



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

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

MATTER OF M-F- LLC

DATE: JULY 21, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a grocery store and wholesale distributor, seeks to temporarily employ the Beneficiary as a “sales supervisor” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, California Service Center, denied the petition. The Director concluded that the position offered to the Beneficiary did not qualify as a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in finding that the position of “sales supervisor” is not a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A).

Upon *de novo* review, we will dismiss the appeal.

I. 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) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

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- (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.

8 C.F.R. § 214.2(h)(4)(iii)(A). U.S. Citizenship and Immigration Services (USCIS) has consistently interpreted 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 proposed 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”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

II. PROFFERED POSITION

In the initial letter of support, the Petitioner indicated that the Beneficiary will “serve as an entry level “sales supervisor” and perform the following job duties:

- Talking with the sales departments between China and USA with Chinese and English. Listen to and resolve customer complaints regarding services, products, or personnel.
- Contract administration including thorough reviews with accounting and project executives as well as continuous recognitions of both pitfalls and opportunities in working toward the company’s best interest.
- Confer with company officials to develop methods and procedures to increase sales, expand markets, and promote business. Analyze details of sales territories to access their growth potential and to set quotas.
- Responsible for updating weekly estimate final costs as well as managing monthly cash flow and cost reporting using [redacted] or similar software.
- Responsible for creating schedules of value, monthly billings and monthly billing reports to accounting.
- Provide staff with assistance in performing difficult or complicated duties. Together with the project superintendent, determine the quantity and types of human resources needed to maintain project schedule and budget. It includes Hiring, training, and evaluating personnel.

- Prioritizes own and team's work. [She] anticipates consequences of actions, potential problems or opportunities for change.
- Attend company meetings to exchange product information and coordinate work activities with other departments. Prepare sales and inventory reports for management and budget departments.

In response to the Director's request for evidence (RFE), the Petitioner provided the following additional duties for the proffered position, along with the percentage of time allocated to each of the tasks:

- Responsible for project planning, marketing, and sales management (5%)
- Direct and supervise employees engaged in sales, inventory – taking, reconciling cash receipts, or performing specific services (30%)
- Monitoring sales staff performance; hiring, training, and evaluating personnel (20%)
- Contracting administration including through reviews with accounting and project executives as well as continuous recognitions of both pitfalls and opportunities in working toward the company's best interest (5%)
- Providing staff with assistance in performing difficult or complicated duties (20%)
- Together with the project superintendent, determine the quantity and types of human resources needed to maintain project schedule and budget (5%)
- Listen to and resolve customer complaints; Excellent conversation with Chinese and English, accounting skills, and computer skills (10%)
- Confer with company officials to develop methods and procedures to increase sales, expand markets, and promote business; Analyzes details of sales territories to access their growth potential and to set quotas (5%)

In the RFE response, the Petitioner noted that the "minimum education needed for such a position is a Bachelor's degree due to the complexity of the job duties and the nature of the business."

III. ANALYSIS

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position satisfies any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, qualifies as a specialty occupation. Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.¹

¹ The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position. While we may not discuss every document submitted, we have reviewed and considered each one.

A. First Criterion

We turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.² To inform this inquiry, we recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³

On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "First-Line Supervisors of Non-retail Sales Workers" corresponding to the Standard Occupational Classification (SOC) code 41-1012 at a Level I wage.⁴

The *Handbook's* entry entitled "First-Line Supervisors of Non-Retail Sales Workers" falls into the group of occupations for which a high school diploma or equivalent is the typical entry-level education.⁵ Accordingly, the *Handbook* does not report that a bachelor's degree in a specific specialty is a requirement for entry into this occupational category.

² Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

³ All of our references are to the 2016-2017 edition of the *Handbook*, available at <http://www.bls.gov/ooh/>. We do not, however, maintain that the *Handbook* is the exclusive source of relevant information. That is, the occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. To satisfy the first criterion, however, the burden of proof remains on the Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

⁴ We will consider the Petitioner's classification of the proffered position at a Level I wage (the lowest of four assignable wage levels) in our analysis of the position. The "Prevailing Wage Determination Policy Guidance" issued by the DOL provides a description of the wage levels. A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that she will be closely supervised and her work closely monitored and reviewed for accuracy; and (3) that she will receive specific instructions on required tasks and expected results. U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf. A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner's job opportunity. *Id.* A Level I wage should be considered for research fellows, workers in training, or internships. *Id.*

⁵ We reviewed the information in the *Handbook* regarding the selected occupational category and note that this occupation is one for which the *Handbook* does not provide detailed data. For additional information, see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., "Data for Occupations Not Covered in Detail," <http://www.bls.gov/ooh/about/data-for-occupations-not-covered-in-detail.htm> (last visited July 13, 2016).

