



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF I-E-, INC.

DATE: SEPT. 21, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a business operating beauty salons, seeks to temporarily employ the Beneficiary as an accountant and to classify him as a nonimmigrant worker in a specialty occupation. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The matter is now before us on appeal. The appeal will be dismissed.

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

The entire record of proceeding includes: (1) the Petitioner's Form I-129 and supporting documentation; (2) the service center's request for evidence (RFE); (3) the Petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B, Notice of Appeal or Motion, a brief, and documentation. We reviewed the record in its entirety before issuing our decision.¹

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

I. THE PROFFERED POSITION

The Petitioner identified the proffered position as an "Accountant" on the Form I-129, and attested on the Form I-129 and on the required Labor Condition Application (LCA) that the proffered

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

Also, in light of the Petitioner's references to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

position is full-time position.² The Petitioner indicated on the LCA that the occupational classification for the proffered position is “Accountant and Auditors,” SOC (ONET/OES) Code 13-2011, at a Level I wage.

The Petitioner initially stated that it is “in the service industry,” employs nine persons, and currently has six locations in the New York area.³ The Petitioner stated that the “essential functions” of the job include, but are not limited to the following:

- Prepare, examine, or analyze accounting records, financial statements, or other financial reports to assess accuracy, completeness, and conformance to reporting and procedural standards;
- Report to President regarding the finances of establishment;
- Maintain payroll for employees and ensure taxes are paid timely;
- Establish tables of accounts and assign entries to proper accounts;
- Develop, implement, modify, and document recordkeeping and accounting systems, making use of current computer technology;
- Compute taxes owed and prepare tax returns, ensuring compliance with payment, reporting or other tax requirements;
- Maintain or examine the records of government agencies;
- Advise President in areas such as compensation, employee health care benefits, design of accounting or data processing systems;
- Develop, maintain, and analyze budgets, preparing periodic reports that compare budgeted costs to actual costs;
- Analyze business operations, trends, costs, revenues, financial commitments, and obligations, to project future revenues and expenses or to provide advice; and
- Coordinate with CPA (Certified Public Accountant) on taxes, registration of new business under the Petitioner and so on[.]

The Petitioner asserted that “[t]his is a professional position requiring a Bachelor’s degree or equivalent education that is normally the minimum requirements for entry into this position.” The Petitioner also asserted that “[i]n order to successfully discharge the duties to complete the job

² In the letter submitted in support of the petition, the Petitioner stated that the proffered position “will be a part time position for the initial period of the H-1B, as a non-immigrant worker, and depending on the business needs can become a full time position in the later years.” The record does not include evidence clarifying whether the proffered position is a part-time or a full-time position. It is incumbent upon the Petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the Petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

³ On appeal, the Petitioner notes that it is an 11-employee business, as it added two employees subsequent to the date of filing the Form I-129. In that regard, we observe that the Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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’l Comm’r 1978).

requirements in suitable manner, an Accountant must have theoretical and practical application of a body of highly specialized knowledge in the field of Accounts/Management, and requires a bachelor's degree or higher in the related field." The Petitioner added that "to perform the related job duties, the Beneficiary should have apprehensive [*sic*] knowledge of computer skills and accounting."

II. SPECIALTY OCCUPATION

A. Legal Framework

To meet its burden of proof, the Petitioner must establish that the employment it is offering to the Beneficiary meets the following statutory and regulatory requirements.

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

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

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

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

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

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

- (4) The nature of the specific duties [is] so specialized and complex that 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

With respect to the proposed duties of the position, the Petitioner described the duties of the proffered position in terms of general and generic functions. The evidence of record does not describe any of the listed functions in sufficient detail to either establish the substantive nature and associated complexity or specialization of the Petitioner's matters upon which the Beneficiary would focus or the practical and theoretical level of accounting knowledge that the Beneficiary would have to apply to those matters. We have also reviewed the Petitioner's response to the RFE and the allocation of the Beneficiary's time and find that the description provided is also insufficiently detailed. For example, the Petitioner stated that the Beneficiary would spend 35% of his time helping the Petitioner come up with a business plan and personal financial plan, as well as offering advice on insurance and expansion. The Petitioner also noted that the Beneficiary would spend: 15% of his time managing its day-to-day records and setting up bookkeeping and accounting systems; 25% of his time providing assistance with tax-related issues such as tax compliance and tax planning and advising the president on employee compensation and health care benefits; and 25% of his time preparing financial statements and audits as well as dealing with the CPAs and Accountants of other businesses prior to purchase. These duties present such a broad view of the proposed duties of the position, that it is not possible to differentiate the duties between basic business consulting duties and routine bookkeeping functions, and specific accounting duties.

