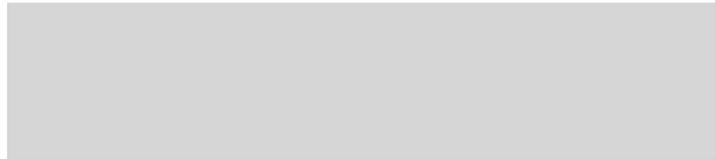




U.S. Citizenship
and Immigration
Services

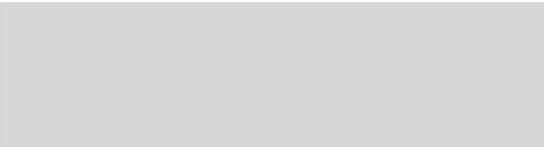
(b)(6)



DATE: **MAY 12 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 (hereinafter "director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. We summarily dismissed the appeal, then reopened the matter *sua sponte*. The appeal will be dismissed. The petition will be denied.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 4-employee "Auction House" established in [REDACTED]. In order to employ the beneficiary in what it designates as a part-time "Graphic Designer" position for 30 hours per week, 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, the petitioner asserts that the director's basis for denial was erroneous and contends that the petitioner satisfied all evidentiary requirements.

As will be discussed below, we have determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and the petitioner's submissions on appeal.

I. PROCEDURAL AND FACTUAL BACKGROUND

As noted above, the petitioner describes itself as an auction house on the Form I-129. The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a Graphic Designer position, and that it corresponds to Standard Occupational Classification (SOC) code and title 27-1024, Graphic Designers, from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a wage Level I, entry-level, position.

With the visa petition, the petitioner submitted evidence that the beneficiary received a bachelor's degree in [REDACTED] from University of the [REDACTED] and a master's degree in [REDACTED] and [REDACTED] from University of [REDACTED].

The petitioner also submitted, *inter alia*: (1) a printout of content from the petitioner's website; (2) a copy of a vacancy announcement the petitioner posted for a graphic designer position; and (3) a letter, dated March 21, 2014, from [REDACTED] signing as the petitioner's director.

The content from the petitioner's website shows various items, including artwork, the petitioner was offering at auction. The petitioner's vacancy announcement states that the graphic designer position announced requires a bachelor's degree in art design, media and animation, or a related field.

Ms. [REDACTED]'s March 21, 2014 letter provides the following description of the duties of the proffered position:

- Develop complex graphics, videos, contents and layouts for promotion materials, briefings, logos, advertising, multimedia presentations, and product illustrations;
- Determine size, color and arrangement of illustrative materials and select style and size of type;
- Design and build Company website pages;
- Use computer software to generate, refine and display current and upcoming Asian Artwork collections images and videos;
- Conduct research on artworks; specifications, styles, production period, materials and manufacturing methods, including the potential need for prospect art collectors;
- Build and maintain archive of traditional Asian paintings, ceramics, bronzes and other art craft pieces from past auctions;
- Gather and organize information and feedback to plan future auctions' design and promotion campaigns.

Ms. [REDACTED] also stated that the position requires a minimum of a bachelor's degree in art design, media and animation, or a related field.

On April 29, 2014, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The service center provided a non-exhaustive list of items that might be used to satisfy the specialty occupation requirements.

In response, the petitioner submitted: (1) a description of the duties of the proffered position; (2) an organizational chart of the petitioner's operations; (3) a list of the job titles and duties of each of the petitioner's employees; (4) vacancy announcements; (5) portions of the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* chapter pertinent to graphic designers; (6) a letter, dated May 11, 2014, from [REDACTED]; (7) a letter, dated May 28, 2014, from [REDACTED]; (8) a letter, dated May 29, 2014, from [REDACTED]; (9) a letter, dated May 30, 2014, from [REDACTED]; (10) a copy of a diploma issued to [REDACTED]; (11) an affidavit from [REDACTED] and (12) a letter from counsel, dated June 16, 2014.