In the RFE and appeal, the Petitioner references the occupational category "Sales Managers" (a distinct and separate category from "First-Line Supervisors of Non-Retail Sales Workers."). Importantly, if the Petitioner believed that its proffered position was a combination of occupations, then it should have selected the relevant occupational category for the highest paying occupation, which in this instance would have been "Sales Managers." U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009),

Moreover, the Petitioner designated the proffered position under this occupational category at a Level I on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the Beneficiary is only expected to possess a basic understanding of the occupation and will perform routine tasks that require limited, if any, exercise of judgment. In accordance with the relevant DOL explanatory information on wage levels, the Beneficiary will be closely supervised and her work closely monitored and reviewed for accuracy. Furthermore, she will receive specific instructions on required tasks and expected results. DOL guidance indicates that a Level I designation is appropriate for a research fellow, a worker in training, or an internship.

Finally, we note that the Petitioner cites to several United States District Court cases for the proposition that there is no apparent requirement that the specialized study be in a single academic discipline. For example, the Petitioner cites to *Residential Finance Corp. v. USCIS*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), and asserts that “[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge.”

We agree with the aforementioned proposition that “[t]he knowledge and not the title of the degree is what is important.” In general, provided the specialties are closely related, e.g., chemistry and biochemistry, 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 philosophy and engineering, 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. Section 214(i)(1)(B) of the Act (emphasis added). For the aforementioned reasons, however, the Petitioner has not met its burden to establish that the particular position offered in this matter requires a bachelor’s or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those tasks.

In any event, the Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Finance*.⁶ We also note that, in contrast to the broad

available at http://flicdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.

⁶ It is noted that the district judge’s decision in that case appears to have been based largely on the many factual errors made by the Director in the decision denying the petition. We further note that the Director’s decision was not appealed to us. Based on the district court’s findings and description of the record, if that matter had first been appealed through the available administrative process, we may very well have remanded the matter to the service center for a new decision

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 even within the same district. See *Matter of K-S-*, 20 I&N Dec. 715, 719-20 (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.*

Here the Petitioner has not provided documentation from an authoritative source that supports its assertion that this particular position qualifies as a specialty occupation. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

B. Second Criterion

The second criterion presents two, alternative prongs: "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[.]" 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (emphasis added). The first prong contemplates the common industry practice, while the alternative prong narrows its focus to the Petitioner's specific position.

1. First Prong

To satisfy this first prong of the second criterion, the Petitioner must establish that the "degree requirement" (i.e., a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent) is common to the industry in parallel positions among similar organizations.

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

As previously discussed, the Petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the Petitioner did not submit any letters or affidavits from similar firms or individuals in the Petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals." Thus, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

for many of the same reasons articulated by the district court if these errors could not have been remedied by us in our *de novo* review of the matter.

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In support of the assertion that the degree requirement is common to the Petitioner's industry in parallel positions among similar organizations, the Petitioner submitted copies of job advertisements. We observe that the Petitioner submitted multiple copies of the same advertisements. Upon review of the documents, we find that the Petitioner's reliance on the job announcements is misplaced.⁷

First, we note that some of the job postings do not appear to involve organizations similar to the Petitioner. For example, one posting is for [REDACTED] an organization that sells watches. The second posting is for [REDACTED] a heating, ventilation, and air conditioning (HVAC) distributor. The third posting is from a staffing company, [REDACTED] for which little or no information regarding the hiring employer is provided. Consequently, there is insufficient information regarding this employer's business operations to conduct a legitimate comparison to the Petitioner's operations.

It is not sufficient for the Petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion. "[G]oing on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings." *In re Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Second, not all of the postings require at least a bachelor's degree in a specific specialty, or its equivalent. For example, one posting is from [REDACTED]. The employer is recruiting an individual who has five plus years of experience in sales. It does not require a bachelor's degree in a specific specialty, or its equivalent. Several job postings indicate a requirement for a bachelor's degree but do not require that such a degree be in a specific specialty.⁸ Another posting is for an international food sales manager for [REDACTED] and states a preference for a bachelor's degree and prior experience. A preference for a bachelor's degree is not an indication of a requirement.

Finally, we observe that some of the advertisements do not appear to involve parallel positions. For example, one posting is for a meat plant sales manager for [REDACTED] and requires a degree and a minimum of ten years of experience in a sales role and five years of experience in the foodservice industry. Another posting is for a director of sales, national accounts for [REDACTED] and requires a bachelor's degree and five years of direct selling experience to particular vendors and ten years of food experience sales. The Petitioner designated its proffered position as a wage level I (entry level) position on the LCA. The advertised positions therefore appear to involve more senior positions than the proffered position. More importantly, the Petitioner has not

⁷ As previously mentioned, the occupational category "Sales Managers" is a distinct and separate category from "First-Line Supervisors of Non-Retail Sales Workers." Here, job announcements include postings for various types of sales managers. Nevertheless, we reviewed all of the posting provided by the Petitioner.

⁸ The postings include the following: (1) [REDACTED] area sales manager; (2) [REDACTED] sales director foodservice; (3) [REDACTED] plant manager; (4) [REDACTED] area sales director; (5) [REDACTED] area sales manager; (6) [REDACTED] sales supervisor; (7) [REDACTED] sales representative; and (8) [REDACTED] regional sales manager dairy food services.

sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to those of the proffered position.

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).

2. Second Prong

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.

