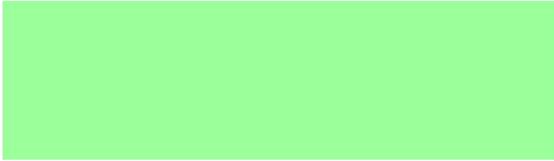
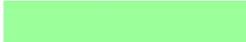


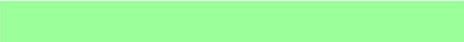


U.S. Citizenship  
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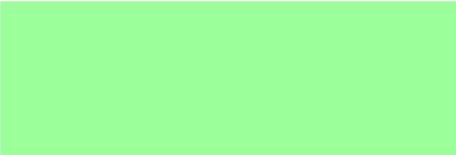


DATE: MAR 20 2015 OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition, and the matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

## I. BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 25-employee landscape business established in [REDACTED]. In order to employ the beneficiary in what it designates as a "horticulturist" position, 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, finding that the petitioner did not establish that the proffered position qualifies as a specialty occupation, and the beneficiary did not qualify for the proffered job. The petitioner timely submitted a Form I-290B, Notice of Appeal or Motion, on September 2, 2014, and submitted a brief thereafter.

The record of proceeding contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; (5) a letter asking for supervisory review after the initial denial; and (6) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record supports the director's decision to deny the petition for its failure to establish the proffered position as a specialty occupation.<sup>1</sup> Accordingly, the appeal will be dismissed, and the petition will be denied.

## II. SPECIALTY OCCUPATION

### A. Law

To meet its burden of proof in establishing the proffered position as a specialty occupation, the petitioner must establish that the employment that it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

<sup>1</sup> 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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 illogical and absurd 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 rely simply upon a proffered position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 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. Position

The petitioner provided a letter of support with the Form I-129. In the letter, it stated that it contracts with landscape architects to install and maintain gardens for high end estates in the [REDACTED]. The petitioner's business includes "site work, soil remediation, plant selection and installation, masonry work, construction of outdoor structures and maintenance of the grounds" post completion.

The petitioner describes the proffered position as follows:

[The beneficiary] is being offered a position as a Horticulturist for three years. In this role, [the beneficiary] will be responsible for overseeing all of our landscape projects. He will work with the managers to ensure each project is executed in a professional and expeditious manner.

[The beneficiary], who has the equivalent of US degree in horticulture, will work with the landscape architects to ensure the landscape design as it concerns site work and plantings are successfully executed. When a landscape architect comes in to price a project our managers review the blueprints and work with our estimators to calculate the cost of a project based on the amount of materials and labor necessary to complete the project. Once an estimate has been accepted he will work with the other managers to plan, and organize the projects under their control. He will interpret and explain the plans and contract terms to administrative staff, workers, and clients.

He will work with the Landscape Architect to set budgets for the plant material based on his familiarity with the materials set for the [sic] [sic] blueprints. He will research the nurseries that have the best quality at [the] best price to ensure our costs are contained. He may suggest alternative plant materials if a particular plant is not available or is too cost prohibitive. He may also do so when soil conditions and or shade conditions make a particular plant choice unsuitable for a particular location. He will research and visit nurseries in search of difficult to find plant material to ensure we have the material we need in the quantity necessary at the price that makes the project cost efficient.

At the outset of any project he will test the soil to determine what nutrient loading if any it requires and what plant material is best suited to that soil type based both on the specifications and the client's input. In conjunction with our engineer, he will determine what site work is necessary based on the elevation of the project. He will ensure crew members on each project understand the complexity of the given project and will ascertain that they are knowledgeable about the plant material being utilized and explain to them the necessary care to take if they are not. He will inspect plant material before installation to ensure plant quality and re-inspect after installation to ascertain that the plant material is thriving in the new environment and that there is no need to replace the plants due to poor installation and or quality issues.

