

(b)(6)

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



U.S. Citizenship
and Immigration
Services

DATE:

OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: **APR 29 2013** Petitioner:

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on April 23, 2012. In the Form I-129 visa petition, the petitioner describes itself as a business engaged in real estate and the remodeling of residential buildings that was established in 2006. In order to employ the beneficiary in what it designates as a construction project manager position, the petitioner seeks to classify him 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 denied the petition on August 9, 2012, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, the petitioner and its counsel assert that the director's basis for denial of the petition was erroneous and contend that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's 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 Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a construction project manager to work on a full-time basis.¹ With the Form I-129 petition, the petitioner submitted a letter dated April 10, 2012, which included the following description of the duties of the proffered position:

- Planning and management of construction projects, schedules and budgets;
- Prepare contracts, negotiate revisions based on needed changes or additions;
- Obtain all necessary permits and licenses, ordering supplies and materials, preparing budget estimates, and developing and implementing quality control programs;
- Planning project phases and schedules and defining labor requirements;

¹ In the Form I-129 petition and the LCA, the petitioner indicated that the beneficiary would be employed on a full-time basis.

- Inspecting construction work to verify compliance with building and safety codes and related regulations;
- Interpreting construction plans and communicating this understanding to subcontractors and others;
- Liaising with supervisor, owners, contractors and design professionals; and
- Investigating any incidents or delays; assessing construction methods and determining cost-effectiveness of construction plans.

In the letter of support, the petitioner stated the minimum educational requirements of the proffered position as "at least a baccalaureate degree in Construction Management, Architectural Engineering or related field." The petitioner stated that the beneficiary is qualified for the proffered position by virtue of his Nigerian degree and other education in the United States, in addition to his prior work experience in the construction industry. The petitioner submitted documentation regarding the beneficiary's academic and professional credentials, including diplomas and certificates in the beneficiary's name and an evaluation of the beneficiary's credentials from The Trustforte Corporation. The evaluation states that the beneficiary has "attained the equivalent of a Bachelor of Science Degree, with a dual major in Architecture and Environmental Studies, from an accredited US college or university."

The petitioner also provided additional evidence, including (1) documents regarding the petitioner's corporate status; (2) printouts from the petitioner's website; (3) evidence regarding the petitioner's business operations and projects entitled "Background Information"; and (4) an opinion letter from Sergio E. Serrano regarding the proffered position.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Construction Managers" – SOC (ONET/OES Code) 11-9021, at a Level I wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 4, 2012. 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, the director requested that the petitioner submit a more detailed description of the work to be performed by the beneficiary for the entire requested period of validity, including the specific job duties, the percentage of the time to be spent on each duty, level of responsibility, hours per week of work, and the minimum education, training and experience necessary to do the job, etc. The director further requested that the petitioner explain why the work to be performed requires the services of a degreed individual.

On July 26, 2012, counsel for the petitioner responded to the RFE by submitting a brief and additional evidence. Specifically, the documentation submitted by counsel included the following: (1) two opinion letters; (2) the petitioner's business plan; (3) a printout of a local news story in

which the petitioner's president is quoted; and (4) copies of previously submitted documents.

In addition, counsel submitted a document with a revised job description. Notably, the document is not on the petitioner's letterhead, nor is it signed or endorsed by the petitioner. Furthermore, the document does not contain a date. The document provides the following revised job description:

- Planning, management, and completion of construction projects, which include renovation projects of single family and multifamily homes—whole house remodeling, historic home remodeling, wing remodeling, single room remodeling, kitchen remodeling, bath remodeling, and green remodeling; 10%
- Assigning and overseeing the work of experienced third-party contractors and subcontractors; 10%
- Oversee green remodeling projects by incorporating cost-saving and earth sustaining concepts into construction projects; 10%
- Knowledge of various building types and construction techniques to effectively manage and oversee work projects; 10%
- Reading and interpret documents such as architectural and engineering construction plans, specifications, operating and maintenance instructions, and procedure manuals; and interpreting this understanding to subcontractors; 10%
- Schedules and conducts various construction related meetings with General Contractor and Subcontractors (including Architect contractors) to review site and building plans, specifications, construction schedule, material delivery, inspection issues, critical dates, costs and proposals; 10%
- Prepare contracts, negotiate revisions based on needed changes or additions; 10%
- Obtain all necessary permits and licenses, ordering supplies and materials, preparing budget estimates, and developing and implementing quality control programs; 5%
- Planning project phases and schedules and defining labor requirements; completing the renovation and construction work within the scheduled time and within the budgeted amount; 10%
- Inspecting construction work to verify compliance with building and safety codes and related regulations; 5%