The duty description provided reads as follows:

Position: Graphic Designer

Duties and Responsibilities	Required Knowledge	Percentage of time
<p>Create and develop complex graphics and video contents and layouts for promotion materials, seasonal catalogs, logos, print advertisings, product illustrations, proposals and multimedia presentations;</p> <p>Determine outline, size, color, composition and arrangement of illustrative materials and select proper style and size of type;</p> <p>Design and build Company website pages;</p> <p>Act as steward of the Company's brand and overall visual quality standards;</p> <p>Use wide range of media tools and computer software to generate, refine and rebuild current and upcoming Asian artwork collections; videos and images;</p>	<p>Color & Design Fundamentals; Digital Painting and Illustration; Video and Audio Production and Post; Layout and Package Design; Graphic Manipulation; Typography; Web Design and scripting; Overall Art Direction;</p> <p>The application of Art Design and Digital Production Software like Adobe Photoshop, Illustration, Flash, Dreamweaver, Premiere, After Effects; Autodesk Maya;</p> <p>Which can only be obtained through a minimum of four-year bachelor's degree level's training in art design, media and animation, visual arts, and the application of digital art and media production software.</p>	60% of the time
<p>Conduct research on artworks, specifications, styles, production period, materials and manufacturing methods, including observe the potential needs for prospect art collectors</p> <p>Build and manage archive of traditional Asian paintings, ceramics, bronzes and other art craft pieces from past auctions and stocks;</p>	<p>Art History: Classical and Contemporary Art Theories and Aesthetics; Visual Culture; Academic Research, Writing and Analyzing;</p> <p>Which can only be obtained through at minimum bachelor degree level's training in fine art, design and animation and other closely related fields.</p>	30% of the time
<p>Gather and organize information and feedback to plan future auction sessions' design, promotion and strategic marketing campaigns.</p>	<p>Visual Communication; Business of Art, Culture, Media and Entertainment Industry;</p>	10% of the time

Which can only be obtained through a minimum of bachelor degree level's training in mass media, animation, creative arts and communications.

The organizational chart and employee list show that the petitioner employs: (1) [REDACTED], a co-owner, as its director of Graphic and Design and chief appraiser, but that the petitioner proposes to hire the beneficiary to relieve Mr. [REDACTED] of his daily duties in graphic design of the catalog so he can retire from his position as Graphic Designer; (2) [REDACTED], a co-owner, as its office manager; (3) [REDACTED] as its research assistant; (4) [REDACTED] for technical support in "web design and development, database management, printing of company materials, etc."; and (5) [REDACTED] as an IT support assistant, learning and assisting [REDACTED] with technical support duties.

In his May 11, 2014 letter, [REDACTED] stated that he is a professor of animation at [REDACTED]. He stated that the duties described above require a minimum of a bachelor's degree in art design, media and animation, creative arts, advertising, or a closely-related field.

In her May 28, 2014 letter, [REDACTED] identified herself as an employee of [REDACTED] for 19 years. She stated that the duties attributed to the proffered position require a bachelor's degree in art design, animation, media or another closely-related field.

The May 29, 2014 letter from [REDACTED] indicates that he has worked as an artist and art critic for twenty years. He further stated that in his opinion the duties attributed to the proffered position require a minimum of four-years of college-level education in an art related major.

In her May 30, 2014 letter, [REDACTED] stated that the petitioner requires a minimum of a bachelor's degree in art design, media and animation, or a related field for the proffered position.

[REDACTED]'s diploma states that he was appointed as an associate of the [REDACTED] College of Art in [REDACTED] after a four-year course of study in drawing and painting. In his affidavit, [REDACTED] stated that he is also known as [REDACTED] and that the diploma was awarded to him.

Counsel's June 16, 2014 letter reiterates that the beneficiary would replace [REDACTED] as the petitioner's graphic designer.

The director denied the petition on July 2, 2014, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, the director found that the petitioner had satisfied none of the supplemental criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner submitted, *inter alia*: (1) a copy of the petitioner's March 16, 2014 auction catalog; (2) copies of vacancy announcements placed by other companies; (3) a book of paintings produced by the beneficiary; and (4) a brief, dated July 14, 2014. The petitioner's auction catalog contains reproductions of numerous works of art, reduced appropriately for such display.

The petitioner asserts on appeal that the evidence submitted is sufficient to show that the proffered position qualifies as a specialty occupation position.

On November 24, 2014, we summarily dismissed the appeal pursuant to 8 C.F.R. § 103.3(a)(1)(v), finding that the petitioner had not specifically identified any erroneous conclusion of law or statement of fact for the appeal. The petitioner submitted a letter dated December 2, 2014, observing that our finding was in error, in that, contrary to an assertion in our decision, the petitioner had timely submitted an appeal brief. On January 14, 2015, we reopened the matter and offered the petitioner an additional opportunity to submit evidence. In response, the petitioner submitted additional copies of evidence previously submitted.

II. SPECIALTY OCCUPATION

The issue before us is whether the petitioner has demonstrated that the proffered position qualifies as a specialty occupation.

A. 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*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

B. Analysis

The director found that the petitioner had not demonstrated that, if the visa petition were approved, the beneficiary would work as a graphic designer.

We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The *Handbook* states the following about the duties of graphic designers:

What Graphic Designers Do

Graphic designers create visual concepts, by hand or using computer software, to communicate ideas that inspire, inform, or captivate consumers. They develop the overall layout and production design for advertisements, brochures, magazines, and corporate reports.

Duties

Graphic designers typically do the following:

- Meet with clients or the art director to determine the scope of a project
- Advise clients on strategies to reach a particular audience
- Determine the message the design should portray
- Create images that identify a product or convey a message
- Develop graphics for product illustrations, logos, and websites

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online.

- Select colors, images, text style, and layout
- Present the design to clients or the art director
- Incorporate changes recommended by the clients into the final design
- Review designs for errors before printing or publishing them

Graphic designers combine art and technology to communicate ideas through images and the layout of websites and printed pages. They may use a variety of design elements to achieve artistic or decorative effects.

Graphic designers work with both text and images. They often select the type, font, size, color, and line length of headlines, headings, and text. Graphic designers also decide how images and text will go together on a print or webpage, including how much space each will have. When using text in layouts, graphic designers collaborate closely with writers who choose the words and decide whether the words will be put into paragraphs, lists, or tables. Through the use of images, text, and color, graphic designers can transform statistical data into visual graphics and diagrams, which can make complex ideas more accessible.

Graphic design is important in the sales and marketing of products, and is a critical component of brochures and logos. Therefore, graphic designers, also referred to as graphic artists or communication designers, often work closely with people in advertising and promotions, public relations, and marketing.

Frequently, designers specialize in a particular category or type of client. For example, some create the graphics used in packaging for various types of retail products, while others may work on the visual design used on a book jacket.

Graphic designers also need to keep up to date with the latest software and computer technologies to remain competitive.

Some individuals with a background in graphic design teach in design schools, colleges, and universities. For more information, see the profile on postsecondary teachers.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Graphic Designers," <http://www.bls.gov/ooh/arts-and-design/graphic-designers.htm#tab-2> (last visited May 6, 2014).

In the instant case, the petitioner stated that the beneficiary would "[c]reate and develop complex graphics and video contents and layouts for promotion materials, seasonal catalogs, logos, print advertisings, product illustrations, proposals and multimedia presentations." We thoroughly reviewed the entire record of proceeding, including the petitioner's catalogs and other publications provided as evidence of the work the beneficiary would perform. We conclude that the evidence of

record does not establish that the beneficiary would engage in duties such as "develop graphics for product illustrations, logos, and websites," "determine the message the design should portray," "advise clients on strategies to reach a particular audience," or "create images." Rather, from the evidence provided, it appears that the beneficiary's work product primarily involves lay-outs of photographs of items to be auctioned.

We reviewed the *Handbook*, and find that the proffered position is more appropriately classified under the occupational category of "Desktop Publisher." The *Handbook* describes the duties of desktop publishers as follows:

What Desktop Publishers Do

Desktop publishers use computer software to design page layouts for newspapers, books, brochures, and other items that are printed or put online. They collect the text, graphics, and other materials they will need and format them into a finished product.