He will train, oversee and work with new employers to teach correct techniques and procedures for plant installation, soil remediation and the placement of plant material in the correct areas. He will direct the activities of the crews concerned with the site preparation and plant installation and give them detailed instructions based on his knowledge of the specifications and the materials being utilized. He will work with subcontractors when an installation cannot be done with in-house workers and or is more efficient in terms of time and scale to contract out the work. He will order and maintain the materials necessary for each project. He will ensure that the materials delivered to the site meet the specifications for the job. If any plant material is inferior he will ensure it is promptly replaced with the correct material. He will visit the site at the appropriate intervals to ensure that the crews are completing their duties at both a level that meets our corporate standards and that conforms to the job specifications. He will confer with

supervisory personnel to discuss such matters as schedules, work procedures, complaints, and problems at the site whether it is with materials, workers or other departments within the company.

In response to the director's RFE, the petitioner provided an advisory opinion from the [REDACTED] which included a list of twenty-five job duties as reflected above. These duties emphasized that the petitioner will coordinate with landscape architects, select and inspect plant materials, and will supervise laborers when installing plant materials.

In filing the Labor Condition Application (LCA) with the U.S. Department of Labor (DOL) the petitioner described the proffered job as a "horticulturist" and indicated that the position corresponds to the Standard Occupational Classification (SOC) Code 11-9121, Natural Sciences Managers, occupational group.

### C. Analysis

Upon review, we find that the job duties as described do not establish that the position falls under the described SOC code. Specifically, according to DOL's *Occupational Outlook Handbook (Handbook)*, the duties of natural sciences managers are as follows:

- Work with top executives to develop goals and strategies for researchers and developers
- Make budgets for projects and programs by determining staffing, training, and equipment needs
- Hire, supervise, and evaluate scientists, technicians, and other staff members
- Review the methods used in their staff's work and the accuracy of the work produced
- Ensure that laboratories are stocked with equipment and supplies
- Monitor the progress of projects, review research, and draft operational reports
- Provide technical assistance to scientists, technicians, and support staff
- Establish and follow administrative procedures, policies, and standards
- Communicate project proposals, research findings, and the status of projects to clients and top management.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., <http://www.bls.gov/ooh/management/natural-sciences-managers.htm#tab-2> (last visited March 17, 2015).

As shown in the *Handbook*, the natural sciences manager career field focuses on the management and direction of scientists and research projects. Nothing in the record supports a finding that the proffered job requires managing of scientist or research laboratories or any other duties as described in the natural sciences manager category. Rather, the record suggests that the proffered position requires the incumbent to work with contractors and landscape architects, and provide direction to laborers to install landscape features. Nothing in the record supports a finding that the proffered position could meet the definition of a natural sciences manager.

On appeal, the petitioner concedes that the position is not properly in the natural sciences manager category, but it was the closest available match to the proffered job.<sup>2</sup> Notably, in the LCA, the petitioner indicated that the prevailing wage for "Natural Sciences Managers"-SOC/(ONET/OES) code 11-9121 at a Level I (entry-level) is \$52,000 per year. However, a search of the Foreign Labor Certification Data Center Online Wage Library indicates that the correct prevailing wage for natural sciences managers at Level I is \$104,042 per year.

With respect to the LCA, the U.S. Department of Labor (DOL) provides guidance for selecting the most relevant O\*NET classification code. DOL's "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O\*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification . . . . If the employer's job opportunity has worker requirements described in a combination of O\*NET occupations, the [determiner] should default directly to the relevant O\*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-

<sup>2</sup> A review of the DOL's Occupational Information Network (O\*NET OnLine) provides an occupation with an SOC Code much closer in line with the duties of the proffered position. SOC 37-1012, First-Line Supervisors of Landscaping, Lawn Service, and Groundskeeping Workers, is substantially similar to the proffered job. Its duties include:

- Establish and enforce operating procedures and work standards that will ensure adequate performance and personnel safety.
- Inspect completed work to ensure conformance to specifications, standards, and contract requirements.
- Direct activities of workers who perform duties such as landscaping, cultivating lawns, or pruning trees and shrubs.
- Schedule work for crews, depending on work priorities, crew or equipment availability, or weather conditions.
- Plant or maintain vegetation through activities such as mulching, fertilizing, watering, mowing, or pruning.
- Monitor project activities to ensure that instructions are followed, deadlines are met, and schedules are maintained.
- Train workers in tasks such as transplanting or pruning trees or shrubs, finishing cement, using equipment, or caring for turf.
- Provide workers with assistance in performing duties as necessary to meet deadlines.
- Inventory supplies of tools, equipment, or materials to ensure that sufficient supplies are available and items are in usable condition.
- Confer with other supervisors to coordinate work activities with those of other departments or units.

