**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: AUG 0 1 2014 OFFICE: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

## I. INTRODUCTION

On the Form I-129 visa petition, the petitioner describes itself as a single-employee religious organization[1] established in 2007. In order to employ the beneficiary in what it designates as a part-time youth pastor position at a salary of $251.40 per week,[2] the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 19, 2013. Within the RFE, the director requested specific documentation to establish that the proffered position qualifies for classification as a specialty occupation and evidence to demonstrate beneficiary's qualifications. The director denied the petition, concluding that the evidence of record failed to establish that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before us contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

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

## II. STANDARD OF PROOF

In the exercise of our administrative review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states the following:

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[1] The petitioner provided a North American Industry Classification System (NAICS) Code of 813110, "Religious Organizations." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "813110 Religious Organizations," http://www.naics.com/naics-code-description/?code=813110 (last visited July 7, 2014).

[2] The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Clergy" occupational classification, SOC (O*NET/OES) Code 21-2011, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

> Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.
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> * * *
>
> The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.
>
> * * *
>
> Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.
>
> Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

*Id.* at 375-76.

Again, we conduct our review of service center decisions on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe.* Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determination that the evidence of record does not establish that the proffered position is a specialty occupation was correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the evidence of record does not establish that the petitioner's claim that the proffered position is a specialty occupation is "more likely than not" or "probably" true. In other words, as the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claim that the proffered position is a specialty occupation is "more likely than not" or "probably" true.

## III. LAW

To meet the petitioner's burden of proof in establishing the proffered position as a specialty occupation, the evidence of record must establish that the employment the petitioner is offering to the beneficiary meets the following statutory and regulatory requirements.

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) states, in pertinent part, the following:

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

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

> *(1)* A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> *(2)* The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> *(3)* The employer normally requires a degree or its equivalent for the position; or
>
> *(4)* The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory

language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

## IV. ANALYSIS

Based upon a complete review of the record of proceeding, we agree with the director and find that the evidence of the record fails to establish that the position as described constitutes a specialty occupation.

In its March 22, 2013 letter submitted in support of the petition, the petitioner stated that the duties of the proffered position would include the following tasks:

1. Conduct religious worship and perform other spiritual functions associated with beliefs and practices of for youth members. (40%)
2. Prepare and deliver sermons to youth members of the church. (10%)
3. Share information about religious issues by writing articles and teaching to young church members. (10%)
4. Counsel youth church members concerning their spiritual, emotional, and personal needs. (20%)
5. Visit people in homes and hospitals to provide them with comfort and support. (5%)
6. Train leaders of youth groups. (15%)

Further, the petitioner stated, "[b]ased on a review of these duties, it is clear that only an individual with a bachelor's degree or higher can perform these duties successfully. In order to provide advice and guidance to youth in accordance with the Christian religion, a bachelor's degree in Christian Education is necessary."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 19, 2013. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted. Notably, although the director acknowledged that the petitioner had submitted a job description, she specifically asked the petitioner to submit a more detailed description of the work to be performed by the beneficiary. In response to the director's RFE, the petitioner submitted a letter from its counsel, dated June 17, 2013, in which he reiterated the same duties as listed in the petitioner's letter of support and stated that the "[y]outh [p]astor position involves very complex and unique duties [which] can only be performed by an individual with a Bachelor's degree in Christian studies or a related field." The petitioner did not, however, submit a more detailed description of the duties as requested.[3]

In addition, the petitioner submitted a one-page letter, dated June 6, 2013, from Senior Pastor at , who stated:

> [A] church, comparable in size as that of [the petitioner], would normally employ and recruit individuals with at least a bachelor's degree in a field related to Christian studies for their Youth Pastor position. This stems from the professional duties related to the Youth Pastor position, including preparing and delivering sermons to youth members of the church, conduction religious worship for youth members, counseling youth church members, etc.

[3] Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). For this reason alone, the petition may not be approved.

