requires an individual with knowledge of theory as well as practical experience. The two are inextricably linked, and one will not suffice in the absence of the other. In particular, the knowledge of historical context, bodily movements, and kuchi-soga inform the actual drumming. Furthermore, pedagogical knowledge is absolutely required to ensure that taiko can be adequately taught to students of various ages and backgrounds, particularly elementary-age children. The knowledge of pedagogy and the knowledge of the theory, customs, and historical context of taiko drumming can only be learned through higher education. For this reason, this position normally requires as a minimum for entry at least a bachelor's degree in a pedagogical field. This requirement is standard for the industry.

III. SPECIALTY OCCUPATION

A. Legal Framework

To meet the petitioner's burden of proof with regard to the proffered position's classification as an H-1B specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following 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 knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

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

who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

B. Analysis

Before proceeding further, we agree with the petitioner that the Director erred by providing the petitioner with analysis from a different case. As such, we hereby withdraw all of the Director's statements and findings that are not relevant to the petitioner's case. However, we do not find these errors critical, as we agree with her ultimate conclusion that the evidence of record is insufficient to establish that the proffered position qualifies for classification as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

With that being said, we will now analyze the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied by establishing that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position that is the subject of the petition.

We normally recognize the Department of Labor's (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. As the petitioner duly noted, however, the *Handbook* does not contain an entry directly corresponding to the O*NET SOC code and occupation title "25-3099, Teachers and Instructors, All Other" chosen by the petitioner. Thus, the *Handbook* is not helpful

with regard to demonstrating the normal educational requirements for positions best classified under the "Teachers and Instructors, All Other" occupational classification.²

The petitioner also asserts that the duties of the proffered position "mirror[]" and "closely parallel" those of "kindergarten and elementary teachers," "middle school teachers," and "high school teachers." The petitioner requests that we consider the *Handbook's* entries with respect to these teaching occupations. However, the petitioner's assertions are not persuasive, as the petitioner has not adequately established that the proffered position is sufficiently similar to the above teaching occupations.³ The mere fact that the proffered position also involves teaching children, without more, is not sufficient to establish that the proffered position shares the same educational requirements as these teaching occupations. Thus, we do not consider the *Handbook* entries on "kindergarten and elementary teachers," "middle school teachers," and "high school teachers" to be instructive here.

When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position more likely than not satisfies this or one of the other three criteria, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from

² We will withdraw the Director's comments indicating that the *Handbook* supports the proposition that "[t]here is no standard for how one prepares for a career as an Instructor of Taiko Drumming." As noted above, the *Handbook* does not contain an entry for the SOC code and occupation title "25-3099, Teachers and Instructors, All Other." Therefore, the *Handbook* does not support any conclusions regarding positions best classified under this occupational category.

This is not to say, however, that the proffered position is best classified under the SOC code and occupation title "25-3099, Teachers and Instructors, All Other." More specifically, we observe that the SOC code and title "25-3021.00, Self-Enrichment Education Teachers," may be more appropriate for the proffered position. The *Handbook* describes the general duties for "Self-Enrichment Education Teachers" as to "[t]each or instruct courses other than those which normally lead to an occupational objective or degree. Courses may include self-improvement, nonvocational, and nonacademic subjects. Teaching may or may not take place in a traditional educational institution." See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Data for Occupations Not Covered in Detail," <http://www.bls.gov/ooh/about/data-for-occupations-not-covered-in-detail.htm> (last visited Aug. 19, 2015).

³ For example, the *Handbook* states that "[k]indergarten and elementary school teachers work in public and private schools." U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Kindergarten and Elementary School Teachers," <http://www.bls.gov/ooh/education-training-and-library/kindergarten-and-elementary-school-teachers.htm#tab-3> (last visited Aug. 19, 2015). There is insufficient evidence to indicate that the petitioner, which describes itself as a non-profit organization established primarily to "advance[e] the understanding and profile of Asian and Asian American cultures through the traditional and contemporary cultural arts," can be considered a public or private school.

other objective, authoritative sources) that supports a finding that the particular position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider and weigh all of the evidence presented to determine whether the particular position qualifies as a specialty occupation.

