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



U.S. Citizenship
and Immigration
Services

JUN 03 2015

DATE:

PETITION RECEIPT #: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(15)(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 "RRB", written over the typed name and title.

Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 10-employee "Sports Facility" established in [REDACTED]. In order to employ the beneficiary in a position it designates as a "Director of [REDACTED]" the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition determining that the record of evidence did not establish that the proffered position qualifies for classification as a specialty occupation. On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before this office includes the following: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Notice of Appeal or Motion (Form I-290B), a brief, and additional documentation. We reviewed the record in its entirety before issuing our decision.¹

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. STATUTORY AND REGULATORY FRAMEWORK FOR A SPECIALTY OCCUPATION

The issue in this matter is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, 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.

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

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

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

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

II. FACTUAL AND PROCEDURAL HISTORY

The petitioner identified the proffered position as a "Director of [REDACTED]" on the Form I-129, and attested on the required Labor Condition Application (LCA) that the occupational classification for the position is "Exercise Physiologists," SOC (ONET/OES) Code 29-1128, at a Level I (entry) wage. The LCA was certified on March 20, 2014, for a validity period from September 13, 2014 to September 12, 2017 for the [REDACTED] Michigan geographical area.

In the petitioner's letter in support of the petition, dated March 28, 2014, the petitioner stated the following about its business:

[The petitioner], located in [REDACTED] Michigan, provides indoor and outdoor soccer leagues, but also instructional programs and indoor and outdoor camps for children of all ages. It offers children soccer camp programs and initiatives designed to satisfy different levels of commitment and interest. [The petitioner] also offers a wide variety of player and coach developmental programs geared towards a wide range of ability and interest levels. Additionally, [the petitioner] offers facility rentals of its three (3) indoor and six (6) outdoor fields. It also provides a

recreational league that promotes skill development through individualized player support from licensed coaches.

The petitioner stated its need for the beneficiary's services and described the duties of the Director of [REDACTED] as follows:

[The beneficiary] will be responsible for developing and managing age-appropriate and fitness-appropriate training and exercise programs (in-season and off-season) to include technical, tactical, and strategic training modules along with speed, agility, and general fitness modules. He will create educational programs for parents focused on health promotion, childhood obesity, and proper nutrition. He will develop and implement additional programs which allow the [petitioner's] population to grow and meet the continuing needs of the community. He will oversee program staffers, and manage staffer selection to ensure qualified personnel are selected to ensure the proper implementation training exercise of activity programs. He will create injury prevention programs for youths, adults, and seniors related to sports and exercise. Finally, he will administer and supervise fitness tests, such as the Illinois Agility Test to test sports agility and the Harvard Step Test – a cardiac stress test used to detect cardiovascular disease.

The petitioner noted that the beneficiary holds "a Master's in Rehabilitation Therapy from the [REDACTED] and an underlying Bachelor's in Physical Education from the [REDACTED] in his home country of Brazil." The petitioner also provided an academic equivalency evaluation evaluating the beneficiary's foreign degrees as equivalent to a Bachelor of Arts Degree in Physical Education and a Master of Science Degree in Rehabilitation Therapy obtained from an accredited U.S. college or university. The petitioner also submitted screen shots of its company website.

Upon review of the initial record, the director requested additional evidence to establish that the proffered position qualifies for classification as a specialty occupation. The director outlined the specific evidence that could be submitted.

In a response, dated September 9, 2014, the petitioner added that it would "soon be offering exercise and athletic programs to adults and the elderly, including programs on movement training and general fitness" and that its "high-quality camp programs teach the game and skills of soccer, develop motor skills, coordination, confidence, and are designed by [its] full-time professional coaches and trainers." The petitioner noted that it "not only focuses on learning and mastering the sport itself, but improving the individual player as an athlete, educating him or her on care for their body through proper exercise and nutrition."

The petitioner repeated the initial description of the duties of the position and added, that the beneficiary will also "assist in the hiring of qualified employees, schedule staff, oversee the selection and purchase of equipment." The petitioner added further:

[The beneficiary] will also be responsible for preparing age-appropriate curriculum booklets for fitness and training programs, advertise and promote age-appropriate training programs, help coordinate the budget for these programs, supervise and evaluate staff involved in the programs, visit local schools to promote the programs and get involved with the school gym teachers to implement similar programs at local schools, attend classes to keep up with the latest information on similar training programs, and work with the [redacted] School of Kinesiology to plan and lead the classes and programs at [the petitioner].