> In fact, the Youth Pastor of [redacted] Mr. [redacted] who has been working for our church in the position since January 30, 2011, holds a master of Divinity degree. Thus the requirement of at least a bachelor's degree in a field related to Christian studies for a Youth Pastor position at a church is a normal requirement.

Despite the director's finding that the petitioner's description of the proposed duties was nonspecific, the petitioner nonetheless elected not to provide a detailed description of the duties the beneficiary would perform, but rather submitted a letter from its counsel restating the same duties in the same manner as in the support letter. Furthermore, we note that the duties provided by the petitioner and counsel are very similar (and some are verbatim) to the O*NET OnLine Summary Report for the occupation "Clergy." However, providing job duties for a proffered position from O*NET is generally not sufficient for establishing H-1B eligibility. While this type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, it cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval as this type of generic description fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operation. Accordingly, it cannot be relied upon when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Such generalized information does not in itself establish a correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. We also observe, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, we find the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position. Moreover, the job descriptions fail to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis within the petitioner's operations; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner's assertion with regard to the educational requirement for the position is conclusory and unpersuasive, as it is not supported by the job description or probative evidence. 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. Comm'r 1972)). Similarly, without documentary evidence to support the claim, the

assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Again, the director afforded the petitioner the opportunity to correct this deficiency, but the petitioner elected not to do so.

We will next address the letter from Senior Pastor Sunhong dated June 6, 2013, in which he asserts that a church comparable in size to that of the petitioner normally hires individuals with bachelor's degree in a field related to Christian studies for youth pastor positions. Upon review, we find that this letter does not constitute probative evidence of the proffered position satisfying any criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

At the outset, we note that this letter is not accompanied by, and does not expressly state the full content of, whatever documentation, personal observations, and/or oral transmissions upon which is may have been based. For example, Senior Pastor does not indicate whether he visited the petitioner's church or spoke with anyone affiliated with the petitioner, so as to ascertain and base his opinions upon the substantive nature and educational requirements of the proposed duties as they would be actually performed. Nor did he specify and discuss any studies, surveys, or other authoritative publications. Furthermore, Senior Pastor did not discuss the duties of the proffered position in any substantive detail; rather, he simply stated the duties of the youth pastor position in general terms similar to that provided by the petitioner in its support letter. The extent of meaningful analysis involved in the formulation of his rather brief letter, therefore, is not apparent. We find that, for these reasons alone, this letter is not probative evidence of the proffered position satisfying any of the criteria described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Furthermore, Senior Pastor does not indicate whether he considered, or was even aware of, the fact that the petitioner submitted an LCA certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation which, signifies that the beneficiary is only expected to possess a basic understanding of the occupation. We consider this a significant omission, in that it suggests an incomplete review of the position in question and a faulty factual basis for the author's ultimate conclusions regarding the educational requirements of the positions upon which he opines.

As noted earlier, the LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Clergy" occupational category, SOC (O*NET/OES) Code 21-2011 and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. The *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (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.[4]

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. The LCA's wage-level indicates that the proffered position is actually a low-level, entry position relative to others within the same occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to possess a basic understanding of the occupation; that she will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

The author's omission of such an important factor as the LCA wage-level significantly diminishes the evidentiary value of his assertions. For all of these reasons, we find that the letter from Senior Pastor Ahn is not probative evidence towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

We will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

We will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[5] We reviewed the information in the *Handbook* regarding the "Clergy" occupational category and note that this occupational category is one for

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[4] 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 (last visited July 2, 2014).

[5] All of our references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site http://www.bls.gov/ooh/.

which the *Handbook* does not provide detailed data. The *Handbook* states the following about this occupation:

> **Data for Occupations Not Covered in Detail**
>
> Although employment for hundreds of occupations are covered in detail in the *Occupational Outlook Handbook*, this page presents summary data on additional occupations for which employment projections are prepared but detailed occupational information is not developed. For each occupation, the Occupational Information Network (O*NET) code, the occupational definition, 2012 employment, the May 2012 median annual wage, the projected employment change and growth rate from 2012 to 2022, and education and training categories are presented.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook,* 2014-15 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 2, 2014).

