U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-M- INC.

DATE: DEC. 1, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a management group, seeks to temporarily employ the Beneficiary as a "hospitality manager" under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, Vermont Service Center, denied the petition. The Petitioner filed a combined motion to reopen and a motion to reconsider, and the Director affirmed her decision to deny the petition. Thereafter, the Petitioner filed a second combined motion to reopen and a motion to reconsider and the Director again affirmed her decision to deny the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. ISSUE

The issues before us are whether (1) the proffered position qualifies as a specialty occupation; and (2) the Beneficiary is qualified to serve in a specialty occupation position in accordance with the applicable statutory and regulatory provisions.[1]

II. 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.

A. Legal Framework

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), defines the term "specialty occupation" as an occupation that requires:

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[1] We conduct appellate review on a *de novo* basis. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); *see also* 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989). We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

(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. Fed. 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 individuals 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 individual, 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 or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

B. Proffered Position

In the support letter, the Petitioner provided the Beneficiary's job duties in the proffered position. In addition, the Petitioner stated it needed "someone who has a Bachelor's degree or equivalent as [the Petitioner's] minimum requirement to hire any staff is a bachelors [*sic*] degree or higher."

In response to the RFE, the Petitioner provided a revised job description for the proffered position, as follows:

- Train and manage [the Petitioner's] international participants who are currently enrolled in the company's program;
- Develop training competencies, training plans for H3, Q1 and J1 programs. These training plans are very detailed and complex;

- Assist the employer in the process of filing J1 designation, such as preparation of employer letter and J1 training plan;
- Responsible for reviewing the daily checklist of [the Petitioner's] hotel staff and international interns. Manage the day to day activities in [the Petitioner's] hotel, ensure the trainees and interns are following their training programs[;]
- Schedule employees, observe performance and conduct reviews and evaluation with assistance from International Recruitment Manager[;]
- Plan, organize and manage mega cultural exchange participants, coordinate the even management with hotel staff and [the Petitioner's] Q-1 participants. Make budgetary recommendations for the mega events, as well as provide marketing and cost analysis of the [*sic*] these events through reports;
- Train staff in Hotel and Property Management System such as Fidelio, Encore, MSI and Profit Manager; [and]
- Sit in periodic reviews with international professors who send trainee to [the Petitioner's] hotels.

The Petitioner also stated that "it is required that an individual possess at least a bachelor's degree in computer science, information technology and related field."

C. Analysis

As previously discussed, the primary issue is whether the Petitioner has provided sufficient evidence to establish that it will employ the Beneficiary in a specialty occupation position.

As a preliminary matter, we find that the Petitioner has provided inconsistent information regarding the Beneficiary's salary. For instance, on the Form I-129 and Labor Condition Application (LCA), the Petitioner indicated that the Beneficiary would be compensated $26,000 per year.[2] However, in response to the RFE, the Petitioner provided a list of its current and past employees, which indicates the Beneficiary's annual salary as $32,100. The Petitioner also provided copies of its newspaper

[2] In the LCA, the Petitioner indicated that the prevailing wage for the intended area of employment for the occupational category, "Managers, All Other" is $26,000. However, we note that the Petitioner's prevailing wage is significantly lower than the wage provided by the Foreign Labor Certification Data Center. Specifically, the prevailing wage for the occupational category, "Managers, All other" at Level I (entry-level) is $71,698, and at Level II (qualified), it is $90,730 per year. For additional information on the prevailing wage for this occupation in see the All Industries Database for 7/2012 - 6/2013 for Managers, All Other at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at (http://www.flcdatacenter.com/OesQuickResults.aspx?code=11-9199&area= &year=13&source=1(last visited Nov. 23, 2015).

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).

advertisements for the proffered position, which state that it "will provide a salary of $25000/yr." No explanation for this inconsistency was provided by the Petitioner.