The petitioner indicated that training programs would include sessions on athletic movement training, athletic performance training, and general fitness. The petitioner indicated further that during the course of the programs:

[The beneficiary] will explain safety rules and the proper use of equipment, and offer modification exercises during classes or training sessions to accommodate different levels of fitness. He will plan exercise routines and choose different movements for each muscle group, depending on participants' capabilities and limitations. He will observe the participants and inform them of the corrective measures necessary for skill improvement. He will also be in charge of yoga and Pilates training, conditioning, and the injury prevention program. He will develop and carry out rehabilitation programs for injured athletes and work in conjunction with the athlete's medical personnel and physical therapist to make sure the athletes can recover promptly and return to action.

[The beneficiary] will also assist in supervising at least 15 licensed soccer coaches and nearly 50 contract referees with our organization.

The petitioner claimed that "[c]onsidering the specialized aspects of this position, including physical training, physical education and nutrition, community education, coaching and trainer selection, business liaising, and competitive athleticism, this position requires at least a Bachelor's Degree in Sport Science, Exercise Science, Physical Education, Rehabilitation Therapy, Kinesiology, or a related field of study." The petitioner also referenced the individuals it employed as the Director of [redacted] Director and Director of [redacted] and the Director of Coaching and asserted that these positions are also professional positions that require a bachelor's degree in an appropriate field of study and that the individuals employed have the appropriate degrees.

The petitioner also submitted an opinion prepared by [redacted] PhD., dated September 3, 2014, on the requirements for the petitioner's position of Director of [redacted]. The petitioner resubmitted the beneficiary's credential's evaluation and screen shots from the company's website.

Upon review of the record, the director denied the petition. The director determined that the petitioner had not established that the proffered position is a specialty occupation.

On appeal, in addition to counsel's brief, the petitioner submitted the [REDACTED] education overview for a physical therapist position, background information on degrees in kinesiology and schools that offer such a degree, information on [REDACTED] Master of Arts programs offering three different physical education master's degrees, background information on degrees in rehabilitation therapist education and licensure requirements, curriculum requirements for a degree in exercise science from the [REDACTED] and [REDACTED] information on a degree in sports science and [REDACTED] information on a degree in exercise and sports science. The petitioner also submitted an excerpt from the Department of Labor's (DOL) *Occupational Outlook Handbook's (Handbook)* chapter on Athletic Trainers and Exercise Physiologists, general information on exercise physiologists from the [REDACTED] information on the field of exercise physiology prepared by an organization on health careers, and information on degrees in exercise physiology and the schools that offer various degree programs in the field. The petitioner also submitted a duplicate record of previously provided documents.

On appeal, the petitioner asserts that the evidence submitted establishes that the proffered position satisfies the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), and that USCIS erred in concluding otherwise. The petitioner also contends that USCIS did not timely mail the decision in this matter, noting that the decision is dated October 15, 2014 and is postmarked October 22, 2014. The petitioner requests that this office consider the petitioner's harm as its counsel did not have sufficient time to submit the brief and evidence to the service center so that the service center could reconsider the matter in full before forwarding the file to this office. The petitioner asserts that the mishandling of the decision warrants this office's favorable exercise of discretion.

III. ANALYSIS

Preliminarily, as to the perceived error by the service center in not timely mailing the director's decision, we observe that it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has not provided a basis to warrant a favorable exercise of discretion. The petitioner has in fact supplemented the record on appeal. As indicated above, we conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The petitioner is not relieved from establishing the essential elements necessary to demonstrate that the proffered position is, in fact, a specialty occupation by a preponderance of evidence.² Based upon a

² 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)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, we must examine each piece of evidence for relevance, probative

complete review of the record of proceeding, and for the specific reasons described below, we agree with the director and find that the evidence does not establish that the position as described constitutes a specialty occupation.

A. The Proffered Position

To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation. The petitioner has not done so here.

