



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

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

MATTER OF S-W-U-

DATE: OCT. 27, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a private university, seeks nonimmigrant classification of the Beneficiary as a temporary worker in a specialty occupation, in order to temporarily employ her in a position with the job title "Exercise Specialist." *See* Immigration and Nationality Act (INA) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director denied the petition, concluding that the evidence of record did not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

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

For the reasons that will be discussed below, we agree with the Director that the Petitioner has not established eligibility for the benefit sought. Accordingly, the appeal will be dismissed.

I. LEGAL FRAMEWORK

The issue on appeal is whether the Petitioner provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the Petitioner must establish that it is offering employment to the beneficiary that meets the applicable statutory and regulatory requirements.¹

¹ We apply the "preponderance of evidence" standard of review as articulated in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). Accordingly, we have examined each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence. Also, we conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.

II. THE PROFFERED POSITION

According to the Petitioner's letter of support filed with the Form I-129, the proffered position would be performed in the Petitioner's proposed Wellness Center “aligning the university with new strategic goals for promoting programs that improve the quality of life of our faculty, staff, students, and community.”

In response to the RFE, the Petitioner submitted what it termed an expanded position-description. The document provides the following “Specific Duties” in chart form, along with estimated expenditures of work time:

1. Patient/Client Assessment
 - a. Assesses client's risk factors that are modifiable and offers support and strategies to aid patient in successful therapeutic lifestyle changes (TLC).
 - b. Determines and obtains the necessary physician referral and medical records to assess the potential participant.
 - c. Performs a preparticipation health screening including review of the participant's medical history and knowledge, their needs and goals, the program's potential benefits, and additional required testing and data.

- d. Evaluate the participant[']s risk to ensure safe participation and determine level of monitoring/supervision in a preventive exercise program.

2. Exercise Prescription

- a. Leads in the supervision of individual and group exercise sessions.
- b. Develops a clinically appropriate exercise program using all available information (e.g. clinical and psychological status, goals, and behavioral assessment).
- c. Reports pertinent information concerning clients to the Wellness Program Supervisor and other appropriate professional staff.
- d. Reviews the exercise program with the participant including home exercise, compliance, and participant's expectations and goals.
- e. Instructs the participant in the safe and effective use of exercise modalities, exercise plan, and reporting symptoms.

3. Program Implementation and Ongoing Support

- a. Implement the program (e.g. exercise treatment, education, counseling, goals).
- b. Strives towards proficiency in the core competencies related to an Exercise Specialist including, but not limited to: knowledge and skill in risk factor and health status identification; fitness appraisal; exercise prescription; and the ability to educate and/or counsel individuals regarding lifestyle modification.
- c. Continually assess participant feedback, clinical signs, and symptoms, exercise tolerance, and provide feedback to the participant[s] about their exercise progress and general program participation.
- d. Develop a basic marketing strategy for faculty, staff, students, and community members that alerts them to the Wellness opportunities available to them using a variety of electronic and print media including a dedicated wellness webpage.
- e. Reassess and update the program (e.g. exercise, education, client goals) based on the participant[']s progress and feedback.
- f. Maintain the participant's records to document progress and clinical status.
- g. Develop a system to report the number and type of wellness visits and report those monthly.

4. Leadership and Counseling

- a. Educate the participant about performance and progression of aerobic, strength, and flexibility exercise programs.
- b. Provide disease management and risk factor reduction education based on the participant's medical history, needs and goals.

- c. Communicates with clients in a respectful way that reflects the Christian faith, and communicates effectively with team members about individual client findings or concerns and about program improvement ideas.
- d. Creates a positive environment for participant adherence and outcomes by incorporating effective motivational skills, communication techniques, and behavioral strategies.
- e. Other duties as capable and assigned by the professional staff (Wellness Program Supervisor, Counseling and Health Services staff, Vice President for Student Life). This includes, but is not limited to, taking blood pressures, assessing heart rates, conducting exercise risk assessments, providing therapeutic massage.
- f. Collaborate and consult with healthcare professionals to address clinical issues and provide referrals to optimize participant outcomes.

5. Legal and Professional Considerations

- a. Evaluate the exercise environment to minimize risk and optimize safety by following routine inspection procedures based on established facility and industry standards and guidelines.
- b. Perform regular inspections of emergency equipment and practice emergency procedures (e.g., crash cart, advanced cardiac life support procedures; activation of emergency medical system).
- c. Assist, as directed, in emergency situations.
- d. Promote awareness and accountability and minimize risk by informing participants of safety procedures and self-monitoring of exercise and related symptoms.
- e. Comply with the Health Insurance Portability and Accountability Act (HIPAA) laws and industry accepted professional, ethical, and business standards in order to maintain strictest confidentiality concerning clients' and families' medical and personal information, optimize safety, and reduce liability.
- f. Promote a positive image of the program by engaging in healthy lifestyle practices.
- g. Attend all staff meetings. If unable to attend, obtains information from meeting minutes or another staff member.
- h. Must obtain CEUs to maintain certification and/or licensure.
- i. Select and participate in continuing education programs that enhance knowledge and skill on a continuing basis, maximize effectiveness, and increase professionalism in the field.

The Petitioner presents the proffered position as belonging to the Community Health Workers occupational group. Also, by virtue of the Labor Condition Application (LCA) that it submitted to support the petition, the Petitioner not only presented Community Health Workers as the occupational group within which the proffered position should be evaluated, but also attested that the

proffered position merited only a Level I prevailing-wage rate, which for the dates and location of community health workers specified in the LCA, was \$12.34 an hour.

III. ANALYSIS

A. Regarding the Director's Reliance on the *Occupational Outlook Handbook*

For the reasons discussed below, we are not persuaded by the contention on appeal that the decision to deny the petition should be overturned because the Director relied upon information presented in the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)*.

USCIS and its predecessor agency (Immigration and Naturalization Service (INS)) have long relied upon the *Handbook* as an authoritative source of information on the wide variety of occupations it addresses.²

The *Handbook* in its “OOH FAQs” section *accessible at* <http://www.bls.gov/ooh/about/ooh-faqs.htm> (last visited Oct. 22, 2015), states the following regarding the information it provides about occupations:

The *Occupational Outlook Handbook (OOH)* provides information on what workers do; the work environment; education, training, and other qualifications; pay; the job outlook; similar occupations; and sources of additional information, for 334 occupational profiles covering about 84 percent of the jobs in the economy.

The *OOH* is broken up into clusters of similar occupations. In order to find an occupation, browse the occupation groups of interest on the left-hand side of the homepage, or use the A-Z Index if you know the specific occupation. You may search for occupations by using the selector drop-down menus on the OOH homepage. Select by pay range, entry-level education, on-the-job training, projected number of new jobs, or projected growth rate. If you know the specific occupation you are interested in, you may enter a job title into the “Search Handbook” box at the top. In addition, you may browse by clicking any of the three links titled “highest paying,” “fastest growing (projected),” “and most new jobs (projected).”

The FAQs section also indicates that, as with the O*NET, the *Handbook* “includes occupations that are covered in the 2010 Standard Occupational Classification System (SOC), which is used by federal statistical agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data”; that “most of [the *Handbook's*] profiles do give

² The *Handbook*, which is available in printed form from third-party publishers, may also be accessed online at <http://www.bls.gov/ooh/home.htm/es/ooh/home.htm>. Our references are to the 2014-15 *Handbook* edition available online.

general guidance on the education and training needed to enter occupations”; that the “How to Become One” section in most of the *Handbook's* occupational profiles describes the general educational preparation typical of those who enter the occupation; that some of those “How to Become One” sections include information on helpful coursework; and that the *Handbook* is also a way to search for occupations by pay range, entry-level education, on-the-job training, projected number of new jobs, or projected growth rate.

As to the Petitioner’s assertion that the *Handbook* is “outmoded,” we note that the FAQs section's response to the *Handbook's* authorship states that the *Handbook* is revised every two years by a staff of economists in the Employment Projections program at the Bureau of Labor Statistics. The Bureau of Labor Statistics produces the *Handbook*.

In the following item from the “Frequently Asked Questions” segment of its Internet site, the Bureau of Labor Statistics identifies itself as follows:

Question: What is the Bureau of Labor Statistics (BLS)?

Answer: The Bureau of Labor Statistics (BLS) is the principal fact-finding agency for the Federal Government in the broad field of labor economics and statistics. The BLS is an independent national statistical agency that collects, processes, analyzes, and disseminates essential statistical data to the American public, the U.S. Congress, other Federal agencies, State and local governments, business, and labor. The BLS also serves as a statistical resource to the Department of Labor.

BLS data must satisfy a number of criteria, including relevance to current social and economic issues, timeliness in reflecting today's rapidly changing economic conditions, accuracy and consistently high statistical quality, and impartiality in both subject matter and presentation.

Bureau of Labor Statistics, U.S. Department of Labor, Frequently Asked Questions (FAQs), http://www.bls.gov/dolfaq/bls_ques26.htm (last visited Oct. 22, 2015).

While we refer to the *Handbook* when it provides information about the duties and educational requirements of occupations to which proffered positions belong, we will not exclude from our consideration information presented from other authoritative sources, such as, for instance, O*NET OnLine.

O*NET OnLine is sponsored by the Department of Labor's Employment & Training Division, and it addresses more SOC occupational classifications than does the *Handbook*. While we view O*NET Online as a reliable source, its information is not as finely tuned as the *Handbook's* with regard to educational requirements for entry into the occupations which it covers. Rather than addressing occupational groups individually - as does the *Handbook* - O*NET OnLine congregates

occupational groups together according to where they fall within the various measures, by which the O*NET OnLine assigns Job Zone classifications from One to Five.

To elucidate, we will now address the “Job Zone” section of the O*NET's Summary Report on Community Health Workers (identifiable by the SOC code 21-1094), which is the occupational category that the Petitioner has indicated that the proffered position corresponds to. That specific section of the O*NET Summary Report assigns Job Zone 4 to the occupation and contains the following information, which the O*NET applies uniformly to all occupations within that Job Zone:

Title	Job Zone Four: Considerable Preparation Needed
Education	Most of these occupations require a four-year bachelor's degree, but some do not.
Related Experience	A considerable amount of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified.
Job Training	Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.
Job Zone Examples	Many of these occupations involve coordinating, supervising, managing, or training others. Examples include accountants, sales managers, database administrators, teachers, chemists, art directors, and cost estimators.
SVP Range	(7.0 to < 8.0)

Employment & Training Administration, U.S. Dept. of Labor, O*Net OnLine, Summary Report for Community Health Workers, at <http://www.onetonline.org/link/summary/21-1094.00> (last visited Oct. 22, 2015).

As seen above, the “Education” section does not focus on the educational requirements of any particular occupational group within the Job Zone Four category. Also, this Job Zone only states that “most” – but not all – of its included occupations “require a four-year bachelor's degree.” In addition, the Job Zone designation does not specify any particular majors or academic concentrations as required by any of its occupations which would require a bachelor's degree. Thus, Job Zone Four designation does not specify which of the included occupational groups would require bachelor's degrees, nor for occupations where bachelor's degrees may be required, does it state that the degrees must be in a specific specialty directly related to the occupation.

This brings us to the import of the SVP designation. O*NET OnLine provides general information regarding the tasks and work activities associated with a particular occupation, as well as broad descriptions of education, training, and experience required to perform the duties of that occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a particular position would require. O*NET OnLine Help provides the following discussion:

Specific Vocational Preparation is a component of Worker Characteristics information found in the *Dictionary of Occupational Titles* (U.S. Department of Labor, 1991).

Specific Vocational Preparation, as defined in Appendix C of the *Dictionary of Occupational Titles*, is the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

1. Vocational education (high school, commercial or shop training, technical school, art school, and that part of college training which is organized around a specific vocational objective)
2. Apprenticeship training (for apprenticeable jobs only)
3. In-plant training (organized classroom study provided by an employer)
4. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker)
5. Essential experience in other jobs (serving in less responsible jobs, which lead to the higher-grade job, or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level Time

1. Short demonstration only
2. Anything beyond short demonstration up to and including 1 month

3. Over 1 month up to and including 3 months
4. Over 3 months up to and including 6 months
5. Over 6 months up to and including 1 year
6. Over 1 year up to and including 2 years
7. Over 2 years up to and including 4 years
8. Over 4 years up to and including 10 years
9. Over 10 years

Note: The levels of this scale are mutually exclusive and do not overlap.

U.S. Department of Labor. (1991). *Dictionary of Occupational Titles* (Rev. 4th ed.). Washington, DC: U.S. Government Printing Office.

See Employment & Training Administration, U.S. Dep't of Labor, O*NET OnLine, O*NET OnLine Help, at <http://www.onetonline.org/help/online/svp>.

Thus, the SVP assigned the proffered position's occupational group does not indicate that at least a four-year bachelor's degree is required for entry, or more importantly, that such a degree must be in a specific specialty closely related to the occupation to which this rating is assigned. Rather, by application of the guidelines quoted above, we see that the "7.0 to < 8.0" SVP designation only conveys that "[o]ver 2 years and up to and including four years" would be the amount of lapsed time required by a typical worker in the occupational group to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation (through vocational education, apprenticeship training, in-plant training, on-the-job training as a learner or trainee, or essential experience in other jobs and acquired in a school, work, military, institutional, or vocational environment).

For the reasons discussed above, and contrary to the Petitioner's interpretation, the O*NET OnLine information carries little weight towards establishing the proffered position one for which the baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry.

As evident in the following excerpt, the *Handbook's* treatment of community health workers focuses on specific particular occupations and upon the particular educational requirements that they require for entry. The *Handbook's* "Health Educators and Community Health Workers" chapter includes the following occupation-specific information (not included in the O*NET) about educational requirements for entry into the Community Health Workers occupation:

Community health workers typically have a high school diploma, although some jobs may require postsecondary education. Education programs may lead to a 1-year certificate or a 2-year associate's degree and cover topics such as wellness, ethics, and cultural awareness, among others. Community health workers typically have a shared language or life experience and an understanding of the community that they serve.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Community Health Workers, *accessible at* <http://www.bls.gov/ooh/community-and-social-service/health-educators.htm#tab-4> (last visited Oct. 22, 2015).

Thus, rather than conflicting with the O*NET, the *Handbook* fills an information gap left by the O*NET.

Additionally, the Petitioner does not provide any statements from the Department of Labor endorsing his characterization of the *Handbook* as “outmoded” and “potentially misleading.” Nor does the Petitioner address the Department of Labor's own endorsement of the *Handbook's* value. Also, the Petitioner's description of the *Handbook* as “outmoded” conflicts with the fact that the Department of Labor continues to publish the *Handbook* every two years. Nor does the record of proceeding quote any Department of Labor document characterizing the O*NET as replacing, superseding, or having superior value or weight than, the *Handbook*. 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)).

B. Import of the LCA

As we noted above, as the LCA supporting the petition, the Petitioner submitted one that had been certified for use with a petition for a position that (1) would be both within the Community Health Workers occupational group and (2) would merit assignment of no more than a Level I (entry-level) prevailing-wage rate, the lowest paying of the four assignable levels.³

³ DOL has stated clearly that its LCA certification process is cursory, that it does not involve substantive review, and that it makes the Petitioner responsible for the accuracy of the information entered in the LCA. With regard to LCA certification, the regulation at 20 C.F.R. § 655.715 states the following:

Certification means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Likewise, the regulation at 20 C.F.R. § 655.735(b) states, in pertinent part, that “[i]t is the employer's responsibility to ensure that ETA [(the DOL's Employment and Training Administration)] receives a complete and accurate LCA.”

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) also makes clear that certification of an LCA does not constitute a determination that a position qualifies for classification as a specialty occupation:

Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

The *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

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

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the Petitioner submitted an LCA certified for a Level I, entry-level position. By virtue of the particular LCA that it submits with a petition, a petitioner attests that both the wage-level and occupational group to which the wage-level pertains accurately reflect the position that is the subject of the petition. Accordingly, by virtue of the LCA submitted in this case, the Petitioner attested that the proffered position is actually a low-level, entry position relative to others within the specified occupation, Community Health Workers.

In accordance with the relevant DOL explanatory information on wage levels, the submission of an LCA certified for use with a Level I prevailing-wage position indicates that the Petitioner assessed the proffered position as one for which the beneficiary would only be required to possess a basic understanding of the occupation; that she would be expected to perform routine tasks requiring limited, if any, exercise of judgment; that she would be closely supervised and her work closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results.⁴

⁴ 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.

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C. Application of the Criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)

We will now discuss why application of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence of record would not support approval of this petition.

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

The issue presented by the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) is whether the evidence in the record of proceeding has established that the particular position that is the subject of the petition is one for which the minimum requirement for entry is normally a baccalaureate or higher degree in a specific specialty, or its equivalent.

We refer the Petitioner to, and here incorporate, our earlier discussion addressing the *Handbook* and O*NET OnLine information regarding the occupational group to which the Petitioner identified the proffered position, i.e., Community Health Workers. The *Handbook* indicates that community health workers do not constitute an occupational group for which entry normally requires at least a bachelor's degree in a specific specialty, or its equivalent. This is clearly conveyed by the *Handbook's* stating:

Community health workers typically have a high school diploma, although some jobs may require postsecondary education. Education programs may lead to a 1-year certificate or a 2-year associate's degree and cover topics such as wellness, ethics, and cultural awareness, among others. Community health workers typically have a shared language or life experience and an understanding of the community that they serve.

Id.

Also, as we have discussed, the O*NET OnLine information cited by the Petitioner does not conflict with the *Handbook's* information, and in fact, the *Handbook* provides details not available at O*NET OnLine.

The Petitioner's RFE-reply includes a letter from [REDACTED] Ed.D., MAACVPR, an associate professor of exercise science at the university that filed the petition. [REDACTED] signs his submission as the supervisor of the wellness program for which the Beneficiary would perform her services as an H-1B nonimmigrant if the petition were approved. According to [REDACTED] the Petitioner has patterned its wellness program upon the [REDACTED] initiative. The record of proceeding does not include documentary evidence of this initiative. However, [REDACTED] states that, as supervisor of the wellness program, he "built the job description on the knowledge, skills, and abilities (KSAs) put forth by the [REDACTED]" He adds:

These KSAs require that a leader in the Wellness Program would be classified as an Exercise Specialist. An Exercise Specialist must have the KSAs to risk-stratify the

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population served, obtain medical clearance, when indicated, develop individualized exercise and lifestyle recommendations, supervise exercise sessions, and provide a safe and effective exercise and lifestyle therapies. According to the [REDACTED], a person with this level of specialized training would require at least a bachelor's degree.

While [REDACTED] attests that he based the proffered position's job description on the KSAs of the [REDACTED] initiative, he does not supplement the letter with evidence to support the implied proposition that performance of a job modelled on the [REDACTED] initiative would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in exercise science or a closely related specialty, as would be required in this petition's context to meet the "specialty occupation" definitions at section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

We first observe that the record of proceeding does not include evidence from [REDACTED] describing the [REDACTED]' initiative, its KSAs, what particular [REDACTED] certification may pertain to that initiative, and the requirements for an individual to achieve such certification. Further, we cannot discern from the evidence of record that [REDACTED] certification involves consideration of the performance requirements of any particular position: rather from what little appears in the record about types of [REDACTED] certification, it appears that [REDACTED] certification is purely a function of what a person demonstrates about his or her education and experience, by documentation and [REDACTED] examination. In light of this record's absence of evidence to the contrary, it appears that [REDACTED] certification requirements neither address nor are dependent upon a candidate's job. By the same token, the evidence of record does not establish that [REDACTED] is an occupation-accrediting or job-certifying agency or that it is recognized as such by any governmental or educational authority.

In addition, we also find that the record of proceeding does not contain any documentary evidence supporting [REDACTED] statement that "[a]ccording to the [REDACTED] a person with this level of specialized training would require at least a bachelor's degree."

In short, the evidence of record does not establish that either [REDACTED] accreditation or the KSAs of the [REDACTED] initiative have significant probative value for our determination on the specialty occupation issue before us.