The Petitioner has not included sufficient detail regarding the Beneficiary's actual day-to-day tasks associated with its general outlines of duties to ascertain that its duties actually include tasks that entail accounting services at a level requiring the theoretical and practical application of at least a bachelor's degree level of knowledge in accounting. The Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, which therefore precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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.

That being said and with the understanding that we are incorporating these comments and findings as part of our analysis of each of the criterion at 8 C.F.R. § 214.2(h)(4)(iii), we shall now separately address each of those criteria.

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

We will first address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). This criterion requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position. We recognize the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴

The Petitioner asserts that the duties it describes are those of an accountant and are thus completely different than the duties of a bookkeeper.⁵ However, the Petitioner has not identified anyone who would perform the routine bookkeeping functions of its business. In response to the service center's RFE, the Petitioner submitted its organizational chart identifying the president of the company and listing five locations, each with a store manager and a technician as employees. The only other position on the organizational chart is the proposed position of accountant.⁶ Neither the organizational chart nor other evidence in the record demonstrates that the Petitioner employs or contracts with anyone to perform the routine bookkeeping functions of its organization. This brings into question how much of the Beneficiary's time can actually be devoted to accounting duties above those usually performed by a junior accountant or a bookkeeping, auditing, or accounting clerk. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Even though the record is materially deficient regarding the Beneficiary's actual duties, we have reviewed the information in the *Handbook* regarding the occupational category "Accountants and Auditors," including the section entitled "How to Become an Accountant or Auditor," which describes the following preparation for the occupation, in pertinent part:

⁴ All of the references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational category are hereby incorporated into the record of proceeding.

⁵ The *Handbook* reports that most bookkeeping, accounting, and auditing clerks need a high school diploma. In other words, a bachelor's degree in a specific specialty is not required for bookkeeping, accounting and auditing clerk positions. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Bookkeeping, Accounting and Auditing Clerks," <http://www.bls.gov/ooh/office-and-administrative-support/bookkeeping-accounting-and-auditing-clerks.htm#tab-4> (last visited Sep. 16, 2015).

⁶ The record includes inconsistent information on the number of the Petitioner's employees in 2014. For example, when the petition was filed in September 2014, the Petitioner stated that it employed nine individuals. However, on the Petitioner's Form 941, Employer's Quarterly Federal Tax Return, for the quarter the petition was filed, the Petitioner listed only two employees who had received wages, tips, or other compensation. Again, it is incumbent upon the Petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the Petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Most accountants and auditors need at least a bachelor's degree in accounting or a related field. Certification within a specific field of accounting improves job prospects. For example, many accountants become Certified Public Accountants (CPAs).

Education

Most accountant and auditor positions require at least a bachelor's degree in accounting or a related field. Some employers prefer to hire applicants who have a master's degree, either in accounting or in business administration with a concentration in accounting.

A few universities and colleges offer specialized programs, such as a bachelor's degree in internal auditing. In some cases, those with associate's degrees, as well as bookkeepers and accounting clerks who meet the education and experience requirements set by their employers, get junior accounting positions and advance to accountant positions by showing their accounting skills on the job.

Many colleges help students gain practical experience through summer or part-time internships with public accounting or business firms.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Accountants and Auditors," <http://www.bls.gov/ooh/business-and-financial/accountants-and-auditors.htm#tab-4> (last visited Sep. 16, 2015).

The *Handbook* indicates only that "[m]ost accountant and auditor positions require at least a bachelor's degree in accounting or a related field." The *Handbook* does not state that such a degree is a normal minimum entry requirement for all accountant and auditor positions. In addition, as set out above, the *Handbook* indicates that some without a bachelor's degree or even a postsecondary degree may "advance to accountant positions by demonstrating their accounting skills on the job."

When reviewing the *Handbook*, it also must be noted that the Petitioner designated the proffered position as a Level I (entry level) position on the LCA. The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

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

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worker in training, or an internship are indicators that a Level I wage should be considered.

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

Thus, in designating the proffered position at a Level I wage, the Petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the Beneficiary is only required to have a basic understanding of the occupation and carries expectations that the Beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. As noted above, according to DOL guidance, a statement that the job offer is for a research fellow, worker in training or an internship is indicative that a Level I wage should be considered.

When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the Petitioner to provide persuasive evidence that the proffered position more likely than not satisfies this or one of the other three criteria, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the Petitioner's responsibility to provide probative evidence (e.g., documentation from other objective, authoritative sources) that supports a finding that the particular position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider and weigh all of the evidence presented to determine whether the particular position qualifies as a specialty occupation.

The *Handbook* does not support the claim that the occupational category of accountants is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent. Even if it did, the record lacks sufficient evidence to support a finding that the particular position proffered here, an entry-level accountant position (as indicated on the LCA), would normally have such a minimum, specialty degree requirement or its equivalent. The Petitioner has not submitted other authoritative evidence to establish that the proffered position, as described, more likely than not satisfies this criterion. The duties and requirements of the position as described in the record of proceeding do not indicate that this particular position proffered by the Petitioner is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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

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

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

In the instant case, the Petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other reliable and authoritative source, indicates that there is a standard, minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations in the Petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

As set out above, we do not find, based upon a complete review of the record of proceeding, that the Petitioner has established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is (1) common to the Petitioner's industry (2) in parallel positions (3) among organizations similar to the Petitioner. Thus, for the reasons discussed above, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The particular position is so complex or unique that it can be performed only by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the Petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In support of its assertion that the proffered position qualifies as a specialty occupation, the Petitioner submitted various documents, including evidence regarding its business operations. For example, the Petitioner submitted its 2013 federal tax return, website articles on beauty salons and

on small businesses need for accountants and/or CPAs, and a brief description of its company. The Petitioner initially noted its desire to expand its business operations and on appeal indicates that it is looking to advance its business into the purchase and sale of commercial property, gas stations, and convenience stores. However, upon review of the record of proceeding, the evidence of record does not include the Petitioner's business plans, or other documentation to demonstrate that it is expanding its operations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Other than offering a comparison of the proffered position's duties to the duties listed in the *Handbook* for an accountant, the Petitioner does not discuss which particular aspects of its company products or its business elevate the proffered position to one that is complex and unique.⁷ The record here does not include evidence of the specific financial requirements associated with the Petitioner's management of five, two-employee locations, including whether its business operations has unique financial requirements that would add complexity to the Beneficiary's duties.⁸ Neither does the Petitioner claim that it is currently required to deal with specific complex agreements and functions that might complicate its financial situation. We here reiterate that the actual responsibilities of the proffered position must be considered and those responsibilities must be related to the nature of the Petitioner's ongoing business. Furthermore, the Petitioner must establish the actual responsibilities exist when the petition is filed. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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'l Comm'r 1978).

Although the Petitioner repeatedly asserts that the job duties it describes for the proffered position establish the position as a specialty occupation, the record does not credibly demonstrate that the duties the Beneficiary will be responsible for or 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 in a specific specialty, or its equivalent. The evidence does not demonstrate how the duties that collectively constitute the proffered position require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty,

⁷ We note here that the *Handbook* offers generalized descriptions of occupations and sets out a range of duties that may be performed within an occupation. Repeating or paraphrasing the duties in the *Handbook* cannot be relied upon by a Petitioner when discussing the duties attached to specific employment. When establishing a position as a specialty occupation, a Petitioner must describe the specific duties and responsibilities to be performed by a Beneficiary in relation to its particular business interests. Otherwise, the record lacks the substantive information allowing for an accurate analysis of the actual position.

⁸ The Petitioner states that it operates six salon locations; however, the record includes lease agreements for only five locations and the Petitioner's organizational chart only identifies five locations. Again, it is incumbent upon the Petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the Petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

or its equivalent, is required to perform them. For instance, the Petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While a few related courses may be beneficial, or even required, in performing certain duties of the proffered position, the Petitioner has not demonstrated how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here.