As additional evidence for our consideration under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), the petitioner asserts that "the [proffered] position normally requires a minimum for entry at least a bachelor's degree in a pedagogical field." To corroborate this assertion, the petitioner submitted "industry letters" from the following individuals:⁴

1. Dr. [REDACTED], Assistant Professor in the Music Department of the [REDACTED], attesting that it is "important" for teachers at a cultural organization to have "both a background in musical instruction and at least a four-year degree in education";
2. [REDACTED], Founder and Director of [REDACTED], attesting that her organization requires its taiko teachers to have "both to have a background in taiko and at least a four-year degree in education";
3. [REDACTED] composer, co-founder and Creative Director of [REDACTED] in [REDACTED] attesting that "[t]o work as a music instructor with our organization, an individual must have a bachelor's degree in education";
4. [REDACTED] Executive Director and Artistic Director of [REDACTED] attesting that this organization "require[s] our teachers both to have a background in Korean traditional percussion music and at least a four-year degree in education";
5. [REDACTED] Artistic Director of [REDACTED], stating that "[i]nternational artists with college degrees, such as [the beneficiary], have added tremendously to the professionalism, caliber, and relevance of the artistic work within the United States and internationally";
6. [REDACTED] Director of [REDACTED] asserting that "[t]o work as a[n] instructor of Japanese cultural instruments with our organization, an individual must have a bachelor's degree in education";
7. [REDACTED], Chief Executive Officer of the [REDACTED] attesting that it "require[s] all our teachers come with a combination of post-secondary education and a strong background in their specific discipline;" and
8. Dr. [REDACTED] Adjunct Assistant Professor, Department of Mass Communications, [REDACTED] stating that "[i]t is imperative for an instructor at [the petitioner] to have both the theoretical and practical knowledge gained from a bachelor's degree."

⁴ While the petitioner characterizes these as "industry letters," the petitioner explains: "Nothing prevents evidence from being considered in multiple categories. The industry letters in this case corroborate [the petitioner's] statements that the degree is normally required, that it is industry custom, and that the nature of the Position and its duties are so complex that a degree is required."

With the exception of the letter from [REDACTED] these letters address the educational requirements for various teaching positions other than a taiko instructor, including an instructor of Korean drums, a music instructor, and otherwise unspecified teaching positions. However, as stated above, the plain language of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) relates to the normal educational requirement for *the particular position* that is the subject of the instant petition. On the whole, these letters are insufficient to corroborate the petitioner's assertions under this criterion.

The petitioner has not submitted reliable evidence from another objective, authoritative source under this criterion. The duties and requirements of the position as described in the record of proceeding are insufficient to establish that this particular position proffered by the petitioner is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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 already discussed, the evidence of record has not established that the proffered position is one for which the *Handbook* reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent.

The petitioner submitted the eight "industry letters" summarized above, as evidence under this criterion. At the outset, we decline to consider the letters from [REDACTED] and [REDACTED] as these letters do not indicate that a bachelor's degree *in a specific specialty* is commonly required.⁵ We also decline to consider the letters from [REDACTED] and [REDACTED]

⁵ For instance, [REDACTED] addresses the value of "those with bachelors and masters degrees [sic]." Mr. [REDACTED] attests that [REDACTED] requires its teachers to have "post-secondary education." Dr. [REDACTED] asserts that

as there is insufficient evidence that [REDACTED] (a preschool program) and [REDACTED] (a social service agency) are organizations sufficiently similar to the petitioner and in the petitioner's industry. As these letters do not meet the afore-said elements of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), other deficits of these letters will not be addressed.

With respect to the letters from [REDACTED] and [REDACTED], we find that these letters do not provide sufficient information regarding the positions being discussed so as to establish that they are parallel to the proffered position. For instance, [REDACTED] letter refers to an otherwise unspecified teaching position at a cultural organization. The letters from [REDACTED] and [REDACTED] discuss the positions of a taiko instructor, a music instructor, and a teacher of Korean drums, respectively, but do not provide any details with respect to the positions' duties to establish that they are, in fact, parallel to the proffered duties. As indicated above, USCIS does not simply rely on a position's title to determine the nature of a particular position.

