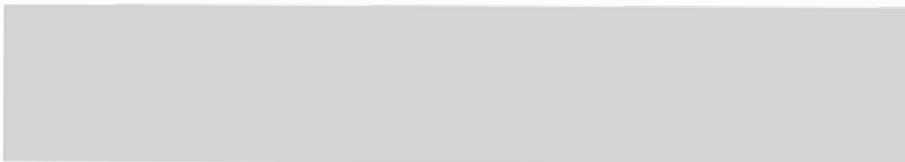




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: MAY 12 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](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

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

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a single-employee "Acupuncture clinic" established in [REDACTED]. In order to employ the beneficiary in what it designates as a part-time "Acupuncturist" position at a wage of \$15.06 per hour, 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 on the ground that the evidence of record did not establish that the proffered position qualifies for classification as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

The record of proceeding contains the following: (1) the Form I-129 and supporting documentation; (2) the Director's request for evidence (RFE); (3) the response to the RFE; (4) the Director's notice of decision; (5) the Notice of Appeal or Motion (Form I-290B) and supporting documentation; (6) our RFE; (7) the response to our RFE; and (8) a Record of Sworn Statement given by [REDACTED]. We have reviewed the record in its entirety before issuing our decision.

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

#### I. FACTUAL AND PROCEDURAL BACKGROUND

The petitioner filed the instant Form I-129 on May 22, 2012. The Form I-129 indicated that the petitioner is an acupuncture clinic with one employee, and that it seeks to employ the beneficiary as an acupuncturist on a part-time basis.

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is an acupuncturist, and that it corresponds to Standard Occupational Classification (SOC) code and title "29-1199, Health Diagnosing and Treating Practitioners, All" from the Occupational Information Network (O\*NET). The LCA states that the proffered position is a Level I, entry-level, position. The LCA lists the North American Industry Classification System (NAICS) Code of "621399, Offices of All Other Miscellaneous Health Practitioners." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "621399 Offices of All Other Miscellaneous Health Practitioners" <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited April 28, 2015).

Accompanying the visa petition was a letter dated May 13, 2012 on letterhead bearing the petitioner's company name and address, and ostensibly signed by [REDACTED] President and Chief

Acupuncturist."<sup>1</sup> The writer of this letter described the petitioner as "a bona fide clinic entity" which is offering the beneficiary temporary employment as an acupuncturist. The writer stated that "[w]ith our current workload, we still do not have enough staff to sufficiently handle all of the research jobs." The writer described the profession of acupuncture generally, and then listed specific job duties and responsibilities of the proffered position, along with the percentages of time to be spent on each duty, as follows:<sup>2</sup>

1. Provide suggestions, consultation, and acupuncture treatment . . . . 20%;
2. Attend special seminars on acupuncture and herbal medicine . . . . 20%;
3. Heal patients with back and foot pains by using acupuncture needles. 15%
4. Diagnose patients with body pains to provide appropriate acupuncture therapies. 20%;
5. Instruct and counsel patients on lifestyle changes. 10%;
6. Participate in acupuncture seminars, conferences and events. 15%;

The writer further stated:

**Our acupuncturist is not required to conduct any administering specific therapeutic treatment of symptoms and disorders amendable to acupuncture procedure, pursuant to acupuncturists' instruction.** Moreover, our Acupuncturist will be in charge of finding new ways of treating patients with various health **problems**. Moreover, the incumbent won't be working under the supervision of another Acupuncturist . . . . Therefore, we require the incumbent to have at least a master's degree in Medicine, or in any other related field such as Chiropractic or Acupuncture.

Also submitted in support of the visa petition was an "Offer of Employment for [the Beneficiary]" dated May 15, 2012 on the same letterhead bearing the petitioner's company name and address, ostensibly signed by "[redacted] President."<sup>3</sup> This document lists the same job duties for the proffered position as those listed in the May 13, 2012 letter.

In addition, job listings and related documents from "Simialr [sic] employers" including [redacted] and [redacted] were submitted. Also submitted were the petitioner's federal tax returns and related tax documentation.

<sup>1</sup> As will be discussed in greater detail below, this letter was neither written on the petitioner's letterhead nor signed by Ms. [redacted]

<sup>2</sup> The writer repeatedly refers to the beneficiary as a male, although she is a female.

<sup>3</sup> As will be discussed below, this letter was neither written on the petitioner's letterhead nor signed by Ms. [redacted]

The Director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on August 30, 2012.

