U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-T-A-, INC.

DATE: SEPT. 30, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an international trade consulting firm, seeks to temporarily employ the Beneficiary as a "project manager" under the H-1B nonimmigrant classification for specialty occupations. *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 Petitioner had not demonstrated that the proffered position qualifies as a specialty occupation position.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the evidence of record satisfies all evidentiary requirements.

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

I. LEGAL FRAMEWORK

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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:

(*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 POSITON

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a "project manager." In a letter submitted with the H-1B petition, the Petitioner provided the following duty description:

- Interact with General Manager to identify tasks and set priorities.
- Develop and execute policies and goals for the various departments with General Manager.
- Manage relationships with clients, factories, client customers and strategic business partners.
- Develop management systems to ensure efficient access to data on factories, product quotations, quality control standards, mold amortizations, tooling control, client intellectual property, validity of UL certifications, etc.
- Periodic audit of factory contracts, client agreements to ensure compliance and "win-win" economic outcomes.
- Supervise outbound sales communications to customers.
- Interface with factories regarding order confirmation/quality control and deliveries.
- Interface with accounting to prepare budgets and financial compliance, review financial statements and reports.
- Directly facilitate product manufacturing.
- Market research, prepare and execute sales promotions coordinating with General Manager.

- Research, locate and determine material sourcing for production of goods.

The Petitioner stated that the proffered position requires a minimum of a four-year college degree in business administration with a concentration in international business, logistics, trade, or project management.

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 qualifies as a specialty occupation.[1] Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.[2]

On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "General and Operations Managers" corresponding to the Standard Occupational Classification code (SOC) 11-1021.[3] However, the Petitioner later attempted to amend the job title and occupational category. In response to a request for evidence (RFE) and on appeal, the Petitioner changed the job title of the proffered position to Project Manager – Supply Chain Logistic. The Petitioner then claimed that the duties of the position are "very similar" to those of "Supply Chain Manager"/"Logisticians," and provided a revised duty description that includes logistician duties. The Petitioner also provided an evaluation from a professor at the asserting that for such positions, and for the position proffered in the instant case in particular, a minimum of a bachelor's degree in business administration with a concentration in supply chain management or logistics is a normal minimum requirement.

We observe that, if the proffered position is a Project Manager – Supply Chain Logistics position, then O*NET would classify it as either a "Supply Chain Manager" position, discussed at SOC

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

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

[3] The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). We will consider this selection 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://flcdatacenter.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.*

11-9199.04, or as a "Logisticians" position, discussed at SOC 13-1081.[4] Those positions are fundamentally different from "General and Operations Manager" positions, discussed at SOC 11-1021. Here, the Petitioner classified the proffered position as a position at SOC 11-1021, "General and Operations Managers," in the LCA, then but later indicated that the "Logisticians" occupational category would have been more appropriate. If the proffered position was classified incorrectly as a "General and Operations Manager" position, then the H-1B petition could be denied as unsupported by an LCA that corresponds to it.[5]

In any event, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. A visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). We will therefore analyze the H-1B petition as one filed for a position located within the "General and Operations Managers" occupational category, as the Petitioner claimed in the LCA, and the evidence submitted which discusses the proffered position by a new name, as having new duties, or as being located within another other occupational category will not be addressed further.[6]

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[4] Notably, the prevailing wage for "Supply Chain Managers" SOC 11-9199.04 for Level I position is higher at $57,762 per year, which is higher than the proffered salary at $51,002 per year. http://www.flcdatacenter.com/OesQuickResults.aspx?code=11-9199&area= &year=15&source=1 (last visited Sept. 29, 2016).

[5] The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

> Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

While the U.S. Department of Labor (DOL) is the agency that certifies LCAs before they are submitted to USCIS, DOL regulations note that it is within the discretion of the U.S. Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

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

(Emphasis added.)

[6] This decision is made without prejudice toward the Petitioner's ability to file a new petition with an LCA certified for a position located within the occupational category the Petitioner believes to be correct.

A. First Criterion

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), 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. 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.[7] The *Handbook* discusses general and operations manager positions in the chapter entitled Top Executives. As to the educational requirements of those positions, it states:

> Many top executives have a bachelor's or master's degree in business administration or in an area related to their field of work. Top executives in the public sector often have a degree in business administration, public administration, law, or the liberal arts. Top executives of large corporations often have a master's degree in business administration (MBA).
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> . . . .
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> Many top executives advance within their own firm, moving up from lower level managerial or supervisory positions. However, other companies may prefer to hire qualified candidates from outside their organization. Top executives who are promoted from lower level positions may be able to substitute experience for education to move up in the company. For example, in industries such as retail trade or transportation, workers without a college degree may work their way up to higher levels within the company to become executives or general managers.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook,* 2016-17 ed., "Top Executives," http://www.bls.gov/ooh/management/top-executives.htm#tab-4 (last visited Sept. 29, 2016).

The *Handbook* does not indicate that a bachelor's degree or the equivalent, in a specific specialty, is normally required for entry into positions located within this occupational category. Instead, the *Handbook* finds that these positions generally impose no specific degree requirement on individuals seeking employment. The statement that "many" top executives, which category includes general and operations managers, have college degrees does not indicate that a bachelor's degree is normally

[7] All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site 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.

the minimum requirement for entry into this occupational category. To the contrary, such a statement does not even necessarily indicate that a majority of top executives possess such a degree.

The *Handbook* indicates that positions located within this occupational category, such as the one proffered here, may be filled by individuals with a broad range of degrees. Its subsequent discussion of the training and education necessary for such employment clearly states that companies also hire executives based on lower-level experience within their own organizations or management experience with another business. Moreover, the *Handbook* does not state that those positions that do require a bachelor's degree or the equivalent require that the degree be in a specific specialty.