The petitioner has provided a broad description of duties for the proffered position which appear to include supervisory duties (overseeing, selecting, and scheduling staffers, supervising at least 15 licensed soccer coaches and nearly 50 contract referees), marketing and promotion duties (advertising and promoting age-appropriate training programs, visiting local schools to promote the programs and getting involved with the school gym teachers to implement programs), managing general activities related to providing the petitioner's services (managing the training and exercise programs, creating educational programs related to health, preparing curriculum booklets for fitness and training programs, purchasing equipment), and teaching exercise classes (planning and leading classes and programs, explaining safety rules and the proper use of equipment, and offering modification exercises during classes or training sessions to accommodate different levels of fitness). In addition, the general description of duties includes some duties that may fall within the broad parameters of the duties of an exercise physiologist as set out in the *Handbook*.³ That is, the

value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

³ All of our 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 categories are hereby incorporated into the record of proceeding. Specifically, we observe that the *Handbook* reports generally that exercise physiologists analyze a patient's medical history to determine the best possible exercise and fitness regimen, perform fitness tests with medical equipment and analyze the subsequent patient data, measure body fat, blood pressure, oxygen usage, and other key patient

beneficiary will administer and supervise two fitness tests, carry out rehabilitation programs for injured athletes in conjunction with the athlete's medical personnel and physical therapist, plan exercise routines dependent on participants' capabilities and limitations, and work with participants on corrective measures.

However, we observe that the petitioner in this matter did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks it generally describes. That is, the petitioner does not specify which tasks were major functions of the proffered position and it did not establish the frequency with which each of the disparate duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner has not even established the primary and essential functions of the proffered position.

Upon review of the various tasks, it appears that many of the tasks do not fall within the parameters of an exercise physiologist, the position attested to on the petitioner's certified LCA. Given the lack of information on how much time the beneficiary will spend supervising staffers, coaches, and referees and marketing and promoting the petitioner's business, as well as teaching general exercise classes and managing and preparing training, exercise, and educational programs and purchasing equipment, it is not possible to conclude that the beneficiary will primarily perform the duties of an exercise physiologist, the position attested to on the certified LCA.⁴ While we will view the performance of duties that are incidental to the primary duties of the proffered position as acceptable when they are unpredictable, intermittent, and of a minor nature, anything beyond such incidental duties, however, e.g. predictable, recurring, and substantive job responsibilities, must be

health indicators, develop exercise programs to improve patient health, and supervise clinical tests to ensure patient safety. U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Athletic Trainers and Exercise Physiologists, available on the Internet at <http://www.bls.gov/ooh/healthcare/athletic-trainers-and-exercise-physiologists.htm#tab-2> (last visited May 21, 2015).

⁴ It is noted that, where a petitioner seeks to employ a beneficiary in two or more distinct occupations, the petitioner should file a separate petition for each, requesting concurrent, part-time employment for each occupation. While it is not the case here, if a petitioner does not file separate petitions and if only one aspect of a combined position qualifies as a specialty occupation, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. *See generally* 8 C.F.R. § 214.2(h). Furthermore and as is the case here, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation and the payment of wages commensurate with the higher paying occupation. *See generally* 8 C.F.R. § 214.2(h); 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. Thus, filing separate petitions would help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion with regard to the proper classification of the position being offered.

specialty occupation duties or the proffered position as a whole cannot be approved as a specialty occupation. In this matter, as the petitioner does not set out the amount of time the beneficiary will perform the various tasks assigned, we cannot ascertain the substantive nature of the proffered position.

Even when reviewing tasks, such as the beneficiary's involvement in carrying out rehabilitation programs for injured athletes in conjunction with the athlete's medical personnel and physical therapist and with yoga and Pilates training, conditioning and injury prevention programs for example, it is not possible to ascertain what tasks the beneficiary will perform within these generally described duties. That is, it is not possible to conclude that the beneficiary's involvement will include analyzing a patient's medical history and developing exercise programs to improve the patient's health, but rather his role may be limited to receiving instruction from the patient's medical and rehabilitative team. Further, although the petitioner indicates that the beneficiary will administer and supervise fitness tests, such as the Illinois Agility Test and the Harvard Step Test, the petitioner does not indicate that it is the beneficiary that will be performing and analyzing other key patient health indicators or otherwise engaging in any medical treatment. The record does not include sufficient probative evidence establishing the beneficiary's actual role within the petitioner's sports facility organization and whether the duties performed actually comprise the duties of an exercise physiologist. Thus, the record does not demonstrate that the occupational classification selected by the petitioner on the LCA is in accord with the proffered job duties.