A letter dated October 24, 2012, again on letterhead bearing the petitioner's company name and address and ostensibly signed by "[REDACTED] President and Acupuncturist," was submitted in response to the RFE.<sup>4</sup> This letter provided additional descriptions of the proffered position, including the statement that "Our Health Diagnosing & Treating Practitioner is not required to conduct any administering specific therapeutic treatment of symptoms and disorders amendable to acupuncture procedure, pursuant to Chiropractic's instruction," and that the beneficiary "will be working without supervision of our senior acupuncturist." With respect to the "unique" nature of the petitioner's business, the letter stated:

The reason why the petitioner's business is very much unique and distinguish is the employer's current practice is not only **treating patient's symptoms** but also helping the patients by providing three major phases of chiropractic care include relief care, Rehabilitative care and supporting care. Moreover, our clinic had also hired well educated entry level Acupuncturist conducting appropriate clinical medical research include gait analysis, writing of case report and medical report's translation in order to assist Doctor Follow Up our patient's health progress. In other words, most of other similar type of clinic would like to focus efficiency treatment, instead of our comprehensive treatment include pre, during and post treatment and conducting clinical research works.

[Errors in the original.]

The same letter provided additional descriptions of the minimum educational requirement for the proffered position. Specifically, the letter stated that "[t]he basic degree required is the graduation degree Must be a preferably in acupuncture [sic]" and that "[t]he candidate needs to have Masters in Acupuncture for 2 years [sic]." In a latter section of the same letter, it stated that the petitioner "require[s] the incumbent to have at least a master's degree in Medicine, or in any other related fields such as Chiropractic or Acupuncture."

Additional evidence relating to job postings placed by [REDACTED], and [REDACTED] was also submitted.

The Director denied the petition on January 11, 2013, concluding that the evidence did not establish the proffered position as a specialty occupation.

<sup>4</sup> As will be discussed below, this letter was neither written on the petitioner's letterhead nor signed by Ms. [REDACTED]

The instant appeal was filed on February 13, 2013. In the accompanying brief ostensibly signed by [REDACTED], Director," the writer elaborated on the duties of the proffered position.<sup>5</sup> Specifically, the writer listed the following two "specific duties" of the proffered position: (1) "[treating] disorders and illnesses by stimulating the body's defense through find [sic] needle insertion (40%); and "[p]repare **advanced treatment plan** using Chinese medicine modalities, finding new ways of treating patients with various health problems **by conducting 'research' on different herbal medications and attend special seminars on acupuncture . . . (15%)**.<sup>6</sup> In addition, the writer stated that the minimum educational requirement for the proffered position is "**at least 4 year undergraduate study in the oriental Medicine or two-three years master programs with major in oriental medicine.**"

Also submitted in support of the appeal, among other documents, was additional evidence relating to job postings purportedly placed by the petitioner and other companies [REDACTED].

During our preliminary review of the appeal, we noted several discrepancies with regard to Ms. [REDACTED] ostensible signatures. As such, we issued the petitioner an RFE on November 7, 2013 to provide clarification and additional documentation relating to the apparent signature discrepancies.

In response to our RFE, the petitioner acknowledged that three of the documents submitted in support of the petition and appeal were "not in fact signed by the Petitioner." The petitioner further indicated that these three documents were submitted by an individual, [REDACTED], who "was not authorized to sign for Petitioner." In a separate notarized affidavit dated November 26, 2013, Ms. [REDACTED] attested to the following:

This is to certify that I, [REDACTED], have reviewed all the documents submitted for the above mentioned petition. There are three documents were not signed by me:

1. A letter dated May 13, 2012 filed in support of the Form I-129
2. An offer dated May 15, 2012
3. Response to RFE dated October 24, 2012.

Attached please find the three documents with my original signature. The person signed the three documents is as follows:

Name: [REDACTED]  
Employer: [REDACTED]  
Address: [REDACTED]  
Telephone Number: [REDACTED]

<sup>5</sup>As will be discussed below, this letter was not written or signed by Ms. [REDACTED]

<sup>6</sup> The writer did not account for the remaining 45% of the proffered duties.

[Errors in the original.]

The petitioner submitted newly signed copies of the letters dated May 13, 2012 and October 24, 2012. The petitioner also submitted a newly signed partial copy of the appeal brief.

On January 21, 2015, officers of the United States Citizenship and Immigration Services (USCIS) personally interviewed Ms. [REDACTED]. On that date, Ms. [REDACTED] freely and voluntarily executed a Record of Sworn Statement which she certified, under penalty of perjury, was true and complete to the best of her knowledge. A portion of Ms. [REDACTED] sworn statement is transcribed below:

Q: Did you fill out the I-129 petition that [the petitioner] filed, which seeks to employ [the beneficiary] as an Acupuncturist? Did anyone assist you with filling out and filing this petition?