In addition, we find that the Petitioner has provided inconsistent information regarding the requirements for the proffered position. For instance, in response to the RFE, the Petitioner stated that the proffered position requires "at least a bachelor's degree in computer science, information technology and related field." However, the Petitioner submitted a letter from of which states that the proffered position requires "a bachelor's-level educational and professional background in hotel management or a related field." In addition, the Petitioner provided copies of its newspaper advertisements for the proffered position, which state that the position requires a candidate with "4 years BS degree in hotel/tourism mgt. or rltd field or its equiv." On motion, the Petitioner submitted a letter from which states that the position requires "a bachelor's degree in Hospitality Management or a related field." No explanation for these inconsistencies was provided by the Petitioner. "[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the Petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

Moreover, it must be noted that within the record of proceeding, the Petitioner has represented that the position requires a bachelor's degree in computer science, information technology, hotel management, hotel/tourism management, and/or hospitality management.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the Petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Here, the Petitioner has represented that a bachelor's degree in computer science, information technology, hotel management, hotel/tourism management, and/or hospitality management is acceptable. The issue is that these fields cover numerous and various specialties. The Petitioner, who bears the burden of proof in this proceeding, does not establish either that these various degrees are all closely related fields or that a general degree in one of these fields is directly related to the duties and responsibilities of the particular position proffered in this matter. Accordingly, as the evidence of record does not establish a standard, minimum requirement of at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation.

Nevertheless, we will continue our evaluation and analysis of the evidence provided by the Petitioner. To that end we will first discuss the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

> *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.[3] In the LCA, the Petitioner asserted that the proffered position corresponds to the occupational classification "Managers, All Other" - SOC (ONET/OES) code 11-9199.

We reviewed the *Handbook* regarding the occupational category "Managers, All Other." However, the *Handbook* does not provide a detailed narrative account nor does it provide summary data for this occupational category. More specifically, the *Handbook* does not provide the typical duties and responsibilities for positions located within the "Managers, All Other" occupational category. It also does not provide any information regarding the academic and/or professional requirements for these positions. Thus, the *Handbook* does not support the claim that the occupational category here is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent.

We note that there are occupational categories which are not covered in detail by the *Handbook*, as well as occupations for which the *Handbook* does not provide any information. The *Handbook* states the following about these occupations:

> Although employment for hundreds of occupations are covered in detail in the *Occupational Outlook Handbook*, this page presents summary data on additional occupations for which employment projections are prepared but detailed occupational information is not developed. For each occupation, the Occupational Information

[3] All references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site http://www.bls.gov/OCO/.

> Network (O*NET) code, the occupational definition, 2012 employment, the May 2012 median annual wage, the projected employment change and growth rate from 2012 to 2022, and education and training categories are presented.

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 Nov. 23, 2015).

Thus, the narrative of the *Handbook* indicates that there are many occupations for which only brief summaries are presented and that detailed occupational profiles for these occupations are not developed.[4] The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed.

Accordingly, in certain instances, the *Handbook* is not determinative. 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 the statutory and regulatory provisions, including this or one of the other three criteria, notwithstanding the absence of the *Handbo*ok's support on the issue. In such case, it is the Petitioner's responsibility to provide probative evidence (e.g., documentation from other objection, 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.

Upon review of the record, we find that the Petitioner has not done so in the instant case. That is, the Petitioner has not submitted probative evidence that normally the minimum requirement for positions falling under the "Managers, All Other" occupational category is at least a bachelor's degree in a specific specialty, or its equivalent. Even if it did, the record lacks sufficient evidence to support a finding that the particular position proffered here would normally have such a minimum, specialty degree requirement, or its equivalent.

In the instant case, the duties and requirements of the position as described in the record of proceeding do not indicate 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)(*1*).

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[4] We note that occupational categories for which the *Handbook* only includes summary data includes a range of occupations, including for example, postmasters and mail superintendents; agents and business managers of artists, performers, and athletes; farm and home management advisors; audio visual and multimedia collections specialists; clergy; merchandise displayers and window trimmers; radio operators; first-line supervisors of police and detectives; crossing guards; travel guides; agricultural inspectors, as well as others.

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 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.