The Petitioner also references the Beneficiary's education and experience and also claims that the Beneficiary's job duties and requirements, performed for his previous employer in H-1B classification, are the same as those to be performed here.⁹ It is not clear if the Petitioner is relying on the Beneficiary's education and experience as support for the proffered position as a specialty occupation. However, if that is the case, we find that 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. Again, the Petitioner does not explain or clarify which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment.

Further, as was also noted above, the LCA submitted in support of the visa petition is approved for a wage Level I employee, an indication that the proffered position is an entry-level position for an employee who has only a basic understanding of the occupation.¹⁰ This does not support the proposition that the proffered position is so complex or unique relative to other positions in the same occupation that it can only be performed by a person with a specific bachelor's degree.¹¹

Upon review of the totality of the record, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its

⁹ If the Petitioner is relying on the prior approval of the Beneficiary to work for another employer in H-1B classification, we reiterate that this record of proceeding does not include sufficient probative evidence to establish that the position proffered by this Petitioner 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 or its equivalent as the minimum for entry into the occupation, as required by the Act.

¹⁰ 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.

¹¹ The issue here is that the Petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

equivalent. As the evidence of record does not so demonstrate it cannot be concluded that the Petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The employer normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the position

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, USCIS reviews the Petitioner's past recruiting and hiring practices, information regarding employees who previously held the position, as well as any other documentation submitted by a Petitioner in support of this criterion of the regulations. Here, the Petitioner indicates that the proffered position is its first internal accounting position.

We note, however, that to merit approval of the petition under this criterion, the record must establish that a Petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. A Petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. Again, USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. According to the Court in *Defensor*, "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388. If USCIS were constrained to recognize a specialty occupation merely because the Petitioner has an established practice of demanding certain educational requirements for the proffered position – and without consideration of how a Beneficiary is to be specifically employed – then any alien with a bachelor's degree in specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.*

Upon review, the record does not include evidence to establish that the Petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position.¹² As the record of proceeding does not demonstrate that the Petitioner normally requires at least a

¹² Again, the critical element is not the title of the position, or even the fact that an employer has routinely insisted on certain educational standards. As noted above, the Petitioner must still establish that the performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.

bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent

Finally, the Petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

Again, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than a junior accounting position, a position that is not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. We have reviewed the Petitioner's 2013 IRS Form 1120S and the documents submitted to demonstrate the nature and scope of the Petitioner's business. However, the record does not include probative evidence establishing that the Petitioner's business and its financial transactions and functions require the performance of specialized and complex duties. Again, the Petitioner's description of the Beneficiary's proposed duties is broad and does not convey an understanding of what the Beneficiary is expected to actually do for the Petitioner on a daily basis.

The Petitioner here relies on *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989), asserting that the Director erroneously focused on the size of the Petitioner in reviewing the petition and reaching her decision. While we concur that USCIS should not limit its review to the size of a Petitioner and must consider the actual responsibilities of the proffered position, we also note that 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. In this matter, the job description provided both initially and in response to the service center's RFE identifies general accounting functions and financial management advisory duties. The record does not include evidence of how or why these duties are so complex or specialized as they relate to the Petitioner's operations that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. The Petitioner also submits no evidence, such as a business plan which outlines a proposed expansion of the Petitioner's enterprise, or any additional documentation demonstrating that the duties of the proffered position require duties beyond basic duties performed by a junior accountant or a bookkeeping or accounting clerk.

Absent any independent documentary evidence to support a finding that the duties to be performed by the Beneficiary in relation to the Petitioner's claimed operations are sufficiently complex to require the services of a degreed accountant, or that a degree requirement is common to the industry, the Petitioner's reliance on *Young China Daily* is not persuasive. Regardless, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration, when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

We again note that the Petitioner has designated the proffered position as a Level I position on the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation.¹³ Such a classification is inconsistent with the Petitioner's claim that the duties are specialized and complex. The record does not include sufficient consistent and probative evidence to establish that the position proffered here encompasses the performance of specialized and complex duties the nature of which requires knowledge usually associated with at least a bachelor's degree in a specific specialty. For the reasons discussed above, the evidence of record does not satisfy the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

III. CONCLUSION

The evidence of record does not satisfy 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 for classification as a specialty occupation. Accordingly, the appeal will be dismissed and the petition denied.

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.

Cite as *Matter of I-E-, INC*, ID# 13859 (AAO Sept. 21, 2015)

¹³ 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.