A: (1) No. (2) Yes. [The beneficiary] filled up some of the information about herself.

Q: Part 8 of the I-129 petition should show if someone other than the petitioner prepared it. This petition is blank in Part 8. Please explain.

A: There is some parts that are typed. I don't know who typed it. You have to ask [the beneficiary].

Q: Were you present when the petition was filled out?

A: No

Q: How do you normally recruit employees for your positions at [the petitioning company]?

A: We call the acupuncture school to recommend graduate

Q: Did you sign the petition? Do you know what documentation was submitted with the petition?

A: (1) Yes (2) I saw some. Whoever [the beneficiary] hired to do paperwork for her.

\* \* \*

Q: In a sworn statement dated 11/26/2013, you stated that you did not sign the May 3, 2012 job description letter submitted with the petition. You said that Mr. [REDACTED] signed it. With that statement you submitted a photocopy of the same letter with your signature. Did you actually write or dictate the letter originally?

A: No

Q: The first letter had letterhead on it. Is this your letterhead? Did you provide the letterhead to Mr. [REDACTED] to use?

A: (May 15, 2012) letterhead – not mine.

Q: In the 11/26/2013 sworn statement you also stated that you did not sign the job offer dated May 15, 2012, and submitted with the petition. It was also written on company letterhead. Is this your company letterhead? Did you supply the letterhead to Mr. [REDACTED]?

A: No, No.

Q: Why would you write a letter or job offer and not sign it? By signing the letters now, do you realize that you are vouching for their content?

A: (1) I won't do that. (2) N/A

Q: You state that you resubmitted the job offer with your signature, however, there is no "re-signed" May 15, 2012 job offer. What is the job offer for [the beneficiary]?

A: ? don't understand

Q: Did Mr. [REDACTED] tell you he signed these documents either before or after they were submitted? When did he tell you? Or, when did you find out?

A: I don't know Mr. [REDACTED]

Q: These documents should be very specific to your operation. Are they written for your operation or are they general descriptions written by Mr. [REDACTED]

A: N/A

Q: Now that you have signed these documents, do you know the content of these documents? Are they valid descriptions of your operation and the position?

A: It wasn't my documents.

Q: The sworn statement also says you did not sign the letter submitted with the response to the request for evidence dated 08/30/2012. Did you see and read the request for evidence at the time? Did you know what was submitted to USCIS in response (to the RFE)?

A: I didn't see any

Q: When did you learn the I-129 employment petition had been denied? Have you read the decision?

A: (investigation letter) (1) I did not get a letter from your office. (2) No I saw Request for Evidence letter (Nov. 7, 2013)

Q: Do you know why the petition was denied?

A: No. I didn't know about the denial

Q: Did you file the appeal? Did you pay for the appeal? (record shows [the beneficiary] wrote the check)

A: No. I didn't know it was appealed. The appeal was my signature, but brief is not my signature.

Q: Did you sign the brief submitted with the appeal? The signature does not look like the most recently submitted samples of your signature?

A: No.,

Q: Did Mr. [REDACTED] sign the appeal brief?

A: I don't know

Q: Did Mr. [REDACTED] prepare the appeal notice I-290B for you?

A: I don't know

Q: Did you see the appeal brief and documentation that was submitted with the appeal prior to submission to USCIS?

A: No

\* \* \*

Q: What is the organizational structure of [the petitioning company]? Do you have an organizational chart? How many people work here? (I129 petition says 1 worker in US)

A: [(1)] 4 partners [(2)] 4 + [the beneficiary]

Q: What are [the beneficiary's] job duties? What is her title? How many hours per week does she work?

A: She is observing and does some researches for cancer patience or stroke patience and pain management

[Errors in the original.]

Ms. [REDACTED] sworn statement has been incorporated into the record of proceeding in its entirety. A copy of Ms. [REDACTED] sworn statement has been attached to this decision.

## II. THE LAW

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must 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, supra*. To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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.

### III. PRELIMINARY FINDINGS

Based upon a complete review of the record of proceeding, we will make some preliminary findings that are material to the determination of the merits of this appeal.