The RFE-response documents also include a letter from [REDACTED], writing as Coordinator Cardiac Rehabilitation, [REDACTED], at [REDACTED]. In part, the letter states that a bachelor's degree in exercise science (which, we note, the Beneficiary holds) is a prerequisite for the certifications offered by [REDACTED]. [REDACTED] also states that, in the month in which she wrote the letter, her wellness center employed an [REDACTED] work in industry," to coach obese employees at [REDACTED] hospital, and to go into a factory setting to do health assessments and exercise training. According to the letter, the new employee not only holds a bachelor's degree in exercise science, but also holds [REDACTED] certification – which the Beneficiary does not.

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While [REDACTED] letter indicates that her hospital hired the person with the exercise science degree and [REDACTED] certification, the letter also indicates that the hospital had also considered for hire persons without those qualifications (identified as “RNs, dieticians, and other exercise professionals”). Therefore, the letter is not evidence that the proffered position could only be performed by a person with at least a bachelor's degree in exercise science, or its equivalent. Further, the hiring action that [REDACTED] references is not equivalent to the one presented by the Petitioner: the Beneficiary does not hold the [REDACTED] certification which [REDACTED] identified as a factor in her hospital's hiring decision.

As the Petitioner presents no information from any authoritative source to refute or rebut the *Handbook's* information, the Petitioner does not present a factual basis for us to conclude that the proffered position's inclusion within the Community Health Workers occupational classification is sufficient to establish that it is, in the words of this criterion, a “particular position” for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.”

We also here incorporate our earlier discussion about the import of the Petitioner's submission of an LCA that had been certified for use with a job opportunity which only merited a Level I prevailing-wage rate. The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, in light of the LCA certified for a Level I, entry-level position.

Again, by submitting an LCA certified for that lowest-assignable prevailing-wage level, the Petitioner signified that it assessed the position as being a low-level, entry position relative to others within the same occupation. As earlier noted, in accordance with the relevant DOL explanatory information on wage levels, the Level I wage-rate is appropriate only for positions where the beneficiary would be required to possess a basic understanding of the occupation; would be expected to perform routine tasks requiring limited, if any, exercise of judgment; would be closely supervised and have her work closely monitored and reviewed for accuracy; and would receive specific instructions on required tasks and expected results. We find that so identifying the proffered position as entry-level within an occupation (Health Care Workers) for which a high-school diploma, a one-year certificate, or a two-year associates degree can qualify a person for entry is materially inconsistent with the Petitioner's claim that it has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

For the reasons discussed above, we conclude that the record of proceeding does not establish that the particular position that is the subject of this petition on 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*

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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)).

As already discussed, the Petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source), reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Further, there is no evidence of a professional association for the industry making a degree a minimum entry requirement, and the record does not contain letters or affidavits from firms or individuals in the industry attesting that such firms "routinely employ and recruit only degreed individuals."

The Petitioner, however, provided copies of five job-vacancy announcements. By employer name, job title, and educational requirements specified for the position, they are:

- [REDACTED] posting for a "Regional Health Fitness Specialist," specifying requirements of a bachelor's degree from a 4-year college or university in "Exercise, Kinesiology, or a related field."
- [REDACTED]; posting for a "Fitness Specialist" which states hiring requirements as "a bachelor's degree from a 4-year college or university in a health-related, exercise science, kinesiology, or physiology major," and "a current NCCA accredited certification (i.e., ACSM RCEP, ACSM HFS, NSCA CPT, NSCA CSCS, NASM CPT, ACE, etc.);"
- [REDACTED] posting for a "Fitness Specialist – WellAware Center, PRN," which specifies the minimum educational requirement of a high school diploma or GED (general education diploma);
- [REDACTED] posting for a "Fitness Specialist" for Duke employees, which specifies as the education/experience/certification requirements "BA/BS in exercise related field [(later described as "exercise science, physical education, or related field)], MS preferred"; "Minimum of one year of experience in employee health promotion setting"; current CPR and First Aid certifications"; and "Professional certification (ACE, AFAA, ACSM)", with allowance for "an equivalent combination of relevant education and/or experience."
- [REDACTED] posting for an "Exercise Specialist/ATC-Flexible" to work as an Athletic Trainer Certified Physical Therapy Aide under the direction and supervision of a licensed Physical Therapist, who must hold at least a bachelor's degree "in exercise science, or

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related field such as recreation, parks management, travel and tourism”; and “Athletic Trainer Certified (ATC) by the National Athletic Training Association Board of Certification (NATABOC)”; and a current Oregon Athletic Trainer License.