In addition to the lack of probative evidence establishing that the beneficiary will primarily perform the duties of the position attested to by the petitioner on the LCA, the petitioner has designated the proffered position as a Level I (entry) position on the LCA.⁵

The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). *See* 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]."). According to section 212(n)(1)(A) of the Act, an employer must attest that it will pay a holder of an H-1B visa the higher of the prevailing wage in the "area of employment" or the amount paid to other employees with similar experience and qualifications who are performing the same services. *See* 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010); *Michal Vojtisek-Lom & Adm'r Wage & Hour Div. v. Clean Air Tech. Int'l, Inc.*, No. 07-97, 2009 WL 2371236, at *8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009).

⁵ Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance."⁶ 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 Level I wage should be considered.

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

Thus, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.⁷ The petitioner's designation of the proffered position as a Level I (entry) position, indicates that the beneficiary will not be expected to serve in a senior or leadership

⁶ Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

⁷ Based on the DOL explanatory information for this wage level, the proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry position.

role.⁸ As noted above, according to DOL guidance, a statement that the job offer is for a research fellow, worker in training, or an internship is indicative that a Level I wage should be considered. We find, upon review of the totality of the record, the petitioner has not provided specific, detailed descriptions of the responsibilities of the position, sufficient to establish that the duties merit recognition of the proffered position as a specialty occupation. The record does not provide sufficient consistent information to establish the necessary correlation between 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. That is the job descriptions do not persuasively support the claim that the position's day-to-day job responsibilities and duties would require the theoretical and practical application of a particular educational level of highly specialized knowledge in a specific specialty directly related to those duties and responsibilities. Moreover, the petitioner's job descriptions and the position certified on the LCA do not correspond in either occupational classification or wage level, so that we may conclude that the required LCA actually supports the petition. Thus, the petition cannot be approved for these reasons.

B. The Petitioner's Requirements

We have also reviewed the petitioner's assertions that degree programs in Sport Science, Exercise Science, Physical Education, Rehabilitation Therapy, Kinesiology or a related field of study, are all degree programs that might prepare an individual to become an exercise physiologist. According to the petitioner, a requirement that a beneficiary have a degree in any one of these various fields is sufficient to establish that the position is a specialty occupation. The petitioner has also submitted information from various colleges and universities on their curriculums for degrees in these various disciplines in order to establish that the degree programs are all related.

As a preliminary matter, it must be noted that the petitioner's claimed entry requirement of at least a bachelor's degree in any of the five various fields noted above for the proffered position, without more, is inadequate to establish that the proposed position qualifies as a specialty occupation. 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

⁸ Thus, the Level I designation conflicts with the petitioner's claim that the beneficiary will be responsible for managing programs, supervising staffers, coaches, and referees, managing training and exercise programs, creating educational programs related to health, and preparing curriculum booklets for fitness and training programs. It also undermines the petitioner's claim that the proposed duties "are sophisticated, complex, and involve a high-level of responsibility." That is, the petitioner's description of duties implies that the beneficiary will have greater responsibility than that of an entry-level employee and thus would appear to require at least a Level III wage level ("experienced") or more likely a Level IV position ("fully competent") designation. See U.S. Dept't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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, for example, 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.

The issue here is that the proposed degrees for the petitioner's proffered position includes numerous and various specialties, some of which are only related generally through basic principles of health and fitness. The petitioner does not specify which higher-level courses, if any, from the various degree programs it accepts, comprise the necessary components/curricula to establish the degree programs as closely related fields. Nor does the petitioner establish that any and all of these fields are directly related to the duties and responsibilities of the proffered position, which includes general business management, organizational functions, marketing, and supervisory duties. Here the petitioner does not expound upon which higher-level courses, common to all the acceptable degrees, would provide the specialized knowledge necessary to perform the duties of the proffered position. As indicated above, the petitioner, who bears the burden of proof in this proceeding, has not sufficiently established either (1) that these five fields are closely related fields or (2) that any and all of the acceptable degree specialties are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty or its equivalent under the petitioner's own standards. 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 and, in fact, supports the opposite conclusion.

Absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular

position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

We have considered the opinion, dated September 3, 2014, proffered by Dr. [REDACTED] on the petitioner's position of director of [REDACTED] as well as Dr. [REDACTED] credentials. Dr. [REDACTED] noted that he provided his opinion based on his qualifications in the physical therapy field, and his knowledge of minimum educational and professional standards within the physical therapy industry and related industries such as health and fitness training. He also noted that he is an "Endowed Professor of Physical Therapy in the College of Health Sciences of [REDACTED]" that he teaches classes in Clinical Sciences, Biomechanics, Kinesiology, and related subjects, that he is an experienced researcher in biomechanics of posture, neuroscience, posture and gait, and that he is a Member of the [REDACTED] among other bodies. Dr. [REDACTED] also indicated that in the course of his teaching, research, and professional experiences, he has become familiar with the requirements associated with positions in various therapeutic treatment and therapeutic training environments, as well as the depth of knowledge and skill, both theoretical and practical, gained by university students who study within physical therapeutic fields, and how that knowledge and skill is recruited and applied in professional industries. Dr. [REDACTED] resume, attached to his opinion, listed the majority of these same credentials.

Dr. [REDACTED] paraphrased the duties that the petitioner provided to USCIS in his review of the proffered position, noting that "[i]n total, the position involves professional sport and fitness program management duties, and is responsible for ensuring the safety, proper functioning and success of the employer's core programs and services." Dr. [REDACTED] opined "the position is clearly indicative of a professional sport/fitness services management occupation." Dr. [REDACTED] stated: "[i]n properly performing the overall duties and functions of the position, the Director of [REDACTED] will apply advanced theoretical concepts and practical methodologies in the areas of Sports Science, Exercise Science, Physical Education, Rehabilitation Therapy, Kinesiology and related areas. Such subjects are taught in bachelor's programs in these fields, and must be applied (in the course of executing the prescribed job duties) ..." Dr. [REDACTED] further stated his belief, that "a bachelor's degree in a relevant sports or fitness field (including those listed above) is a reasonable minimum prerequisite for the subject position given the complexity of the position's program development duties, managerial responsibilities, and larger role of the position within the context of organizational operations and objectives" and that "it is a common standard among established sports and fitness services organizations (such as the employer), to ensure that a Director charged with such duties possess at least bachelor's-level educational training in an appropriate sports science, physical education (or related) field."

Dr. [REDACTED] opined that "to deny the specialized nature of such an occupation (in suggesting that a less-trained individual could be qualified) is tantamount to undermining the value of post-secondary education in the field." Dr. [REDACTED] opined further "that a Director of [REDACTED] who will be responsible for the duties specified above, with an organization such as [the petitioner], is required to demonstrate at least bachelor's-level academic training in Sports Science, Exercise

Science, Physical Education, Rehabilitation Therapy, Kinesiology, or a related area in order to competently execute the required job duties. Generalized knowledge, alone, of Sports Science, Exercise Science, Physical Education, Rehabilitation Therapy, Kinesiology, or a related field is not sufficient for a Director of [REDACTED] to successfully meet the functional position requirements." Dr. [REDACTED] noted the beneficiary's advanced post-secondary studies in physical education and rehabilitation therapy and stated his belief that the beneficiary would be "very well qualified" for the position.

First, upon review of Dr. [REDACTED] credentials we do not find that even when considered in the aggregate, that his credentials establish a sufficient basis to support his expertise with regard to the minimum education requirements for the performance of the particular position that is the subject of this petition. Dr. [REDACTED] for example has not submitted evidence that he has published, conducted research, run surveys, or engaged in any enterprise, pursuit, or employment - academic or otherwise - so structured as to provide him with such special knowledge in the particular area upon which he opines that we should regard him as authoritative or expert in that particular area. While Dr. [REDACTED] claims expertise on the basis of his position as a professor and his research, he does not persuasively articulate - and the resume presented does not show - that he has expertise or has been recognized as an authority in the areas on which he presented his opinion, that is, in the area of the minimum educational requirements for this particular proffered position or in the area of a position's qualification for H-1B specialty occupation recognition in accordance with the governing statutes and USCIS regulations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Next, we note that Dr. [REDACTED] opinion does not expressly state the full content of whatever documentation and/or oral transmissions upon which it is based. For example, he does not indicate whether he visited the petitioner's business premises or spoke with anyone affiliated with the petitioner, so as to ascertain and base his opinion upon the substantive nature and educational requirements of the proposed duties as they would be actually performed. Further, we do not find any statement in his opinion submission which indicates the extent to which he reviewed the particular position upon which he opined. Additionally, Dr. [REDACTED] does not specify or discuss any relevant research, studies, surveys, or other authoritative publications as part of his review and or as a foundation for his opinion.