Duties

Desktop publishers typically do the following:

- Gather existing materials or work with designers and writers to create new artwork or text
- Find and edit graphics, such as photographs or illustrations
- Use scanners to turn drawings and other materials into digital images
- Import text and graphics into desktop publishing software programs
- Position artwork and text on the page layout
- Select formatting properties, such as text size, column width, and spacing
- Check proofs, or preliminary layouts, for errors and make corrections
- Finalize formatted documents for printing or electronic publication
- Send final files to a commercial printer or print the documents on a high-resolution printer

Desktop publishers use publishing software to create page layouts for print or electronic publication. In addition to designing pages, desktop publishers may edit or write text. Some desktop publishers might be responsible for correcting spelling, punctuation, and grammar or for writing original content themselves.

Desktop publishers' responsibilities may vary widely from project to project and employer to employer. Smaller firms typically use desktop publishers to perform a

wide range of tasks, while desktop publishers at larger firms may specialize in one part of the publishing process.

Desktop publishers work with other design and media professionals, such as writers, editors, and graphic designers. For example, they work with graphic designers to come up with images that complement the text and fit the available space.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Desktop Publishers," <http://www.bls.gov/ooh/office-and-administrative-support/desktop-publishers.htm#tab-2> (last visited May 6, 2014).

The beneficiary's prospective duties appear to be largely concerned with producing the petitioner's auction catalogs which are consistent with the duties of a desktop publisher.

Further, one of the duties attributed to the proffered position is to "Design and build [the petitioner's] website pages." The *Handbook* describes the duties of a web developer as follows:

What Web Developers Do

Web developers design and create websites. They are responsible for the look of the site. They are also responsible for the site's technical aspects, such as performance and capacity, which are measures of a website's speed and how much traffic the site can handle. They also may create content for the site.

Duties

Web developers typically do the following:

- Meet with their clients or management to discuss the needs of the website and the expected needs of the website's audience and plan how it should look
- Create and debug applications for a website
- Write code for the site, using programming languages such as HTML or XML
- Work with other team members to determine what information the site will contain
- Work with graphics and other designers to determine the website's layout
- Integrate graphics, audio, and video into the website
- Monitor website traffic

When creating a website, developers have to make their client's vision a reality. They work with clients to make sure it fits in with the type of site it is supposed to be, such

as ecommerce, news, or gaming. Different types of websites may require different applications to work right. For example, a gaming site should be able to handle advanced graphics while an ecommerce site needs a payment processing application. The developer decides which applications and designs will best fit the site. Some developers handle all aspects of a website's construction, while others specialize in a certain aspect of it. The following are some types of specialized web developers:

Web architects or programmers are responsible for the overall technical construction of the website. They create the basic framework of the site and ensure that it works as expected. Web architects also establish procedures for allowing others to add new pages to the website and meet with management to discuss major changes to the site.

Web designers are responsible for how a website looks. They create the site's layout and integrate graphics; applications, such as a retail checkout tool; and other content into the site. They also write web-design programs in a variety of computer languages, such as HTML or JavaScript.

Webmasters maintain websites and keep them updated. They ensure that websites operate correctly and test for errors such as broken links. Many webmasters respond to user comments as well.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Web Developers," <http://www.bls.gov/ooh/computer-and-information-technology/web-developers.htm#tab-2> (last visited May 6, 2014).

The evidence in the record suggests that the proffered position is a combination of a web developer position and a desktop publisher position.²

We further note that some of the duties attributed to the proffered position are developing complex graphics, videos, logos, and multimedia presentations. However, the evidence submitted does not sufficiently demonstrate that such duties form any part of the petitioner's business. The record contains insufficient evidence to corroborate the assertion that, in her work for the petitioner, the beneficiary would develop complex graphics, videos, logos, multimedia presentations. The record is similarly devoid of sufficient information regarding other claimed duties of the proffered position such as building and managing an archive of traditional Asian art from past auctions and stocks. The

² It is noted that, where a petitioner seeks to employ a beneficiary in two or more distinct occupations, the petitioner should file separate petitions, requesting concurrent, part-time employment for each occupation. If a petitioner does not file separate petitions and if only one aspect of a combined position qualifies as a specialty occupation, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. See generally 8 C.F.R. § 214.2(h).

petitioner has not, therefore, established the substantive nature of the duties the beneficiary would actually perform if the visa petition were approved.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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

III. CONCLUSION

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.