- Liaising with supervisor, owners, contractors, architects, and design professionals; and 5%
- Investigating any incidents or delays; assessing construction methods and determining cost effectiveness of construction plans. 5%

Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on August 9, 2012. The petitioner submitted an appeal of the denial of the H-1B petition. In support of the Form I-290B, counsel submitted a brief and additional evidence.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

The petitioner stated that the beneficiary would be employed in a construction project manager position. However, to determine whether a particular job qualifies as a specialty occupation, U.S. Citizenship and Immigration Services (USCIS) does not simply rely on a position's title. As previously mentioned, 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, 387 (5th Cir. 2000). 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.

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through attainment of at least a baccalaureate degree in a specific discipline. The AAO finds that the petitioner has not done so.

In the instant case, the AAO observes that the duties of the proffered position, as described by the petitioner in support of the Form I-129 and in response to the director's RFE, have been stated in generic terms that fail to convey the actual tasks the beneficiary will perform on a day-to-day basis. The AAO notes that the duties of the proffered position are rephrased "core" tasks from the Occupational Information Network (O*NET) OnLine Details Report for the occupation "Construction Managers." The O*NET OnLine Details Report for "Construction Managers" contains the following "core" tasks, in pertinent part:

- Schedule the project in logical steps and budget time required to meet deadlines.
- Confer with supervisory personnel, owners, contractors, or design professionals to discuss and resolve matters, such as work procedures, complaints, or construction problems.
- Prepare contracts and negotiate revisions, changes and additions to contractual agreements with architects, consultants, clients, suppliers and subcontractors.
- Prepare and submit budget estimates, progress reports, or cost tracking reports.
- Interpret and explain plans and contract terms to administrative staff, workers, and clients, representing the owner or developer.
- Plan, organize, or direct activities concerned with the construction or maintenance of structures, facilities, or systems.
- Inspect or review projects to monitor compliance with building and safety codes, or other regulations.
- Select, contract, and oversee workers who complete specific pieces of the project, such as painting or plumbing.
- Obtain all necessary permits and licenses.
- Develop or implement quality control programs.
- Investigate damage, accidents, or delays at construction sites, to ensure that proper procedures are being carried out.
- Evaluate construction methods and determine cost-effectiveness of plans, using computers.

U.S. Department of Labor, Employment & Training Administration, O*NET OnLine, 11-9021.00 – Construction Managers, on the Internet at <http://www.onetonline.org/link/details/11-9021.00> (last visited April 10, 2013).

The AAO notes that providing job duties for a proffered position from O*NET is generally not sufficient for establishing H-1B eligibility. That is, 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 operations. 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. The AAO also observes, 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, the AAO finds 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 in the record of proceeding fail to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (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.

That is, the job duties of the proffered position, as provided by the petitioner, do not convey the substantive nature of the actual work that the beneficiary would perform. Rather, the job descriptions convey, at best, only generalized functions of the occupational category at a generic level. Moreover, the AAO notes that the petitioner fails to distinguish similar tasks provided in the job descriptions. For example, the petitioner claims that the beneficiary will spend 10% of his time in the "planning, management, and completion of construction projects." The description fails to specify any particular details as to the specific tasks necessary for the performance of this duty and how this duty differs from the other duties in the job description. The description states that the beneficiary will "schedule and conduct various construction related meetings with General Contractor[s] and Subcontractors (including Architect contractors)." The description also states that the beneficiary will be responsible for "[l]iaising with supervisor, owners, contractors, architects, and design professionals." Neither the petitioner nor its counsel provide any explanation as to the difference between "meeting" and "liaising" with these parties. Furthermore, the statements do not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application.

In addition, the AAO observes that the petitioner has indicated that 10% of the beneficiary's time has been allocated to "knowledge of various building types and construction techniques." This statement does not delineate the actual work the beneficiary will perform. This is further illustrated by the petitioner's statement that the beneficiary will obtain all necessary permits and licenses. The statement fails to provide any particular details regarding the demands, level of responsibilities and requirements necessary for the performance of this duty. The petitioner states that the beneficiary will be responsible for assessing construction methods and determining cost effectiveness of construction plans. This phrase could cover a range of issues, and without further information, it does not provide any insights into the beneficiary's day-to-day work. According to the petitioner, the beneficiary will be responsible for investigating any incidents or delays. However, the statement fails to provide any specifics regarding the beneficiary's role "investigating," and it does not provide any information as to the complexity of the job duty, the amount of supervision required, and the level of judgment and understanding required to perform the duty.

Furthermore, the AAO notes that it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich.

2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's operations are relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in or its equivalent in a specific specialty. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties.

In the Form I-129, the petitioner described itself as business engages in real estate and remodeling residential buildings. The petitioner indicates that it was established in 2006 and "started business in 2008." The petitioning company currently consists of one employee, the owner who serves as the president of the company. The petitioner reported its gross annual income as approximately \$101,000 and its net annual income as approximately \$12,000.

In the instant case, the petitioner failed to adequately address the issue of how the beneficiary will be relieved from performing non-qualifying duties for the entire period of requested employment. The AAO observes that in the business plan, the petitioner states that it intends to hire additional employees. However, the AAO notes that the petitioner's claim that it intends to hire additional employees in the future is insufficient, as a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. See 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). If the petitioner wishes for a new set of facts to be considered, it may file a new petition, with a valid LCA and the proper fee(s), for USCIS to consider. A position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129.

Moreover, the AAO observes that the record of proceeding contains discrepancies between what the petitioner claims about the level of responsibility inherent in the proffered position set against the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of petition.

That is, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational category of "Construction Managers" - SOC (ONET/OES) code 11-9021. The petitioner stated in the LCA that the wage level for the proffered position was a Level I (entry) position, with a prevailing wage of \$64,792 per year. The LCA was certified on March 26, 2012. The petitioner signed the LCA on April 10, 2012, attesting that the information provided was true and accurate.

Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education,

training and experience) generally required for acceptable performance in that occupation.² Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.³ The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

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

Throughout the record of proceeding, the petitioner and counsel claim that the proffered position involves complex, unique and/or specialized duties. For example, in its April 10, 2012 letter, the petitioner states that the beneficiary will "direct and develop the growing company's construction projects" using his "extensive professional experience in the construction industry." The letter further states that the beneficiary will provide the petitioner with "the construction management

² For additional information on wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

³ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

direction required to successful[ly] continue its projected growth." In response to the RFE, a revised list of duties was submitted, which indicates that the proffered position involves the "planning, management, and completion" of all phases and facets of the petitioner's construction projects. The duties further indicate that the beneficiary will be "assigning and overseeing work of experienced third-party contractor and subcontractors," preparing and negotiating contracts, and inspecting construction work. In response to the RFE, the petitioner provided a business plan. In the business plan, the petitioner states that it is "looking at the option of sharing its ownership, selling about 30% ownership to [the beneficiary]" and indicates that the beneficiary is an "active participant in management decisions." The business plan further states that the beneficiary an owner of [REDACTED], which is "the contractor arm of [the petitioner's] business." In the business plan, the beneficiary is referred to as the "Vice President/Project Manager." An organizational chart indicates that the petitioner expects 5-7 individuals to report directly or indirectly to the beneficiary and that the beneficiary will report to the petitioner's president. The beneficiary is further referred to as the "secondary owner."

The petitioner's counsel submitted an evaluation of the proffered position from [REDACTED] professor of civil and environmental engineering at [REDACTED]. According to [REDACTED], the duties of the proffered position require the beneficiary "to apply extensive knowledge of advanced theoretical concepts." He further indicates that in the proffered position, the beneficiary will be working "at an advanced level." The petitioner's counsel also submitted a letter from [REDACTED], former professor of management and information systems at [REDACTED]. [REDACTED] states that, based on his review of the duties of the proffered position, the beneficiary "must perform at an extremely high level of knowledge, skills and business competencies" Further, [REDACTED] states that the proffered position "require[s] a high level of business and personal communication skills and performance as both an individual and a team contributor." [REDACTED] describes the proffered position as "the critical performer that determines [the petitioner's] future success." The AAO notes that counsel for the petitioner repeatedly cites Mr. [REDACTED] and [REDACTED] characterization of the proffered position.

The AAO observes that the duties of the proffered position, the petitioner's business plan, and letters submitted in support of the petition indicated that the petitioner will be relying heavily on the beneficiary to supervise substantial portions of the petitioner's business operations. Such reliance on the beneficiary's work appears to surpass the expectations of a Level I position, as described above, in which the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and is expected to provide limited exercise of judgment. Here, rather than the beneficiary's work being "monitored and reviewed for accuracy," the petitioner and counsel suggest that the petitioner is relying on the beneficiary services to ensure the growth and success of the petitioner's business.

Thus, upon review of the assertions made by the petitioner and counsel, the AAO must question the level of complexity, independent judgment and understanding actually required for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described in the record of proceeding conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within

the occupation. 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; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

Certification by the Department of Labor [DOL] 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.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

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

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial (which it has not), the petition could not be approved for this reason.

The AAO now addresses the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

For an H-1B petition to be granted, the petitioner must provide 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 the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must 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 387. To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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 at 147 (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 make its determination whether the proffered position qualifies as a specialty occupation, the AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

The AAO recognizes DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴ As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Construction Managers."

The AAO reviewed the chapter of the *Handbook* entitled "Construction Managers," including the sections regarding the duties and educational requirements for this occupational category.⁵ However, the *Handbook* does not indicate that these 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 chapter of the *Handbook* (2012-2013 edition) for "Construction Managers," describes the requirements for this occupational category as follows:

Employers increasingly prefer candidates with both work experience and a bachelor's degree in a construction-related field. However, some construction managers may qualify with a high school diploma and by working many years in a construction trade. Certification, although not required, is becoming increasingly important.

Education

It is increasingly important for construction managers to have a bachelor's degree in construction science, construction management, architecture or engineering. As construction processes become increasingly complex, employers are placing more importance on specialized education.

More than 100 colleges and universities offer bachelor's degree programs in construction science, building science, or construction engineering. These programs include courses in project control and management, design, construction methods and materials, cost estimation, building codes and standards, and contract administration. Courses in mathematics and statistics are also relevant.

An associate's degree combined with work experience may be enough for some positions. A number of 2-year colleges offer construction management or construction technology programs.

⁴ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁵ For additional information regarding construction manager positions, see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Construction Managers, on the Internet at <http://www.bls.gov/ooh/management/construction-managers.htm> (last visited April 10, 2013).

In addition, those with a high school diploma and years of relevant work experience will be able to work as construction managers, though they will do so primarily as self-employed general contractors.

Work Experience

Practical construction experience is important when entering the occupation because it reduces the need for initial on-the-job training. Internships, cooperative education programs, and long-term jobs in the industry provide that experience. Some construction managers become qualified solely through extensive construction experience, spending many years in carpentry, masonry, or general subcontracting.

Training

New construction managers are generally hired as assistants to experienced managers before beginning independent work. Work as an assistant can last from several weeks to several months, depending on the firm.

Certification

Certification is becoming increasingly important for construction managers. Although not required, certification can be valuable because it can demonstrate knowledge and experience.

The Construction Management Association of America awards the Certified Construction Manager (CCM) designation to workers who have the required experience and who pass a technical exam. Applicants for this certification must also complete a self-study course that covers the professional role of a construction manager, legal issues, the allocation of risk, and other topics related to construction management.

The American Institute of Constructors awards the Associate Constructor (AC) and Certified Professional Constructor (CPC) designations to candidates who meet its requirements and pass the appropriate construction exams.

Occupational Outlook Handbook, 2012-13 ed., Construction Managers, available on the Internet at <http://www.bls.gov/ooh/management/construction-managers.htm#tab-4> (last visited April 10, 2013).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

The *Handbook* indicates that certification is becoming increasingly important for construction managers. The *Handbook* continues by stating that certification is valuable because it can demonstrate knowledge and experience. However, in the instant case, there is no indication that the petitioner requires its construction manager to have obtained the designation Certified Construction Manager (CCM), Associate Constructor (AC), Certified Professional Constructor (CPC) or any other certification.