In the instant matter, it is unclear whether we can rely upon the statements attested to in the Forms I-129, I-290B, and supporting documentation as true and correct representations of the proffered position and the petitioner's operations. That is, the petitioner's President, [REDACTED] acknowledged in her sworn statement dated January 28, 2015 that: she did not fill out the Form I-129; she was not present when the petition was filled out; and the Form I-129 was filled out by the beneficiary and an individual unknown to her. The petitioner also acknowledged in her sworn statement that the supporting documentation contained in the record of proceeding were: not provided, written, or dictated by her; not written on the petitioner's company letterhead; and submitted by "whoever [the beneficiary] hired to do paperwork for her." When asked if the petitioner filed and paid for the appeal, as the record reflects that the beneficiary wrote the check for the appeal, the petitioner stated: "No. I didn't know it was appealed. The appeal was my signature, but brief is not my signature." Finally, when specifically asked whether, by re-signing the documents in response to our RFE, she is now aware of and is vouching for their contents, the petitioner did not provide a clear answer (she answered: "N/A" and "It wasn't my documents").<sup>7</sup>

While we acknowledge that the petitioner did personally sign the Forms I-129 and I-290B, and subsequently re-signed copies of additional supporting evidence, it is nevertheless unclear what evidentiary force, if any, the petitioner's signatures have in certifying the truth and correctness of the evidence submitted. *See* 8 C.F.R. § 103.2(a)(2) (providing, in pertinent part: "By signing the benefit request, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct"). As mentioned above, the petitioner was specifically asked whether, by re-signing the documents in response to our RFE, she is now aware of and is vouching for their contents. The petitioner was unable to provide a clear answer, instead answering "N/A" and "It wasn't my documents."

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<sup>7</sup> We note that statutory and regulatory provisions specifically prohibit a beneficiary of a visa petition from filing a petition, and from paying (either directly or indirectly) the fees and costs connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of the LCA and Form I-129. *See* Section 212(n)(2)(C)(vi)(II) of the Act; section 214(c)(12)(A) of the Act; 20 C.F.R. § 655.731(c)(10)(ii); 8 C.F.R. § 103.2(a)(3). Moreover, the regulations specifically prohibit the beneficiary of a visa petition from being recognized as an "affected party" with legal standing in an appellate proceeding, and from paying the required filing fee for the appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B); 8 CFR 103.3(a)(2)(i).

On the whole, the petitioner's sworn statements made on January 21, 2015 indicate that she has not reviewed all of the contents of the evidence of record and is therefore unable to vouch for their truthfulness. In contrast, however, the petitioner certified in her signed letter dated November 26, 2013 that she has "reviewed all the documents submitted for the above mentioned Petition." The petitioner has not provided an explanation, corroborated by objective evidence, to resolve this critical issue. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Without knowing whether the evidence of record represents the true and correct disclosure of all salient aspects of the proffered position and the petitioner's operations, we cannot determine whether the proffered position qualifies for classification as a specialty occupation and that the petition is otherwise approvable.

To ascertain the intent of a petitioner, USCIS must look to the Forms I-129, I-290B, and the documents filed in support therein. It is only in this manner that the agency can determine the exact position offered, the petitioner's ability to support the position offered, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the Director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Thus, a crucial aspect of this matter is whether we can rely upon the statements attested to in the Forms I-129, I-290B, and supporting documentation. The petitioner has not established that to be the case here.

There are also numerous discrepancies and deficiencies that further undermine the probative value and credibility of any and all of the statements and evidence submitted for the record. For instance, with respect to the duties of the proffered position, the May 13, 2012 letter described the proffered duties as including: providing suggestions, consultation, and acupuncture treatment (20%); healing patients with back and foot pain by using acupuncture needles (15%); and diagnosing patients with body pain to provide appropriate acupuncture therapies (20%). The appellate brief stated that at least 40% of the proffered position's "specific duties" include "[treating] disorders and illnesses by stimulating the body's defense through find [sic] needle insertion." However, in Ms. [REDACTED] sworn statement dated January 21, 2015, the beneficiary's duties were described as "observing and does some researches for cancer patience or stroke patience and pain management [sic]." Ms. [REDACTED] did not state that the proffered duties included the actual administration of acupuncture treatment. Notably, the May 13, 2012 letter specifically stated that the petitioner "do[es] not have enough staff to sufficiently handle all of the research jobs," and discussed the petitioner's "unique" business practice of "conducting clinical research works," a factor that was repeatedly highlighted in subsequently submitted letters.