Further, 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 she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she 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, a worker in training, or an internship is indicative that a Level I wage should be considered.

Further, we find that, to the extent that they are described in the record of proceedings, the numerous duties that the Petitioner ascribes to the proffered position indicate a need for a range of knowledge, but do not establish any particular level of formal, postsecondary education leading to a bachelor's or higher degree in a specific specialty as minimally necessary to attain such knowledge.

Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).[8]

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

[8] Even if we considered the proffered position located within the "Logisticians" occupational category, as the Petitioner now claims, a review of the *Handbook* does not indicate that, simply by virtue of its occupational classification, such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty, or its equivalent, for entry into the occupation. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., "Logisticians," http://www.bls.gov/ooh/business-and-financial/logisticians.htm (last visited Sep. 29, 2016). As such, absent evidence that the position of logistician satisfies one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

casts its gaze upon 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)).

Here and as already discussed, the Petitioner has not established that its proffered position is one for which the *Handbook* (or other independent, authoritative source) reports an industry-wide 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.

The Petitioner did provide two letters from other companies that appear to generally conduct business in the Petitioner's industry. While the president of [redacted] states that a bachelor's degree is the normal entry requirement for a Project Manager – Supply Chain Logistics, he does not state that such a position would require a degree in any specific specialty. The president of that company further states, "Our Company employs 60 people in positions similar to that of Project Manager – Supply Chain Logistics. All our employees have at least a bachelor degree with emphasis in the industry that they are serving." Again, we note that the proffered position is not designated a supply chain logistics position on the accompanying LCA. For this additional reason, that letter is not persuasive evidence for the proposition that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent.

The other letter is from the president and CEO of [redacted] As to the proffered position, he stated, "[B]ecause this position is designed to service the nursery industry, a degree in forestry and/or horticultural science would be an entry level requirement." As those degrees are not required to perform the duties of the proffered position, the position described in this letter does not appear "parallel" to the one proffered here.

The Petitioner did not submit any other relevant evidence for our consideration under this criterion. Thus, 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.

A review of the record of proceedings finds that the Petitioner has not credibly demonstrated 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. Even when considering the Petitioner's general descriptions of the proffered position's duties, the evidence of record does not establish why a few related courses or industry experience alone is insufficient preparation for the proffered position. While related courses may be beneficial, or even required, in performing certain duties of the 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 proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

This is further evidenced by the LCA submitted by the Petitioner in support of the instant petition. As noted above, the Petitioner attested on the submitted LCA that the wage level for the proffered position is a Level I (entry-level) wage. Such a wage level is for a position which only requires a basic understanding of the occupation; the performance of routine tasks that require limited, if any, exercise of judgment; close supervision and work closely monitored and reviewed for accuracy; and the receipt of specific instructions on required tasks and expected results, is contrary to a position that requires the performance of complex duties.[9] It is, instead, a position for an employee who has only basic understanding of the occupation. In order to attempt to show that parallel positions require a minimum of a bachelor's degree in a specific specialty or its equivalent, the Petitioner would be obliged to demonstrate that other entry-level positions in the occupational category that require only a basic understanding of the duties of such positions similarly require a

[9] 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.

minimum of a bachelor's degree in a specific specialty or its equivalent, the proposition of which is not supported by the *Handbook*.

Therefore, the evidence of record does not establish that this position is significantly different from other positions in the occupation such that it refutes the *Handbook*'s information to the effect that there is a spectrum of degrees acceptable for such positions, including degrees not in a specific specialty. In other words, 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 equivalent.

As the Petitioner did not demonstrate how the proffered position is so complex or unique relative to other positions within the same occupational category that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, 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*).

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.

In its response to the RFE, the Petitioner stated:

> As reflected on the attached organizational chart, **Exhibit F**, Petitioner employs six individuals and all of them have or (the newest employee) are near achieving a bachelor degree. Moreover, employees that are supervised by beneficiary hold bachelor's degrees. Project Assistant Manager, has a Bachelor of Business administration from the at **Exhibit G**.
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> It is well established that an individual who supervises professionals is a professional himself or herself.

The pertinent statute indicates that, to qualify for H-1B approval, a position must require a minimum of a bachelor's degree in a specific specialty or its equivalent. Section 214(i)(l) of the Act. Whether a position qualifies as "professional" is not directly relevant.

The Petitioner's organizational chart shows that, in addition to its president, the Petitioner employs a staff accountant; a "Project Manager, International Supply Chain Management" (the Beneficiary); an "Admin/Import Compliance Specialist; a sales manager; and a project assistant manager. As none of these positions has been shown to be the same as the proffered position, their educational requirements of those other positions are not directly relevant.

The Petitioner stated in the H-1B petition, that it was established in 2004. However, the record contains insufficient evidence pertinent to the educational requirements the Petitioner required in its recruitment for the position or pertinent to anyone who has held the proffered position prior to the Beneficiary. Therefore, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).[10]

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.

In the instant case, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. We again refer to our earlier comments and findings with regard to the implication of the Petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels) wage. That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. Upon review of the totality of the record, we find that the Petitioner has not established that the nature of the specific duties is so specialized and complex that the 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.[11] The Petitioner has not demonstrated in the record that its proffered position is one with duties sufficiently specialized and complex to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

IV. CONCLUSION

Because the Petitioner has not satisfied one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated that the proffered position qualifies as a specialty occupation.

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[10] While a petitioner may believe or otherwise assert that a proffered position requires a degree in a specific specialty, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a 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 employer artificially 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 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

[11] Again, 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.*

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.

Cite as *Matter of G-T-A-, Inc.*, ID# 123239 (AAO Sept. 30, 2016)