Upon review of the *Handbook*, the AAO observes that it does not support the assertion that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. This passage of the *Handbook* states that employers "increasingly prefer" individuals with a bachelor's degree in a construction-related field. However, a *preference* for a degree does not indicate a *requirement* for the same. The *Handbook* clearly states that a high school diploma or an associate's degree, combined with work experience, is sufficient preparation for employment as a construction manager. The *Handbook* further reports that a number of two-year colleges offer construction management or construction technology programs. According to the *Handbook*, some construction managers become qualified solely through experience, spending many years in carpentry, masonry, or general subcontracting. The *Handbook* emphasizes the importance of construction experience for positions in this occupation.

In response to the RFE, counsel references DOL regulations as they relate to the "PERM" program for permanent labor certification, and as set forth in the *Federal Register*, Vol. 69, No. 247 at Appendix A to the Preamble-Professional Recruitment Occupations-Education and Training Categories at 77377 (December 27, 2004). Counsel claims that the provisions are relevant to this proceeding. The AAO reviewed the regulations and finds that counsel's reliance is misplaced. DOL's regulations on the PERM program do not establish that the proffered position qualifies as a specialty occupation normally requiring at least a bachelor's degree in specific specialty, or its equivalent.

More specifically, the *Federal Register* states that the purpose of the list of occupations at Appendix A is **not** for determining whether a position is a specialty occupation. In fact, the *Federal Register* unambiguously states that "**the list is not intended to be used to qualify an alien for purposes of eligibility under the H-1B and H-1B1 program** (emphasis added)." Moreover, the *Federal Register* clearly indicates that "[t]he primary purpose of the list of occupations is to provide employers with the necessary information to determine whether to recruit under the standards provided in the regulations for professional occupations or for nonprofessional occupations." The *Federal Register* continues by stating that "the only presumption the list of occupations should create is that if the occupation involved in the application is on the list of occupations in Appendix A, employers must follow the recruitment regiment for professional occupations at § 656.17(e) of this final rule."

Thus, the AAO finds no merit in counsel's contention that this provision regarding Professional Recruitment is relevant to this matter. Counsel cites no statutory or regulatory authority, case law, or precedent decision to support it. Moreover, neither the statutory nor regulatory provisions governing USCIS adjudication of Form I-129 specialty occupation petitions provide for the

approval of an H-1B petition on the grounds argued by the petitioner's counsel, or even indicate that an employer's recruitment regiment for permanent labor certification are relevant to USCIS adjudications of Form H-1B petitions.

Furthermore, as noted previously, in order to be classified as a specialty occupation, the position must require a degree in a *specific specialty*. The AAO is therefore not persuaded by counsel's claim that the proffered position is a specialty occupation because of the cited appendix. The appendix is a list of occupations for which a bachelor's degree or higher degree is a customary requirement. It does not, however, demonstrate that a bachelor's degree in a *specific specialty* is required, and does not, therefore, demonstrate that a position so designated qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Therefore, despite counsel's assertion to the contrary, the documentation is not probative of the proffered position qualifying as a specialty occupation.⁶

On appeal, counsel for the petitioner provides an article from the Occupational Outlook Quarterly (Summer 2006) entitled "Project Managers Stay in Charge and Out Front." In her brief, counsel highlights a passage of the article that states, "Project managers generally need to have at least a bachelor's degree, although it need not be in a business- or management- related concentration." Counsel further states that the proffered position is a "Construction Project Manager[,] which demands a greater complexity than construction manager[,] as the submitted duties detail."⁷ The AAO here incorporates by reference its earlier discussion regarding the petitioner's failure to establish the substantive nature of the proffered position. The AAO observes that counsel does not provide any indication as to how the proffered position differs from a construction manager position, and notes that 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). Further, contrary to the purpose for which it was provided, the AAO notes that article does not indicate that project managers are required to hold a bachelor's degree in a specific specialty, or its equivalent. Rather, the article states that although project managers generally need to have a bachelor's degree, "it need not be in a business-or management-related concentration." Thus, the article does not indicate that a bachelor's degree in a *specific specialty* is required for a project manager position.