In support of the assertion that the proffered position is a specialty occupation under this criterion of the regulations, the Petitioner submitted four position evaluations from [5] The evaluations are dated April 13, 2010, February 24, 2014, April 4, 2014, and May 29, 2014. We have reviewed the documentation and find that they possess limited probative value in this matter.

As mentioned, stated that the proffered position requires "a bachelor level educational and/or professional experience in hotel and restaurant management or a related field." indicated that he reviewed the Petitioner's job description, and provided job descriptions that appear verbatim from the Petitioner's job description. However, there is no indication that possesses any knowledge of the Petitioner's proffered position beyond the Petitioner's job description. While states in his letter dated February 24, 2014, that he has in-depth expertise and knowledge of the Petitioner's business, he does not demonstrate knowledge of the Petitioner's specific business operations, or how the duties of the position would actually be performed in the context of the Petitioner's business enterprise. His opinion does not relate his conclusion to specific, concrete aspects of this Petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. For example, in the letters dated February 13, 2010, and April 4, 2014,

[5] In response to the RFE, the Petitioner stated that it enclosed job advertisements in support of the assertion that the claimed degree requirement is common to the Petitioner's industry in parallel positions among similar organizations. However, the advertisements were not provided.

claims that the Beneficiary has "responsibility over multiple departments at the hotel level, with full authority and responsibility over such departments as Maintenance and Engineering, Food and Beverage managers, hotel restaurants, and front office department." He also states that "the Hospitality Manager is reported to by managers from each of these departments, and the Hospitality Manager has full authority over those within these managerial positions and the staff within these departments." However, the record does not contain evidence that substantiates claims. While the record of proceeding contains several letters from various hotels and resorts, the letters only state that the properties have partnered with the Petitioner for its cultural exchange program. The letters do not indicate that the Hospitality Manager for the Petitioner has responsibility over their departments or their employees report to the Beneficiary. For example, the letter from state that it has "partnered with [the Petitioner] who has supplied us with workers from various countries" and that it has "program participants working in [its] guest services and food & beverage departments." It further states that "our company will continue to partner with [the Petitioner] and fully support the Q1 Cultural Exchange programs and its participants." Another letter from states that it has been "partnering for several years in the cultural exchange program with [the Petitioner]." A letter from state that it has "hosted many cultural events including shows, expos, dance classes and food tasting."

We find that the evidence in the record does not establish that possessed the requisite information necessary to adequately assess the nature of the proffered position. While claims in-depth knowledge of the Petitioner's business, there is no evidence that has visited the Petitioner's business and observed the Petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. provides general conclusory statements regarding the proffered position, but he does not provide a substantive, analytical basis for his opinion and ultimate conclusions.

Therefore, we conclude that the letters rendered by are not probative evidence to establish the proffered position qualifies as a specialty occupation. The conclusions reached by lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. Further, the letters are not in accord with other information in the record.

On motion, the Petitioner also submitted an opinion evaluation from of The evaluation is dated May 29, 2014. We find that does not reference or discuss any studies, surveys, industry publications, authoritative publications, or other sources of empirical information which he may have consulted in the course of whatever evaluative process he may have followed. He provides a brief, general description of the Petitioner's business activities; however, he does not demonstrate or assert in-depth knowledge of the Petitioner's specific business operations or how the duties of the position would actually be performed in the context of the Petitioner's business enterprise. For instance, there is no evidence that he has any in-depth knowledge of the Petitioner's business operations gained through such means as visiting the Petitioner's premises, observing the Petitioner's employees, interviewing them about the nature of their work, or documenting the knowledge that they apply on the job.

Furthermore, [redacted] does not discuss the duties of the proffered position in any substantive detail. To the contrary, he simply listed the tasks in bullet-point fashion with little discussion. [redacted] also does not provide a substantive, analytical basis for his opinion and ultimate conclusion. His opinion does not relate his conclusion to specific, concrete aspects of this Petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. Moreover, he did not support his conclusions by providing copies or citations of any research material used. He has not provided sufficient facts that would support the assertion that the proffered position requires at least a bachelor's degree in a specific specialty (or its equivalent). For example, he asserts that the Petitioner is a "multi-faceted" company and "excels through innovation, creativity and rewarding strategies," and that "the Petitioner "provides owners and operators financial performance, quality assurance and peace of mind as well as optimal balance of financial decisions." However, the record of proceeding does not contain evidence of services described above. Therefore, it does not appear that [redacted] possessed the requisite information necessary to adequately assess the nature of the Petitioner's position.