Furthermore, none of the letters from [REDACTED] and [REDACTED] provide sufficient information relevant to the common or routine employment and recruitment practices of the organizations they represent. For instance, the letters do not provide detailed information with respect to the number of parallel positions each organization has employed, or the educational qualifications of the individuals actually employed in these positions.⁶ Moreover, no corroborating evidence has been submitted to support the claims made in these letters. Without such information and evidence, the petitioner has not demonstrated what statistically valid inferences, if any, can be drawn from these four letters with regard to the common educational requirements for entry into parallel positions in similar organizations in the petitioner's industry.⁷ Overall, we find the submitted "industry letters" insufficient to satisfy the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), and the record contains no further evidence for our consideration under this prong.

instructors at the petitioning organization must have "knowledge gained from a bachelors [sic] degree." None of these letters specifically reference a bachelor's degree in a particular specialty, e.g., a bachelor's degree in education.

⁶ Notably, [REDACTED] states that all of her "teachers" (in the plural) are required to have a four-year degree in education. However, the evidence of record establishes neither the number of [REDACTED] employees nor their educational credentials.

Furthermore, [REDACTED] attests that his organization currently has a visiting instructor "who has a bachelor and master's degree in Korean music." There is no indication or evidence that this visiting instructor has at least a four-year degree in *education*, or its equivalent.

⁷ See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

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

The evidence of record also does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that 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 in a specific specialty, or its equivalent.

Here, the petitioner has not adequately explained why the position is so complex or unique that it can be performed only by an individual with a bachelor's degree in education, or its equivalent. The petitioner explained in its August 17, 2014 letter that the proffered position is "more demanding than teaching other subject areas," because it requires "background not only in taiko drumming but education in how to teach." The petitioner highlighted several unique aspects of taiko drumming, such as "kakegoe" and "kuchi-shoga," that an instructor "must know and absolutely must be able to teach to students." The petitioner also asserted in its March 5, 2014 letter that the proffered position requires pedagogical knowledge as well as "knowledge of the theory, customs, and historical context of taiko drumming."

However, it is not apparent how a bachelor's degree in education – without further specialization – would provide the background knowledge of taiko drumming necessary to perform the proffered position. The petitioner has not identified which particular courses of study would provide the knowledge of taiko drumming necessary for the position, and how these courses represent an established curriculum leading to a baccalaureate or higher degree in education. While the petitioner stated that a bachelor's degree in education would allow for the beneficiary to "modify her lessons as need be while they are happening," this brief statement is insufficient to explain why the position can be performed only by an individual with a bachelor's degree in education, or its equivalent.

We also note the wage-level designated by the petitioner on the LCA. The LCA indicates a wage level at a Level I (entry) wage, which is the lowest of four assignable wage levels.⁸ Without further

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

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

evidence, the 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 wage.⁹ 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."¹⁰

Accordingly, the petitioner has not satisfied the second alternative prong at 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

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the proffered position.

Level I wage should be considered.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

⁹ The issue here is that the petitioner's designation of this position as a Level I, entry-level position undermines any 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.

¹⁰ 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.

The record of proceeding does not contain sufficient evidence relevant to this criterion. The petitioner has not explained or documented its hiring and recruiting history for the proffered position.¹¹

We note that 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 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 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* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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

Finally, we find that the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's 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 the specific specialty or its equivalent.

As reflected in this decision's earlier discussions, the record of proceeding does not establish that the proffered position and its constituent duties are so complex that it requires a baccalaureate or higher degree in education, or its equivalent. For efficiency's sake, we hereby incorporate our earlier discussion and findings made with respect to the second alternative prong of 8 C.F.R.

¹¹ The petitioner explained that it is seeking to change the beneficiary's nonimmigrant status from the P-3 to the H-1B classification "because another employee is retiring" and thus it wishes to "shift [the beneficiary's] duties." However, the petitioner did not provide any additional relevant information, such as information regarding the retiring employee's duties and educational credentials, or whether the petitioner employed any other individuals in this particular position.

§ 214.2(h)(4)(iii)(A)(2).¹² The evidence in the record of proceeding does not establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

We further incorporate here 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.¹³

As the evidence does not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

IV. CONCLUSION AND ORDER

Based upon a complete review of the record of proceeding, we find that the evidence does not establish that the proffered position, as described, more likely than not constitutes a specialty occupation.¹⁴ Accordingly, the appeal will be dismissed and the petition will be denied.

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.

¹² On appeal, the petitioner explained that because the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) both involve an inquiry into complexity, the petitioner "treats them together" and has submitted the same evidence and assertions for consideration under both criteria.

¹³ 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.

¹⁴ As this matter is dispositive of the petitioner's appeal, we will not address any of the additional deficiencies we have identified on appeal.