We reviewed the Petitioner's job duties and the documentation regarding its business operations, including the Petitioner's financial records and accompanying organizational chart. In the initial petition, the Petitioner described job duties related to supervising employees in retail sales while managing customer concerns in English and Chinese. The Petitioner stated the position is an "entry-level Sales Supervisor." In the RFE response, the Petitioner expanded the job duties to include project planning and marketing and described the position as a "high-level" executive sales supervisor. The Petitioner asserts that the minimum education needed for the position is a bachelor's degree due to the complexity of the tasks and the nature of its business operations.

While the Petitioner claims that the proffered position meets this criterion of the regulations, it does not sufficiently demonstrate how the sales supervisor position as described requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent. For instance, the Petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex or unique. While a few related courses may be beneficial in performing certain duties of the position, the Petitioner has not demonstrated how an established curriculum of such courses is required.

Further, the evidence of record does not establish that this position is significantly different from other positions within the occupation such that it refutes the *Handbook's* information to the effect that a high school diploma is sufficient for entry into the occupation. Without more, the record lacks sufficiently detailed information to distinguish the level of judgment and understanding necessary to perform the duties as complex or unique. Rather, it appears that the knowledge to perform the tasks can be obtained by an individual without at least a bachelor's degree in a specific specialty, or its equivalent.

The Petitioner claims that the Beneficiary is well qualified for the position, and references her qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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C. Third Criterion

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 merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. While a petitioner may assert that a proffered position requires a specific degree, that statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing the Petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the Petitioner created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. Evidence provided in support of this criterion may include, but is not limited to, documentation regarding the Petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

We reviewed the Petitioner's statements regarding the proffered position. The Petitioner, however, does not assert that it has previously employed specialty-degreed individuals in the proffered position. The Petitioner submitted job announcements for the proffered position that were published in the [REDACTED] in support of its assertion that it requires a degree in a specific specialty, or its equivalent, for the position. However, these job postings were published after the submission of the LCA and the instant petition, and do not demonstrate a hiring history for the proffered position.

Moreover, the job advertisements have varying educational requirements. For example, two of the job postings indicate that a bachelor's degree is needed for the position, but they do not state that the degree must be in a particular discipline. The third posting states a preference for an individual with a bachelor degree in business, sales, or project management. A preference for a degree is not an indication of a requirement. Therefore, even if these posting had been representative of the Petitioner's past hiring practices, the postings do not state that the Petitioner requires a degree in a specific specialty for the position. Thus, without more, the documentation does not establish that the Petitioner satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

D. Fourth Criterion

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

We reviewed the Petitioner's statements regarding the proffered position. However, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. Specifically, we incorporate our earlier discussion and analysis regarding the designation of the proffered position in the LCA as a Level I position (the lowest of four assignable wage-levels) relative to others within the occupational category. Without more, the position is one not likely distinguishable by relatively specialized and complex duties. That is, without further evidence, the Petitioner has not demonstrated that its proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level.

Although the Petitioner asserts that the nature of the specific duties is specialized and complex, the record lacks sufficient evidence to support this claim. Thus, the Petitioner has submitted inadequate probative evidence to satisfy the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

IV. REQUIRED WAGE

Since the identified basis for denial is dispositive of the Petitioner's appeal, we need not address another ground of ineligibility we observe in the record of proceeding. Nevertheless, we will briefly note and summarize it here with the hope and intention that, if the Petitioner seeks again to employ the Beneficiary or another individual as an H-1B employee in the proffered position, it will submit sufficient independent objective evidence to address and overcome this additional ground in any future filing.

More specifically, wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.⁹

Here, the Petitioner initially stated that the Beneficiary would serve in an entry-level sales supervisor position, but later claimed that she would serve as a high-level executive. The Petitioner further explained that it will rely heavily on the Beneficiary's work product and expertise to make critical decisions regarding the company's business and operations. According to the Petitioner, the position involves complex and specialized duties. Moreover, the Petitioner stated that the position requires Mandarin and Cantonese language skills.

⁹ For additional information on wage levels, 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.

It does not appear that such aspects of the work were reflected in the wage-level selected by the Petitioner for the proffered position.¹⁰ Therefore, we must question the stated requirements, as well as the level of complexity, independent judgment and understanding that are needed to perform the duties as the LCA is certified for a Level I entry-level position.

Under the H-1B program, the Petitioner must pay the Beneficiary at least the same wage rate as that paid to other employees with similar experience and qualifications or the local prevailing wage for the occupation in the area of employment, whichever is higher.¹¹ Consequently, the Petitioner has not established that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted.¹²

V. CONCLUSION

For the reasons discussed, the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The burden is on the Petitioner to show 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.

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¹⁰ For example, according to DOL guidance, a language requirement other than English in a petitioner's job offer generally is considered a special skill, requiring a higher wage-level. *Id.*

¹¹ Moreover, the Petitioner has provided inconsistent information regarding the offered wage. The Petitioner indicated in the Form I-129, Petition for a Nonimmigrant Worker, that it would pay the Beneficiary \$49,920 per year. However in the RFE response, the Petitioner indicated that it would provide a wage of \$46,080 per year.

¹² The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary.