



U.S. Citizenship
and Immigration
Services

(b)(6)



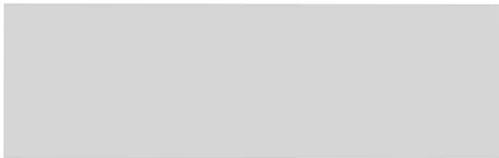
DATE: **JUN 19 2015**

PETITION RECEIPT #: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

I. PROCEDURAL BACKGROUND

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a publishing house, with 34 employees, which was established in [REDACTED]. In order to employ the beneficiary in what it designates as an editorial assistant position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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

The record of proceeding contains: (1) the Form I-129 and supporting documentation; (2) the Director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the Director's decision; and (5) the Notice of Appeal or Motion (Form I-290B) and supporting documentation. We reviewed the record in its entirety before issuing our decision.¹

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

II. SPECIALTY OCCUPATION

The primary issue is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position.

A. Legal Framework

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and

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

- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

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

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

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

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

accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

B. Proffered Position

In the Form I-129, the petitioner indicated that it wishes to employ the beneficiary as an editorial assistant on a full-time basis for an annual salary of \$32,000. In the support letter, the petitioner asserts:

The minimum requirement for this professional position is a Bachelor's degree in publishing, photography, or a related field. The attainment of a Bachelor's degree for this position is necessary because the work is highly complex and demanding...

The petitioner also provided the following information regarding the duties and requirements of the proffered position:

[The beneficiary] will be responsible for the following: management of art logs, trafficking of artwork and related editorial tasks for the development of book projects and to ensure the completion of individual book projects; research and development of editorial content; hire and supervise freelance employees for

project specific tasks including copy editors and proofreaders by marking copy to indicate errors in type, arrangement, grammar, punctuation, or spelling; coordinate, sign off and route proofs, book related material, press releases, and catalog copy to [REDACTED] and [REDACTED] for publication and distribution. Additionally, [the beneficiary] will interview and train an editorial intern every session, oversee photo acquisition and permissions on a project-by-project basis; train and supervise interns in related tasks.

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position corresponds to the occupational classification of "Proofreaders and Copy Markers"-SOC (ONET/OES Code) 43-9081, at a Level I (entry) wage.

In response to the Director's RFE, the petitioner provided additional details about the job duties and the percentage of time spent on each duty.² For example:

Assist in the development of five or six titles per season, working in close collaboration with Editor(s). Editorial responsibility for all titles will be assigned by the Publisher and Editor, including:

- *Trafficking of artwork and related editorial tasks for the development and completion of individual book projects* – The editorial department works closely with the production department. Once all image files/physical artworks have been received for a book project, these are transmitted to production for processing. A transmittal log must be drafted alongside art receipts (required when transmitting physical art work), to track what has been transferred. This is also accompanied by a PDF of the book layout and a print out with detailed instructions on file codes and image sizing. These processes require intimate knowledge of both (Adobe) image processing software and administrative software, and experience in the handling of both digital and physical artworks. All files/artworks must be carefully checked for quality and size and coded/cataloged according to our in-house system.
Time Allocation: 15%
- *Assist Editor(s) in maintaining correspondence and communication with photographers, designers, authors, and others involved in book projects* – There are a number of people involved in the making of a book. Each person provides a different service and has different requirements. It is of the utmost importance to understand the dynamics of this correspondence and be

² In the response to the RFE, the petitioner referred to the proffered position as a "copy editor" on its cover letter.

experienced in working with a variety of different people. Prior knowledge of the photographer, designers, and authors is extremely beneficial and something naturally accumulated during a related field of study in the arts which often requires collaboration such as this and a vested/demonstrated interest in the industry.

Time Allocation: 15%

- *Assist Editor(s) in research and development of editorial content* – For any given project a foundation of materials must be developed in order to pitch an idea to the organization and expanded on as the project progresses. In-depth research must be conducted into the main collaborators and ideas must be formed around the Editor and Editorial Assistant's concept. This requires a focused engagement in the subject, intellectual discipline and creative problem solving.

Time Allocation: 25%

- *Track and draft contracts, maintain payment schedules, complimentary copies, and job cost allocation on assigned book projects* – Maintain and update individual bookbinders in collaboration with production manager, Managing Editor, Publisher and Senior Text Editor. Run budget forms (publishing summaries) for each title in collaboration with the Production Manager, Editor, and CFO, and monitor distribution and updating budget documents throughout each project.

Combine Time Allocation: 10%

- *Oversee photo acquisition and permissions on a project-by-project basis: train and supervise interns to identify and contact sources, bargain for lower prices, issue check requests, prepare captions, and login/out photos. In collaboration with intern, develop and maintain binders for each title's permission files* – This requires specific knowledge and research skills to understand where to acquire artwork and at what price, being able to negotiate licenses, understand the intricacies of image copyright law and what information is needed in order to accurately present the work of other artists in the context of a book.

Time Allocation: 10%

On appeal, the petitioner submits a document titled "Specific Job Responsibilities Addendum" and states that the "supplementary job duty descriptions" provided below "do not replace the previously submitted descriptions, but are meant to further explain such duties." These supplementary job duties include:

- 1) Trafficking of Artwork and Related Editorial Tasks for the Development and Completion of Individual Book Projects (Time Allocation Approximately 15%)

After all the images associated with a specific book project are archived, as detailed in §1, the image files, in either digital or physical form, are transmitted to production for processing. Prior to transmitting the image to production, the editorial assistant creates a transmittal log. The editorial assistant verifies the image quality and size and assigned code. These tasks are performed with the final product, the illustrated book, in mind. To complete the tasks in compliance with the high standards maintained by [the petitioner], the editorial assistant must have a comprehensive understanding of fine art book production, including, but not limited to: page count, trim size, image layout and sizing, paper weight, cover material, binding and stamping.

- 2) Maintain Correspondence and Communications with Photographers, Designers, Authors, Others involved in Book Projects (Time Allocation Approximately 15%)

The editorial assistant interacts and collaborates with photographers, photo agents, gallery owners/assistants, designers, authors, archivists, and book distributors on a daily basis. The editorial assistant must be able to discuss the technicalities of the images used in the photo books and the subject matter of the book projects as they relate to the photography industry. Competency in such topics is normally gained through specialized study in photography or a related field, and experience in photography or a related field.

- 3) Research and Development of Editorial Content (Time Allocation Approximately 25%)

The editorial assistant contributes to each season's book titles. In order to do so, the editorial assistant must apply their knowledge and understanding of the history of photography, how photography transcends to become a piece of fine art, photo composition, color balance, and the use of light. Additionally, the editorial assistant must understand the interests of practitioners, artists, and others involved in the fine art photography industry in order to develop editorial content that will be of value to [the petitioner] and fulfill [the petitioner]'s mission.

- 4) Track and draft contracts, maintain payment schedules, complimentary copies, and job cost allocation on assigned book projects (Time Allocation Approximately 10%)

Maintain and update individual bookbinders in collaboration with the production manager, Managing Editor, Publisher and Senior Text Editor

Run budget forms for each title, monitor distribution and update budget documents throughout each project.

- 5) Oversee photo acquisition and permissions on a project-by-project basis and interview, train, and supervise editorial interns (Time Allocation Approximately 11%)

The editorial assistant is responsible for acquiring artwork, negotiating artwork prices, negotiating licenses, and working in conformance with applicable copyright laws. The editorial assistant has the authority to assign such tasks to editorial interns, but is ultimately responsible for the acquisition of photographs used in book projects and obtaining the permissions necessary, ensuring that [the petitioner] does not violate copyright laws.

C. Analysis

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

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

We recognize 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 We reviewed the information in the *Handbook* regarding the occupational category "Proofreaders and Copy Markers" and note that this occupation is one for which the *Handbook* does not provide detailed data. The *Handbook* states the following about these occupations:

Data for Occupations Not Covered in Detail

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 Network (O*NET) code, the occupational definition, 2012 employment, the May

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/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational category are hereby incorporated into the record of proceeding.

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 June 16, 2015).

Thus, the narrative of the *Handbook* reports that there are some occupations for which only summary data is prepared but detailed occupational profiles are not developed.⁴ It appears 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 this or one of the other three criteria, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other objective, authoritative sources) that supports a finding that the particular position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider and weigh all of the evidence presented to determine whether the particular position qualifies as a specialty occupation.

The *Handbook* does not indicate that proofreader and copy marker positions comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. The full-text of the *Handbook* regarding this occupational category is as follows:

Proofreaders and Copy Markers

(O*NET 43-9081.00)

Read transcripts or proof type to detect and correct any grammatical, typographical, or compositional errors. Excludes workers whose primary duty is editing copy. Includes proofreaders of Braille.

2012 employment: **13,200**

May 2012 median annual wage: **\$32,780**

⁴ The *Handbook* only includes summary data for 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.

Projected employment change, 2012-22:

Number of new jobs: **-200**

Growth rate: **-1 percent (little or no change)**

Education and training:

Typical entry-level education: **Bachelor's degree**

Work experience in a related occupation: **None**

Typical on-the-job-training: **None**

Id. (last visited June 16, 2015).

The *Handbook* summary data provides "education and training categories" for occupations. The occupational category "Proofreaders and Copy Markers" falls into the group of occupations for which a bachelor's degree (no specific specialty) is the typical entry-level education. We note that, as evident in the above excerpt on this occupation, the *Handbook* does not report that bachelor's degrees held by those entering the occupation are limited to and must be in any specific specialty directly related to the occupation. Accordingly, the *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty is normally the minimum requirement for entry into this occupational category.

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.⁵ Thus, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

⁵ On appeal, the petitioner asserts that the *Handbook* does not provide a job title or a job description that matches the position of editorial assistant for its organization. However, we note that the duties presented by the petitioner encompass duties described in several occupational categories in the *Handbook*, which include "Editors"-SOC (ONET/OES) Code 27-3041 and "Desktop Publishers"-SOC (ONET/OES) Code 43-9031. See <http://www.bls.gov/ooh/media-and-communication/editors.htm#tab-2> and <http://www.bls.gov/ooh/office-and-administrative-support/desktop-publishers.htm#tab-2> (last viewed June 16, 2015). Notably, the prevailing wage for editors at Level I in [REDACTED] New York is \$40,352 per year, and for desktop publishers is \$34,694 per year, which is higher than the salary for the proffered position at \$32,000 per year. See <http://www.flcdatcenter.com/OesQuickResults.aspx?code=27-3041&year=14&source=1> and <http://www.flcdatcenter.com/OesQuickResults.aspx?code=43-9031&year=14&source=1> (last viewed June 16, 2015).

According to the Department of Labor's "Prevailing Wage Determination Policy Guidance," when a proffered position is a combination of occupations, the petitioner should select the relevant occupational code for the highest paying occupational category. 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.

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

Next, we will review the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other independent, authoritative source) reports a standard industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter.

In response to the Director's RFE, the petitioner asserted that similarly situated businesses require a Baccalaureate Degree in a specific field of study as a standard minimum requirement for the job offered. In support of this assertion, the petitioner submitted the following:

- A letter from [REDACTED] Managing Editor of the Editorial Department at the [REDACTED]. Mr. [REDACTED] writes, "For all positions in the department, including editorial assistants, the Editorial Department requires a bachelor's degree."
 - A letter from [REDACTED] Editor in Chief of the [REDACTED], stating, "the most basic requirement [for the position] is a bachelor's degree."
 - A letter from [REDACTED], Publisher of the [REDACTED]. Ms. [REDACTED] writes, "all positions in the editorial department, including editorial assistants, require a minimum of a bachelor's degree."
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- A letter from [REDACTED] Chief Financial Officer of [REDACTED] who states that his company "requires all editorial assistants to have a minimum of a bachelor's degree."

Each letter submitted in support of the petition states that the minimum requirement for editorial assistants in the petitioner's industry is a bachelor's degree.⁶ The letters do not indicate that a bachelor's degree is a specific specialty, or its equivalent is the minimum requirement for an editorial assistant position.⁷ Therefore, the letters do not establish that a bachelor's or higher degree in a specific specialty, or its equivalent, is a requirement common to the industry in parallel positions among similar organizations.