Thus, the narrative of the *Handbook* indicates that there are many occupations for which only brief summaries are presented. That is, detailed occupational profiles for these occupations are not developed.[6]

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

The *Handbook* does not indicate that clergy positions comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. The full-text of the *Handbook* regarding this occupational category is as follows:

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[6] We note that occupational categories for which the *Handbook* only includes summary data includes a range of occupations, including for example, postmasters and mail superintendents; agents and business managers of artists, performers, and athletes; farm and home management advisors; audio visual and multimedia collections specialists; clergy; merchandise displayers and window trimmers; radio operators; first-line supervisors of police and detectives; crossing guards; travel guides; agricultural inspectors, as well as others.

**Clergy**

(O*NET 21-2011.00)

Conduct religious worship and perform other spiritual functions associated with beliefs and practices of religious faith or denomination. Provide spiritual and moral guidance.

- 2012 employment: 239,600
- May 2012 median annual wage: $44,060
- Projected employment change, 2012-22:
  - Number of new jobs: 23,600
  - Growth rate: 10 percent (about as fast as average)

- Education and training:
  - Typical entry-level education: Bachelor's degree
  - Work experience in a related occupation: None
  - Typical on-the-job-training: Moderate-term on-the-job training

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 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 2, 2014).

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupational category. The *Handbook*'s summary data provides "education and training categories" for occupations. The occupational category "Clergy" falls into the group of occupations for which a bachelor's degree (no specific specialty) is the typical entry-level education. However, although the *Handbook* reports that the typical entry-level education is a bachelor's degree, it does not indicate that it is typically *required* for entry into the occupation. Further, the *Handbook* does not report that bachelor's degrees held by those entering the occupation are limited to any specific specialty.

We here reiterate that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the position. *See* 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). The *Handbook* does not establish that the occupation requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's degree or higher in the *specific specialty*, or its equivalent, as a minimum for entry into the occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Thus, the *Handbook* is not probative evidence of the occupational category "Clergy" requiring at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, the proffered position's inclusion in the "Clergy" occupational classification would not in itself satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

We again note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. Thus, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that 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.

On appeal, counsel cites §203(b)(3)(A)(ii) of the Act and acknowledges that this section of the Act pertains to immigrant visa classifications. Counsel further cites *Matter of Wu*, 11I&N Dec. 697 (DD 1966), which also pertains to immigrant visa petitions and whether the beneficiary is a member of the professions as defined in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and as interpreted at that time. The issue before us is whether the petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation and not whether it is a profession. Thus, the section of the statute and the matter cited by counsel are irrelevant to the instant petition.[7]

In the instant case, the evidence of record does not establish that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding by the petitioner do not indicate that this particular position 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 evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, we find that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) 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

[7] We note that the current, primary, and fundamental difference between qualifying as a profession and qualifying as a specialty occupation is that specialty occupations require the U.S. bachelor's or higher degree, or its equivalent, to be in a specific specialty. Thus, while "ministers" are specifically identified as qualifying as a profession as that term is defined in section 101(a)(32) of the Act, that occupation would not necessarily qualify as a specialty occupation unless it met the definition of that term at section 214(i)(1) of the Act.