_____ specifying a high school or GED certificate as acceptable (though not preferred) for its advertised position, does not favor the Petitioner's contention.

The _____ job-posting does not appear to be for a position parallel to the one that is the subject of the petition, as the posting is for a person certified as an athletic trainer who would help provide outpatient rehabilitation, as part of a patient-care team and under the direction and supervision of a licensed physical therapist.

The “Job Description” of the _____ advertisement deals only in generalities about (1) the job's central purpose (“to provide professional fitness service to members, clients, and guests of the center to appropriately meet the health and fitness needs of each individual” and (2) the need to “[m]aintain a positive and professional demeanor during [all] interactions and work related relationships.” This is an insufficient factual basis for considering the advertised position as parallel to the proffered position.

The minimum requirements specified in the _____ advertisement - “High School Diploma or GED” – bear against the against the Petitioner's claim.

Also, the fact that _____ and _____ all specify professional certifications in addition to the specified degrees, which shows that those employers require a greater demonstration of knowledge of the associated occupation than the Petitioner, also suggests that their positions are not parallel to the one that is the subject of this petition.

Thus, just a few of the five job postings are relevant for consideration as related to positions parallel to the one for which the petition was filed, and they suggest, at best, that a bachelor's degree in a specific specialty is sometimes required for the type of position that is the subject of this petition.⁵ As the documentation does not establish that the Petitioner has met this prong of the regulations,

⁵ Even if all of the job postings indicated that a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations (which they do not), the Petitioner does not demonstrate what inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995).

As such, even if the job announcements supported the finding that the position required a bachelor's or higher degree in a specific specialty, or its equivalent (for organizations in the same industry that are similar to the Petitioner), it cannot be found that such a limited number of postings that appear to have been consciously selected outweigh the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States.

further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

As the evidence has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the Petitioner's industry in positions that are (1) in the Petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the Petitioner, 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

A petitioner satisfies the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) by showing that its particular position is so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty, or its equivalent.

We see that the Petitioner has ascribed a sizeable number of duties and responsibilities to the proffered position. However, the Petitioner has not supplemented those duty descriptions with any objective evidence by which we can reasonably conclude that the proffered position is so complex or so unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty. For instance, the Petitioner did not submit evidence showing how completion of a particular curriculum culminating in a bachelor's or higher degree in a specific specialty would be necessary to handle whatever relative level of complexity or uniqueness the petitioner may attribute to the position.

Thus, the Petitioner has not met the burden of proof for satisfying 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. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent. In fact, the record reflects that the Petitioner is here engaged in a first-time hiring for the position.

Thus, we find that the Petitioner has not satisfied the criterion at 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

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) is satisfied if the evidence of record establishes that the nature of the proffered position's specific duties is so specialized and complex as to require the application of knowledge usually associated with the attainment of at least a bachelor's degree in a specific specialty or its equivalent.

While ascribing many duties to the proffered position, the Petitioner has not provided credible, probative evidence which objectively confirms that the nature of the specific duties is so specialized and complex that their performance would require application of knowledge usually associated with the attainment of at least a bachelor's degree in a specific specialty or its equivalent; and there is no basis for us to take administrative notice that the duties as described by the Petitioner satisfy the requirements of this criterion. Also, in light of our earlier discussions about its import, the Petitioner's use of a Level I prevailing-wage designation appears inconsistent with this criterion.

Therefore, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed.⁶

IV. CONCLUSION AND ORDER

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 S-W-U-*, ID# 14213 (AAO Oct. 27, 2015)

⁶ As the grounds discussed above are dispositive of the Petitioner's eligibility for the benefit sought in this matter, we will not address and will instead reserve our determination on the additional issues and deficiencies that we observe in the record of proceeding with regard to the approval of the H-1B petition.