In addition, the AAO notes that the O*NET Summary Report referenced by counsel is insufficient to establish that the proffered position qualifies as a specialty occupation for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Contrary to the assertion of counsel, O*NET OnLine does not state a requirement for a

⁶ The issue before the AAO is whether the petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation and not whether it is a profession as that term is defined in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and 8 C.F.R. § 204.5(k)(2). Thus, while a position may qualify as a profession as that term is defined in section 101(a)(32) of the Act, the 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.

⁷ Contrary to counsel's claim, the AAO notes that the petitioner has designated the proffered position a low, entry level position, relative to others within the occupational category as indicated by the assignment of the position as a Level I position on the LCA.

bachelor's degree. Rather, it assigns this occupation a Job Zone "Four" rating, which groups it among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, O*NET OnLine does not indicate that such a degree must be in a specific specialty directly related to the occupation. Therefore, O*NET OnLine information cited by counsel is not probative of the proffered position being a specialty occupation.

Counsel also references the opinion letters written by [REDACTED], professor of civil and environmental engineering at [REDACTED] and [REDACTED], former professor of management and information systems at [REDACTED]. The AAO reviewed the letters in their entirety; however, the petitioner's reliance on the letters is misplaced.

[REDACTED] writes in his letter that "[b]ased on [his] knowledge of and experience in the field, [he] believe[s] that it is a general, industry-standard practice for a company of the nature of the prospective employer to hire a Construction Project Manager with at least a bachelor's-level educational and professional background in Construction Management, Architectural Engineering, or a related field." He further states that "it is a general business practice for a company with commercial and operational objectives comparable to those of the employer, to hire a professional-level Construction Project Manager (i.e., a specialist with at least a bachelor's-level educational background, or the equivalent, in Construction Management, Architectural Engineering, or a related area)." [REDACTED] states that he bases his opinion on a review of the job duties of the proffered position. He does not state that he has any knowledge of the petitioner or the petitioner's business operations, and does not indicate what he means when he refers to "commercial and operational objectives comparable to those of the employer."

The AAO notes that on the Form I-129, the petitioner described itself as a business engaged in real estate and remodeling residential businesses. The petitioner reports to have one employee, a gross annual income of approximately \$101,000 and a net annual income of approximately \$12,000. In its business plan, the petitioner indicates that it buys "rundown" homes, remodels them, and sells them to individual buyers." The AAO notes that the evidence regarding the petitioner's business operations indicates that the petitioner works substantially on relatively smaller projects, including single family homes. Although [REDACTED] states that "[he] believe[s] that it is a general, industry-standard practice for a company of the nature of the prospective employer to hire a Construction Project Manager with at least a bachelor's-level educational and professional background in Construction Management, Architectural Engineering, or a related field," the AAO hereby incorporates its previous discussion regarding the *Handbook*, and notes that the *Handbook* does not support [REDACTED] claim. The *Handbook* clearly states that a high school diploma or an associate's degree, combined with work experience, is sufficient preparation for employment as a construction manager. Moreover, according to the *Handbook*, some construction managers become qualified solely through experience, spending many years in carpentry, masonry, or general subcontracting.

Further, the AAO notes that, according to [REDACTED], the duties of the proffered position require the beneficiary "to apply extensive knowledge of advanced theoretical concepts." He further indicates that in the proffered position, the beneficiary will be working "at an advanced level." Thus, it does not appear that the petitioner informed [REDACTED] that it designated the proffered

position as a Level I (entry level) position on the LCA. As previously noted, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

Similarly, [REDACTED] writes the following regarding the educational requirement of the proffered position:

To successfully perform the duties of [the proffered position] the candidate would need to have a minimum of a Bachelor's Degree in Construction Management, Architectural Engineering, or a related field. This represents a common standard for parallel positions among similar organizations. Firms similar to [the petitioner], routinely recruit and employ individuals to manage, analyze, and improve their operations that have as a minimum a Bachelor's Degree in Construction Management, Architectural Engineering, or a related field.