pilot, the [determiner] shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

Here, while the petitioner asserts that the occupational category natural sciences manager is the closest category to the proffered position, the LCA filed in support of the Form I-129 does not reflect the correct prevailing wage for natural sciences manager. Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational classification in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupational category at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Here, the LCA does not properly reflect the correct occupational category and thus does not correspond to the H-1B petition. Further, the petitioner has not demonstrated that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted. For this reason alone the appeal must be dismissed and the petition must be denied; an inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. See 8 C.F.R. § 214.2(h)(1)(ii); see also 8 C.F.R. § 103.2(b)(1).

However, in the interests of providing a more comprehensive and informative decision for the petitioner's benefit, we will now discuss the issue of specialty occupation. In this context we will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition. Here, as previously discussed, the petitioner has not established that it selected the proper occupational category for the proffered position on the LCA, which precludes the discussion of the *Handbook*.

In the petitioner's letter asking for a supervisory review, the petitioner asserts that the North American Free Trade Agreement (NAFTA) at Appendix 1603.D.1 indicates that the proffered position is a specialty occupation. We note that the entry of Canadian and Mexican nationals pursuant to NAFTA is governed by section 214(e) of the Act and 8 C.F.R. § 214.6, and those provisions are not relevant here since TN visa is a separate category from the H-1B classification. However, assuming *arguendo* that TN visa is relevant to our discussion, the petitioner asserts that the minimum education requirement and alternative credentials for the position of horticulturist is a baccalaureate or licenciatura degree, and the horticulturist occupation was first listed in the United States-Canada Free Trade Agreement in 1989. However, in order to be classified as a specialty occupation, the position must require a degree in a specific specialty. The NAFTA Appendix does not demonstrate that a bachelor's degree in a specific specialty is required, and does not demonstrate that a position so designated qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Therefore, despite counsel's assertion to the contrary, the documentation is not probative of the proffered position qualifying as a specialty occupation.<sup>3</sup>

Further, the petitioner provided an advisory opinion report drafted by [REDACTED] of [REDACTED] Ms. [REDACTED] states that the position of horticulturist for the petition requires a minimum of the U.S. Bachelor's degree in Horticulture or related area. We reviewed the opinion letter in its entirety. However, as discussed below, the report is not persuasive in establishing the proffered position as a specialty occupation position.<sup>4</sup>

<sup>3</sup> Again, the issue is whether the petitioner's proffered position qualifies as a nonimmigrant H 1B specialty occupation and not whether it is a profession as that term is defined in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and 8 C.F.R. § 204.5(k)(2). Thus, while a position may qualify as a profession as that term is defined in section 101(a)(32) of the Act, the occupation would not necessarily qualify as a specialty occupation unless it met the definition of that term at section 214(i)(1) of the Act.

<sup>4</sup> *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. 8 C.F.R. § 214.2(h)(4)(ii). A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. *Id.*

It is noted that Ms. [REDACTED] provided a brief description of the petitioner's business and a job description for the proffered position. Upon review of Ms. [REDACTED] opinion report, there is no indication that she possesses any knowledge of the petitioner's proffered position beyond this information. She does not discuss the duties of the proffered position in any substantive detail. To the contrary, she simply provides a list of duties which appears to be verbatim from the petitioner's job description, and claims that the appropriate knowledge required for these job duties would be a bachelor's degree in business administration or related area. She does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. For instance, there is no evidence that Ms. [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Ms. [REDACTED] opinion does not relate her conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue.

Ms. [REDACTED] provides a summary of her qualifications, including her educational credentials and professional experience. Based upon a complete review of Ms. [REDACTED] report, however, she has failed to provide sufficient information regarding the basis of her expertise on this particular issue. Ms. [REDACTED] has a bachelor's of arts degree in International Studies and Spanish/Latin American Studies, and a Master's of Business Administration. Nothing in the record supports a finding that the author has any specialized knowledge in the field of horticulture or landscaping. There is no indication that she has published any work or conducted any research or studies pertinent to the educational requirements for such positions (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that she is an authority on those specific requirements. We further note that neither Ms. [REDACTED] nor [REDACTED] is a landscape industry spokesperson or organization. Thus, Ms. [REDACTED] opinion that the proffered position requires a bachelor's degree in horticulture is not the type of evidence that is entitled to substantial weight.

As a matter of discretion, USCIS may accept expert opinion testimony. However, USCIS will reject an expert opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. *Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. *Id.*; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) ("[E]xpert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to 'fact' but rather is admissible only if 'it will assist the trier of fact to understand the evidence or to determine a fact in issue.'").

As the evidence in the record of proceeding does not establish that at least a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Next, we find that the petitioner has not satisfied 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 to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) 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 at 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* or any other authoritative resource, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. The record does contain letters from various companies in the landscape industry. The first letter, from [REDACTED], states that it "is very important to hire a qualified and experienced Horticulturist." The letter further states that the petitioner needs people who have knowledge about "plant identification and soil nutrients suited to each specific landscape," "different types of plants, including annuals, perennials, shrubs, trees," and "ability to accurately diagnose the numerous diseases of different plant material." The letter does not state that a bachelor's degree in a specific specialty is the industry requirement for entry into this field.

The next letter comes from [REDACTED]. This letter states they only recommend landscape contractors to their clients if they have a horticulturist on staff. Continuing on, the letter states that they only recommend the petitioner because they have a horticulturist on staff and "they have the [h]orticultural knowledge and expertise to make any project thrive and succeed." However, the letter does not state that a bachelor's degree in a specific specialty is the industry standard for entry into this field.

The third letter comes from [REDACTED]. This letter states that a horticultural professional with experience caring for trees and plants is necessary for a high end landscaping business. The letter does not state what the minimum educational requirement for a horticulturist would be. Thus, here again there is no consensus industry standard that the minimum requirement for entry into the field is a bachelor's degree in a specific specialty.

The fourth, and the final letter is from [REDACTED]. [REDACTED] is in "the same field of work as [the petitioner]." The letter states that horticulturist's knowledge is important in the industry and that "he has training in science and biology." The letter does not indicate that "training" is equivalent to a bachelor's degree and is required for the horticulturist position.

The record also contains copies of the job advertisement. However, upon review of the evidence, we find that the petitioner's reliance on the job announcement is misplaced.

In the Form I-129 and supporting documentation, the petitioner states that it is a landscape business established in [REDACTED] with 25 employees. The petitioner reported its gross annual income as approximately \$3 million, but did not provide its net annual income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 115112 – "Soil Preparation, Planting, and Cultivating."<sup>5</sup> The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This U.S. industry comprises establishments primarily engaged in performing a soil preparation activity or crop production service, such as plowing, fertilizing, seed bed preparation, planting, cultivating, and crop protecting services.

See U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 115112 – Soil Preparation, Planting, and Cultivating on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited March 17, 2015).

We note that the job and company descriptions are scant, making it hard to tell which, if any, are parallel jobs in organizations similar to the petitioner. For example, the advertisements from [REDACTED] and [REDACTED] do not provide sufficient information about the employers. The record also contains job advertisement from the [REDACTED] which is a research and teaching facility, and [REDACTED] which is "nationally recognized provider of superior arboricultural services" in more than 25 locations. The petitioner did not supplement the record with further information and we are unable to determine if the advertising employers are similar to the petitioner.