In summary, and for each and all of the reasons discussed above, we conclude that the advisory opinions rendered by [redacted] and [redacted] possess limited probative value toward establishing that the proffered position qualifies as a specialty occupation. The conclusions reached by them lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which they reached such conclusions. There is an inadequate factual foundation established to support the opinions and we find that the opinions are not in accord with other information in the record.

We may, in our discretion, use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Id.* As a reasonable exercise of its discretion we discount the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, we hereby incorporate the above discussion and analysis regarding the opinion letters into each of the bases in this decision for dismissing the appeal.

Thus, based upon a complete review of the record, we find the Petitioner has not established 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 support of its assertion that the proffered position qualifies as a specialty occupation, the Petitioner described the proffered position and its business operations. Upon review, we find that the Petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. 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 in performing certain duties of the position, the Petitioner has not demonstrated 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 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 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 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* section 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 foreign national with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In response to the RFE, the Petitioner provided copies of two undated newspaper advertisements for the proffered position. As the postings are not dated, it cannot be determined when they were created. It must be noted that evidence that the Petitioner creates after an RFE is issued will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the Director's notice. Thus, the newspaper advertisements have little probative value.

The Petitioner also submitted a copy of its online job posting for the proffered position posted on its website on April 4, 2014. Thus, the job posting was posted after the Director's RFE and does not pre-date the filing of the petition. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). Again, evidence that the Petitioner creates after the Director issues an RFE is not considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be

proven and existent at the time of the Director's notice. Therefore, this posting also holds little probative value.

In addition, the Petitioner submitted a list of its current and past employees. The list included the individuals' salary, education, and brief job description. In addition, the list indicated that there are four individuals that hold the hospitality manager position, including the Beneficiary. Notably, the Petitioner submitted the credentials of only two of those individuals. Further, we note that three individuals are paid significantly less than the Beneficiary, which suggests that they are employed in different positions. The Petitioner did not provide an explanation for the variance in the wages.

Although the Petitioner provided a brief job description, the Petitioner did not provide the day-to-day responsibilities for these individuals. The Petitioner also did not submit any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, it is unclear whether the duties and responsibilities of these individuals were the same or similar to those of the proffered position.

Consequently, it cannot be determined how representative the Petitioner's claim regarding *three individuals* is of the Petitioner's normal recruiting and hiring practices. Without further information, the submission of *the educational credentials of two individuals* is not persuasive in establishing that the Petitioner, a company with more than 100 employees, normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

Upon review of the record, we conclude that the Petitioner did not provide sufficient documentary evidence to support the assertion that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, directly related to the duties of the position. The Petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

The Petitioner claims 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. We reviewed the Petitioner's statements regarding duties of the proffered position and its business operations. However, 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.

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 submitted inadequate probative evidence to satisfy 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.

III. BENEFICIARY'S QUALIFICATION

We do not need to examine the issue of the Beneficiary's qualifications, because the Petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the Beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a baccalaureate or higher degree in a specific specialty, or its equivalent. Therefore, we need not and will not address the Beneficiary's qualifications further.

IV. 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.[6]

ORDER: The appeal is dismissed.

Cite as *Matter of B-M- Inc.*, ID# 13234 (AAO Dec. 1, 2015)

[6] As the identified ground for denial is dispositive of the Petitioner's continued eligibility, we need not address any additional issues we observe in the record of proceeding. However, we will briefly note that the Petitioner has not established that the Beneficiary is eligible for an extension beyond the six-year under AC21. The Petitioner submitted an audit notification for labor certification dated November 17, 2010, but there is no evidence that this labor certification was still pending at the time of filing the instant petition on June 25, 2013 or that she qualifies for an extension on any other basis.