Also, and significantly, Dr. [REDACTED] did not discuss the pertinent occupational information provided in the *Handbook*, on the position of exercise physiologist. He does not appear to be aware that the petitioner characterized the position on the LCA as pertaining to the occupational category of "Exercise Physiologist," the position the petitioner attested is the occupational classification that most closely responds to the duties of the proffered position. Thus, it does not appear that Dr. [REDACTED] is fully informed of the petitioner's representations regarding the nature of the proffered position. Further, we observe that Dr. [REDACTED] does not discuss the fact that the petitioner submitted an LCA certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is

only expected to possess a basic understanding of the occupation.⁹ The omission of such an important factor severely diminishes the evidentiary value of his opinion, especially as Dr. [REDACTED] focuses on the management functions of the described position.

To the extent that Dr. [REDACTED] relied on the qualifications of the beneficiary to determine that the position proffered here is a specialty occupation, we note that a beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. at 560, ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Finally, we observe that Dr. [REDACTED] does not identify specific subjects or courses that comprise the requirements of the various degrees he opines will be applied in the execution of the prescribed job duties. He does not discuss how the various fields he finds acceptable to perform the duties of the proffered position are closely related fields and he does provide any meaningful analysis on how these various disciplines are directly related to the duties and responsibilities of the proffered position. That is, other than his conclusory statements, he does not discuss specific bachelor's level coursework that is directly related to particular duties. The extent of meaningful analysis involved in the formulation of the position-evaluation opinion, therefore, is questionable. Moreover, Dr. [REDACTED] did not explain the empirical basis for his assertion regarding minimum industry hiring standards.

We may, in our discretion, use as advisory opinion statements submitted as expert testimony. 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. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

For all of these reasons, we find that the opinion letter authored by Dr. [REDACTED] does not merit recognition or weight as an expert opinion, and is not probative evidence towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We recognize that the petitioner here desires an employee with a sports and health-related background. However, the petitioner does not substantiate that only a bachelor's degree in a specific discipline would provide the specialized knowledge to perform the general duties it ascribes to the proffered position. 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

⁹ The *Prevailing Wage Determination Policy Guidance* is available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion. We are therefore unable to conclude that the proffered position requires the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

C. Conclusion Regarding the Proffered Position

Upon review of the descriptions of the proffered position, the petitioner's academic requirements for the position, and the LCA submitted in support of the petition, we find that the petitioner has not established the substantive nature of the work to be performed by the beneficiary, which therefore precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

To briefly elaborate, the petitioner has not established that the proffered position is an exercise physiologist. Moreover, the petitioner has not established that a specific body of highly specialized knowledge is required to perform the general duties it ascribes to the proffered position. The petitioner has submitted an LCA that is at odds, both in regards to occupational classification and wage level, with its claims that the position is a specialty occupation. The LCA thus undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, as noted above, the proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry position.

Additionally, as we cannot determine the substantive nature of the position we cannot determine that there is a specific industry standard established to perform the duties of the position. Again, although the petitioner may desire particular educational requirements for its management team, the petitioner has not established that this specific position requires a bachelor's degree or higher, or its equivalent to perform the duties of the position. In that regard, the petitioner has not established that it normally requires a degree in a specific discipline to perform the duties of the position. Although the petitioner appears to have other employees at a management level in its organization, the petitioner has not offered probative evidence that these positions are similar to the proffered

position or even if similar as a management 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. 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. According to the Court in *Defensor*, "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388. If USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position – and without consideration of how a beneficiary is to be specifically employed – then any alien with a bachelor's degree in 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.*

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 for this reason.

IV. CONCLUSION

The petition must be denied for the above stated reasons, with each considered as an independent and alternate basis for the decision.¹⁰ In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.

¹⁰ As the identified ground of ineligibility is dispositive of the petitioner's appeal, we need not address any additional issues in the record of proceeding.