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 an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty, or the equivalent, for entry into those positions, and the deficiencies in Senior Pastor's letter were discussed above. Thus, we incorporate by reference the previous discussion on the matter. In the RFE response letter, dated June 17, 2013, counsel states that youth pastor position "is a common position required by similarly sized churches and submits a letter, dated June 6, 2013, from Senior Pastor of First, we note that the petitioner submitted no corroborating evidence that the petitioner is a similar organization as the one for which Senior Pastor claims to provide services. Second, Senior Pastor makes no mention of the size of his congregation. Furthermore, as discussed previously, Senior Pastor fails to provide the basis of his knowledge and did not indicate that he relied on any authoritative source(s) to support his assertion about the proffered position. Moreover, there is no indication that Senior Pastor possesses any knowledge of the petitioner's proffered position beyond, perhaps, simply the job title. There is no evidence that Senior Pastor reviewed the petitioner's job description and he does not demonstrate or assert in-depth knowledge of the petitioner's specific organization or how the duties of the position would actually be performed in the context of the petitioner's operations. Notably, his opinion is not supported by independent, objective evidence demonstrating the manner in which he reached such conclusion. Accordingly, for the reasons discussed, the letter is not probative in this matter.

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty or its equivalent that is common (1) to the petitioner's industry and (2) for positions in that industry that are both (a) parallel to the proffered position and (b) located in organizations that are similar to the petitioner.

Next, we find that the evidence of record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which provides that "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."

In the instant case, the record of proceeding fails to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Additionally, we find that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only

be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.

The petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty. Thus, based upon the record of proceeding, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position. Specifically, the petitioner fails to demonstrate how the duties of the position as described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate 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.

We observe that the petitioner has indicated that the beneficiary possesses the required expertise based on her educational background and professional achievements. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. In the instant case, the petitioner does not establish which of the proposed duties, if any, would render the proffered position so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Again, the petitioner did not demonstrate 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.

This is further demonstrated by the LCA submitted by the petitioner in support of the instant petition. We incorporate here by reference and reiterate our earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the analysis of the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate selected by the petitioner, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that she will receive specific instructions on required tasks and expected results; and that her work will be reviewed for accuracy.

For all of these reasons, it cannot be concluded that the evidence of record satisfies the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), which entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty or its equivalent for the position.

Our review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. Additionally, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.[8]

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, 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 petitioner 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 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if 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* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

On the Form I-129, the petitioner indicated that it was established in 2007. The petitioner did not submit any documentation regarding its recruitment and hiring practices. It appears that the pastor position is a new position, and the record is devoid of information to satisfy this criterion. While a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, it is unclear how an employer that has never recruited and hired for the position would be able to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

Upon review of the record of proceeding, we find that the petitioner has not provided probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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[8] Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within the same occupation.

Next, we find that the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), which requires the petitioner to establish that the nature of the proffered position's 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 the specific specialty or its equivalent.

As discussed previously, providing job duties for a proffered position from O*NET is generally not sufficient for establishing relative specialization and complexity of the proffered position. With regard to the specific duties of the position proffered here, we find that the record of proceeding lacks sufficient, credible evidence establishing that they are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's degree in a specific specialty, or the equivalent.

Moreover, we incorporate our earlier discussion regarding the wage-level designation on the LCA, which is appropriate for duties whose nature is less complex and specialized than required to satisfy this criterion. We find that both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, by the submission of an LCA certified for a wage-level I, the petitioner effectively attests that the proposed duties are of relatively low complexity as compared to others within the same occupational category. This fact is materially inconsistent with the level of complexity required by this criterion.

As earlier noted, 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 [emphasis in original].

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 (last visited July 2, 2014).

The pertinent guidance from DOL, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

> **Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

*Id.*

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this Level II wage-rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of the petitioner's Level I wage-rate designation.

Further, we note the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

> **Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.
>
> Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

*Id.*

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

> **Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These

> employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

*Id.*

As already noted, by virtue of this submission, the petitioner effectively attested to DOL that the proffered position is a low-level, entry position relative to others within the same occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(4)*.

As the evidence of record does not satisfy at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

## V. CONCLUSION AND ORDER

As set forth above, we agree with the director's findings that the evidence of record does not demonstrate that the proffered position qualifies for classification as a specialty occupation. Accordingly, the director's decision will not be disturbed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed. The petition is denied.