On appeal, the petitioner submitted additional letters from the following professors and teachers of photography:

- [REDACTED] Assistant Professor of Photographic Arts and Sciences at [REDACTED]
- [REDACTED], Associate Professor of Photography, [REDACTED]
- Lori Novak, Professor of Photography and Imaging at [REDACTED] Department of Photography & Imaging;
- [REDACTED] Professor of Photography at the [REDACTED]; and

⁶ To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, 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. Thus, the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988) (stating that "[t]he mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility"). Thus, while a general-purpose degree or a degree in any discipline 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 at 147.

⁷ As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the letters is not necessary. That is, as the evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions, not every deficit of every letter has been addressed.

- [REDACTED], Teacher at the [REDACTED].

The letters listed above indicate that the professors would recommend that students wanting to be employed as an editorial assistant for an organization similar to the petitioner acquire a degree in photography or a related field. However, the letters do not indicate that such firms routinely employ and recruit only degreed employees in a specific specialty. For example, Professor [REDACTED] states "it is widely acknowledged that no specific degree exists for the position of Editorial Assistant at a publisher such as [the petitioner]" but "an employer must look to the specifics of that publisher in order to establish the best criteria and requirements for the role."

In addition to the letters from the academia, the petitioner also submitted letters from [REDACTED] Chairman of [REDACTED] a non-profit publisher of fine art photography books, and a letter from [REDACTED] Marketing Manager at [REDACTED] an illustrated book publisher. Mr. [REDACTED] states:

In my experience, I have found that individuals with a minimum of a bachelor's degree in photography or a related field, as well as personal experience in photography are essential to the position of an editorial assistant in photo publishing. When an editorial assistant has these qualifications, then we are able to collaborate on a professional level, and make decisions together that involve a high degree of subtlety.

Mr. [REDACTED] writes:

The tasks required by [editorial assistants] – research and development of content, close collaboration with artists and designers, handling of artworks and materials, and development of promotions – requires someone with this direct knowledge gained through university study and work experience.

The letters from Mr. [REDACTED] and Mr. [REDACTED] discuss the benefits of having a candidate with a university level education in photography; however, neither asserts that a bachelor's degree in photography or a related field, or its equivalent is a common requirement for editorial assistants in their field or for editorial assistants hired by their employers. Moreover, it must be noted that the letters previously submitted in response to the RFE did not indicate that a bachelor's degree in a specific specialty, or its equivalent is common for editorial assistants. As discussed, the letters only stated that a bachelor's degree is required, without stating a specific specialty. As such, 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 industry in parallel positions among similar organizations.

The petitioner also submitted copies of job advertisements in support of the assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations.

In the Form I-129, the petitioner stated that it is a publishing house with 34 employees. The petitioner did not report its annual gross or net income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 511120.⁸ This NAICS code is designated for "Periodical Publishers."

For the petitioner to establish that an organization is similar under this criterion of the regulations, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner.

When determining whether the petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In the instant case, the petitioner submitted three vacancy announcements. The announcements are from [REDACTED] one of the world's leading publishers of books for women; [REDACTED] a global scientific publisher, whose publications range from medicine to all fields of life sciences, and from mathematics to engineering; and [REDACTED] a provider of instructional, assessment and learning-performance management solutions for the secondary, post-secondary, and professional markets. We will briefly note that, without more, the job postings do not appear to be from organizations similar to the petitioner. On appeal, the petitioner acknowledges the differences between the petitioner's business and the businesses from the job advertisements, stating "it should be noted that previous submissions from publishing companies were provided from publishing companies that do not specialize in the printing of fine-art photography."

Furthermore, the job postings state a bachelor's degree as a requirement, but do not indicate that the minimum requirement for an editorial assistant is a bachelor's degree in a specific specialty, or its equivalent. As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings

⁸ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and, each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last viewed June 16, 2015).

is not necessary.⁹ That is, as the evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions, not every deficit of every job posting has been addressed.

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.