In addition, several of the submitted letters emphasize the petitioner's other "unique" business practice of providing "three major phases of chiropractic care includ[ing] relief care, Rehabilitative care and supporting care." There are numerous references within the record of proceeding to the

petitioner's chiropractic practice as well, such as the proffered position working together with a "Doctor of Chiropractor" and "pursuant to Chiropractic's [*sic*] instruction." However, the record of proceeding does not establish that the petitioner's operations actually include chiropractic services. The petitioner is described on the Form I-129 as an "Acupuncture clinic." The petitioner's tax returns describe the petitioner's business activity and product/service as a clinic for acupuncture. The LCA listed a NAICS Code of "621399, Offices of All Other Miscellaneous Health Practitioners," which specifically *excludes* offices for chiropractors. U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "621399, Offices of All Other Miscellaneous Health Practitioners," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited April 28, 2015).

Nor does the evidence of record establish that the petitioner has sufficient staffing and resources to support the claimed chiropractic and clinical research practices. In particular, the Form I-129 indicated that the petitioner has only one employee, presumably Ms. [REDACTED] who is identified as the petitioner's "President and Acupuncturist" and "President and Chief Acupuncturist." The petitioner's 2010 federal tax documentation indicates that the company employed only one individual (who received a salary or wages of \$4,292). The petitioner's 2011 annual federal unemployment tax return shows two employees receiving wages.<sup>8</sup> Overall, the evidence of record is unclear as to the true size and scope of the petitioner's operations, and its ability to support the beneficiary's employment in the manner asserted.<sup>9</sup> It is reasonable to assume that the size of an employer's business has or could have an impact on the claimed duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v. Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the actual duties of a particular position.

Throughout the record, there are repeated claims regarding the complexity and uniqueness of the proffered position, such as statements that the beneficiary will not work under the supervision of another acupuncturist, will "be in charge of finding new ways of treating patients with various health **problems**," and will "[p]repare **advanced treatment plan**." However, we must question the level of complexity, independent judgment and understanding that are actually needed for the proffered position as the LCA is certified for a Level I entry-level position.<sup>10</sup> This characterization

<sup>8</sup> The petitioner did not submit its 2011 federal tax return.

<sup>9</sup> We acknowledge Ms. [REDACTED] sworn statement that the petitioning company has five employees, including the beneficiary, as of January 21, 2015. However, the petitioner did not further elaborate on the roles and duties of all its employees. Moreover, we note that eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

<sup>10</sup> The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage

of the position and the claimed duties, responsibilities and requirements as described in the record of proceeding conflict with the wage-rate element of the LCA selected by the petitioner, which is indicative of a comparatively low, entry-level position relative to others within the same occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that this is 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 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.

Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

For all of the above reasons, including the failure to establish the truthfulness of the statements attested to in the Forms I-129, I-290B, and supporting documentation, and the numerous, unresolved discrepancies regarding the proffered position and its constituent duties, the petitioner has not established the substantive nature of the proffered position.

#### IV. SPECIALTY OCCUPATION DISCUSSION

The failure to establish the substantive nature of the work to be performed by the beneficiary therefore precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal

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levels. A Level I wage rate is described by DOL as follows:

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

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

Finally, even if the petitioner were able to establish the substantive nature of the work to be performed by the beneficiary, we still could not find that the proffered position qualifies as a specialty occupation. Specifically, the evidence of record does not contain consistent, credible descriptions of the minimum educational requirement for the proffered position. The evidence in the record contains numerous varying descriptions of the minimum educational requirement for the proffered position, including a "Masters in Acupuncture," "at least a master's degree in Medicine, or in any other related fields such as Chiropractic or Acupuncture," "**at least 4 year undergraduate study in the oriental Medicine,**" and "**two-three years master programs with major in oriental medicine.**"

If the proffered position can be satisfied by a Chiropractic degree, then this further raises questions as to whether the proffered position could be classified as a specialty occupation. To qualify as a specialty occupation, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the duties and responsibilities of the position in question. The petitioner has not explained how a Chiropractic degree would provide the body of highly specialized knowledge needed to perform the duties of the proffered position, which includes the insertion of needles in "365 acupuncture points in human body."

In general, provided the specialties are closely related, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields such as Acupuncture and Chiropractic would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties.<sup>11</sup> Section 214(i)(1)(B) of

<sup>11</sup> While the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a

the Act (emphasis added). The petitioner has not done so here. In other words, the petitioner has not established that a Chiropractic degree is closely and directly related to the duties and responsibilities of the particular position proffered in this matter. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty or its equivalent.

#### V. CONCLUSION

For the reasons discussed above, the evidence of record is insufficient to establish that the proffered position qualifies for classification as a specialty occupation.<sup>12</sup> Accordingly, the appeal is dismissed.

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.

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minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

<sup>12</sup> As these issues preclude approval of the petition, we will not discuss any of the additional deficiencies we have observed on appeal.