Further, some advertisements do not appear to be for parallel positions based upon the job duties and the requirements. For example, an advertisement for an experienced general manager at a private residence states that the duties include "[e]stablishing standardized operating manuals, procedures, and inventories," and "overseeing all building operations, maintenance, safety and security systems, as well as the management of third party vendors, contractors, architects, designers, engineers, and consultants." Moreover, the position for [REDACTED] requires working with "IB 112 students in Horticultural Methods class" and "participat[ing] in volunteer training and interpretation of assigned areas for volunteers with both tours and/or written materials." Further, some positions appear to be for more senior positions than the proffered position. For example, the position for a private residence requires "5+ years of experience in rural estate property management." Similarly, another unnamed employer in [REDACTED] River area also seeks "5+ years of operations supervisory experience." As previously

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<sup>5</sup> 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 U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited March 17, 2015).

discussed, the petitioner designated the proffered position on the LCA as a Level I (entry level) position.

Additionally, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. Notably, some employers such as [REDACTED] and [REDACTED] require less than a bachelor's degree such as an associate's degree. Some employers such as [REDACTED] and [REDACTED] prefer a degree, but the advertisements do not indicate if the degree preferred is a bachelor's degree and that a bachelor's degree in a specific specialty is required. Some employers such as [REDACTED] and [REDACTED] require a bachelor's degree in Horticulture, but as discussed earlier, the petitioner did not establish that the advertised positions are parallel and that the advertising employers are similar to the petitioner.

The job advertisements do not establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions in the petitioner's industry. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.<sup>6</sup>

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

Next, we find that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty. Specifically, the petition and supporting documents undercut the assertion

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<sup>6</sup> The petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

that this position is so complex that it can only be performed by a person holding a bachelor's degree in horticulture. As mentioned, the petitioner identified this position as a Wage Level I position. Positions at this level are characterized 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 [emphasis in original].

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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

Based upon the Level I wage rate, the beneficiary is only required to have a basic understanding of the occupation. Further, the wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; his work will be closely supervised and monitored; he will receive specific instructions on required tasks and expected results; and his work will be reviewed for accuracy.

Without further evidence, it is not credible that the petitioner's proffered position is complex or unique as such a position 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. 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."<sup>7</sup>

Moreover, although Ms. [REDACTED] provided a list of courses in the advisory opinion report that she claimed are relevant, it must be noted that she did not establish how such a curriculum is necessary to perform the duties of the proffered position. While a few related courses may be beneficial in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position

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<sup>7</sup> For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*; Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

We note that the petitioner has indicated that the beneficiary "is amply qualified the position." However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation. Consequently, as it has not been shown that the particular position for which this petition was filed is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

Our review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question. To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. 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 the performance requirements of the proffered position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

In its appeal brief the petitioner states that it would have provided responsive information if the director had requested it in an RFE. Title 8 C.F.R. § 103.2(b)(8) permits the director to deny a petition for failure to establish eligibility without having to request evidence regarding the ground or grounds of ineligibility identified by the director. Here, the petitioner did not provide substantiating evidence necessary to carry its burden that it in fact has a history of only hiring individuals with a bachelor's degree in a specific specialty for the proffered job.

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 at 387. 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 a 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 proposed 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.

As the record of proceeding does not present a history of recruiting and hiring only individuals with a bachelor's degree, or the equivalent, in a specific specialty for the proffered position, it does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, we find that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty.

The petitioner claims that the nature of the specific duties of the position in the context of its business operations is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We reviewed the petitioner's statements regarding its business operations. However, upon review of the entire record of proceeding we find that the submitted documentation fails to support the assertion that the proffered position satisfies this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, we reiterate our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position 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. For instance, 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." The petitioner has submitted inadequate probative evidence to satisfy the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation.

### III. BENEFICIARY QUALIFICATIONS

In addition, the director noted that the beneficiary did not qualify to perform services in a specialty occupation. However, we do not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree, or its equivalent. Therefore, we need not and will not address the beneficiary's qualifications further, except to note that the petitioner submitted a combined evaluation of the beneficiary's education and work experience from Ms. [REDACTED] from [REDACTED]. However, as the claimed equivalency was based in part on experience, there is no evidence that the evaluator has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience and that the beneficiary also has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. *See* 8 C.F.R. § 214.2(h)(4)(iii)(C)(~~4~~) and (D)(1). As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in any specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

#### IV. CONCLUSION

The director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the denial. 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.