On appeal, the petitioner states "[t]he job duties of the editorial assistant at [the petitioner] are unique and contrast from those discussed in the Occupational Outlook Handbook or those discussed in the O*Net job description . . . Specifically, the editorial assistant responsibilities are photography focused, requiring the editorial assistant to have an in-depth understanding of photography and related topics such as how a photograph transcends to become a piece of fine art, as well as photo composition, color balance, and the history of photography. . . Such skills are not obtained through a general bachelor's degree, but require the study of photography or a related field at the undergraduate or the graduate level and/or extensive experience in the subject matter."

However, the record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its normal is so complex or

⁹ Even if all of the job postings indicated that a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations (which they do not), the petitioner does not demonstrate what inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

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

unique that it can be performed only by an individual with a degree." To begin with, the record does not sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of editorial assistant. Specifically, even though the petitioner asserts that some of the proffered position's duties are so complex and unique that a bachelor's degree is required, the petitioner does not demonstrate how the editorial assistant duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex and unique. While a few courses in photography may be beneficial in performing certain duties of an editorial assistant 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 particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. On appeal, the petitioner asserts that the editorial assistant is required to have "an in-depth understanding of photography and related topics" and "such skills are not obtained through a general bachelor's degree, but require the study of photography or related field at the undergraduate or the graduate level and/or extensive experience in the subject matter." However, the LCA indicates a wage level at a Level I (entry) wage, which is the lowest of four assignable wage levels. The wage-level of the proffered position indicates that (relative to other positions falling under this occupational category) the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. Without further evidence, the evidence does not demonstrate that the proffered position is complex or unique as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage.¹⁰ For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹¹

¹⁰ The issue here is that the petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

¹¹ For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't &

We note that the petitioner repeatedly indicates that the beneficiary is "an ideal candidate" and well qualified for the proffered position. However, the test to establish a position as a specialty occupation is not the credentials and skills of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent). The petitioner did not establish that its particular position is so complex or unique that it can only be performed by an individual with 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.

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a

body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In response to the Director's RFE, the petitioner submitted evidence of its recruiting history in the form of four job postings. The first posting, for an Editorial Assistant, states that a bachelor's degree is required and that knowledge of photography is preferred. The second posting, for a Proofreader/Copy Editor, states that it requires a bachelor's degree with knowledge of photography preferred and two to three years of copyediting and/or proofreading experience. The third posting is for an Education and Public Programs Assistant, which requires a bachelor's degree. The fourth posting is for an Executive Assistant, requiring a bachelor's degree and "associated work experience." Upon review of the submitted job postings we note that only one of the postings is for a comparable position and that it does not require a bachelor's degree in a specific specialty, or its equivalent. Further, the additional three job postings for unrelated positions also do not require a bachelor's degree or equivalent in a specific specialty.

In response to the RFE and also on appeal, the petitioner submitted the resumes and academic transcripts of some of its current staff who claim that they previously held the position as an editorial assistant. The educational backgrounds of the former editorial assistants include, among others, a bachelor's degree in History with an Art/Art History minor; a bachelor's degree in Film Studies with a minor in Studio Art (photography concentration); and a bachelor's degree in Journalism. The documents do not support the assertion that the petitioner normally requires a bachelor's degree in a specific specialty or its equivalent for the proffered position. Further the petitioner did not submit probative evidence to establish the individuals' current or past employment with the petitioner (e.g., pay statements, Form W-2 Wage and Tax Statements).

The record does not establish that the petitioner normally requires a bachelor's degree in a specific specialty, or its equivalent, for the proffered position and that performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge. Therefore, 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.

We have reviewed the petitioner's information regarding the proffered position including the letters from individuals in the field of publishing and photography. While the evidence provides some insights into the petitioner's business operations and the proffered position, as discussed, the letters do not establish that the nature of the specific duties of the proffered position 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 further incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level I position (the lowest of four assignable wage-levels) relative to others within the occupational category. Without more, the position is one not likely distinguishable by relatively specialized and complex duties. That is, without further evidence, the petitioner's has not demonstrated that its proffered position is one with specialized and complex duties as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a substantially higher prevailing wage.¹²

The petitioner has submitted insufficient evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the nature of the specific duties of the proffered position is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We, therefore, conclude that the petitioner did not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has 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. CONCLUSION AND ORDER

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

¹² As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.