The AAO notes that it appears that [REDACTED] based his assessment on the duties of the proffered position that were submitted with the initial Form I-129 petition. Based on this list of duties, and his knowledge of the petitioner's business operations (which he summarizes as "purchas[ing], restor[ing] rundown houses, and then sell[ing] them," as well as offering "construction and renovation services"), [REDACTED] concludes that the beneficiary "must perform at an extremely high level of knowledge, skills and business competencies" Further, [REDACTED] states that the proffered position "require[s] a high level of business and personal communication skills and performance as both an individual and a team contributor." [REDACTED] describes the proffered position as "the critical performer that determines [the petitioner's] future success."

Thus, it appears that [REDACTED] is also unaware that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. Again, as previously noted, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

It appears that both [REDACTED] and [REDACTED] have based their assessments on incomplete information regarding the proffered position. Without this information, the petitioner has not demonstrated that [REDACTED] and [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

Furthermore, the AAO notes that, while [REDACTED] and [REDACTED] may, in fact, be recognized authorities on various topics, they have failed to provide sufficient information regarding the basis of their claimed expertise on this particular issue. Neither their self-endorsement nor their extensive

resumes establish their expertise pertinent to the recruiting and hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. Without further clarification, it is unclear how their education, training, skills or experience would translate to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of one-employee residential remodelers (as designated by the petitioner on the Form I-129 petition and with the NAICS code) similar to the petitioner for construction manager positions.

_____ and _____ have not demonstrated or asserted in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. Their opinions do not relate their conclusions to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusions about the educational requirements for the particular position here at issue.

Moreover, there is no indication that _____ and _____ have published any work or conducted any research or studies pertinent to the educational requirements for *construction managers* in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that they are an authority on those specific requirements. The opinion letters contain no evidence that they were based on scholarly research conducted by _____ or _____ in the specific area upon which they are opining. In reaching their conclusions, they provide no documentary support for their assertions regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies). They assert a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement. Notably, they failed to provide the basis for their conclusions supported by copies or citations of any research material used.⁸

The AAO may, in its discretion, use as advisory opinions or statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letters as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the opinion letters into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition

⁸ The AAO notes that the term recognized authority means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must include how the conclusions were reached, as well as the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In the instant case, the petitioner has not established 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 do not indicate that the 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 petitioner failed to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO reviews the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) 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. at 1102).

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 of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

As previously mentioned, the petitioner provided two opinion letters in support of the H-1B petition. However, for the reasons already discussed, the AAO discounts the opinion letters as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Thus, based upon a complete review of the record of proceeding, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

The AAO acknowledges that the petitioner and its counsel may believe that the proffered position qualifies as specialty occupation under this criterion of the regulations. In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted documents regarding its corporate status; printouts from its website; evidence regarding its business operations and projects entitled "Background Information"; the petitioner's business plan; and a printout of a local news story in which the petitioner's president is quoted. The petitioner also submitted opinion letters from [REDACTED] and [REDACTED] discussed at length above. The AAO reviewed the record of proceeding in its entirety. However, upon review of the record, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of construction manager.

A review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate 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, the AAO finds 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. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition, which indicates a Level I (entry level) wage. Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."⁹

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, including the LCA, 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

⁹ For additional information regarding wage levels as defined by DOL, see Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

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.

The AAO observes that the description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background and experience working in the construction industry will assist him in carrying out the duties of the proffered position. 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 duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner failed to 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. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The 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. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To satisfy this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. 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.

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 2006 and has one employee. The petitioner did not submit any documentation regarding its recruitment and hiring practices. It appears that the construction manager position is a new position. The record is devoid of information to satisfy this criterion of the regulations.

Upon review of the record of proceeding, the AAO finds 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).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its 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 a specific specialty or its equivalent.

The AAO acknowledges that in the appeal counsel claims that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. In support of the petition, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted the petitioner submitted documents regarding its corporate status; printouts from its website; evidence regarding its business operations and projects entitled "Background Information"; the petitioner's business plan; and a printout of a local news story in which the petitioner's president is quoted.¹⁰ The AAO reviewed the documentation submitted by the petitioner and finds that it fails to support the assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, the AAO also reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Construction Managers," and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a

¹⁰ As previously discussed, the petitioner and its counsel also submitted two opinion letters. The AAO addressed the letters earlier in the decision. As a reasonable exercise of its discretion the AAO discounts the advisory opinion letters as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, as previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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