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

(b)(6)

DATE: JUL 23 2013 OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: 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 (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
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.

On the Form I-129 visa petition, the petitioner describes itself as a software/IT services company established in 1996. In order to employ the beneficiary in what it designates as a human resources specialist position, 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 denied the petition, 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, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the 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, and the petition will be denied.

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. 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)(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;
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> *(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;
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> *(3)* The employer normally requires a degree or its equivalent for the position; or
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> *(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 illogical and absurd 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.

In the petition signed on November 18, 2011, the petitioner indicates that it is seeking the beneficiary's services as a human resources specialist on a full-time basis at the rate of $33,218 per year.[1] In the November 18, 2011 letter of support, the petitioner states that the beneficiary will be responsible for the following duties:

> Beneficiary will coordinate with the operations and business development team to assess business needs. She will use technical knowledge of the information technology field to ensure company policies and procedures are in compliance with standards of the industry. She will ensure the implementation of standard policies and make periodic reports to the management.
>
> Beneficiary will establish policies for screening candidates to ensure their qualifications meet open positions. She will coordinate with technical recruiters to develop methods for skills testing, employee development sessions and training. She will maintain records of reference checks and background investigations, supervisory reports and evaluations. Beneficiary will maintain excellent documentation with the company's on-line system as well as hard files within the Branch Office. She will

[1] The petitioner also submitted a document entitled "Summary of Terms of Oral Agreement." The document is dated November 18, 2011 and indicates that the beneficiary will be "compensated at the rate of $33,218.00/Year for 40 hours per week." The document continues by stating, "This contains the agreement between the parties. There are no other representations or agreements except as herein provided." The document is not signed.

The petitioner also provided a copy of its employee handbook. Section 8.1 states, "You received an Offer Letter, Stating your job classification, salary and all terms of your employment not covered by this Handbook. No Employee other than the Director of Human Resources or the President / Vice President of [the petitioning company] is authorized to sign an Offer Letter."

maintain employee information, such as personal data, compensation, benefits, and tax data; attendance; performance reviews and evaluations; and termination date and reason.

Beneficiary will demonstrate a thorough understanding of the US information technology personnel standards and procedures. She will use her knowledge of information technology to ensure appropriate policies are in place for managing technical resources. Additionally, Beneficiary will ensure proper labor relation and governmental compliance. She will evaluate and modify benefits policies to ensure that programs are current, competitive and in compliance with legal requirements.

The AAO observes that the petitioner did not state that the proffered position has any particular academic requirements.[2]

With the Form I-129 petition, the petitioner submitted a copy of the beneficiary's foreign diplomas and transcripts regarding her credentials in plastics engineering technology and polymer engineering, as well as a credential evaluation from . The evaluation contains two entries. The first entry indicates that the beneficiary's foreign education is the U.S. equivalent of a "[h]igh school diploma and associate degree," and the second entry indicates that the beneficiary has the U.S. equivalent of a bachelor's degree.

In addition, the petitioner 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 "Human Resources Assistants, Except Payroll and Timekeeping" - SOC (ONET/OES Code) 43-4161, at a Level II wage.

In support of the petition, the petitioner also submitted: (1) an organizational chart; (2) a copy of its Recruiting Training Manual; (3) documentation regarding its time sheets and performance appraisals; and (4) a copy of its Employee Handbook.[3]

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on March 7, 2012. The petitioner was asked to submit documentation to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted. Notably, the director acknowledged that the petitioner had submitted a job description, but notified the petitioner that it was not persuasive in establishing that the proffered

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[2] The petitioner does not claim that the position requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as the minimum requirement for entry into the occupation, as required by the Act.

[3] The AAO notes that the Employee Handbook states at section 7.4 that "[i]nterview bonuses will be given to our employees who help us out in technical screening of our candidates based either in India or the US." The Employee Handbook continues by stating that "[a]ny employee conducting interview / technical guidance on behalf of [the petitioner], of candidates based in India or the US, would be entitled to interview bonus" and will receive $50 per candidate for the first 20 candidates interviewed and $75 per candidate beyond the 20th candidate.

position is a specialty occupation. The director specifically requested that the petitioner provide a detailed statement to: explain the beneficiary's proposed duties and responsibilities; indicate the percentage of time devoted to each duty; state the educational requirements for these duties; and explain how the beneficiary's education relates to the position and indicate the courses taken that are relevant to the position.

On May 25, 2012, counsel responded to the director's RFE with a brief and additional evidence. In the brief, counsel provided a revised description of the duties of the proffered position, and the percentage of time the beneficiary would spend performing the duties of the position.[4] In addition, counsel submitted documents in support of the petition, including: (1) the petitioner's Form W-2 for 2011; (2) the petitioner's Federal Income Tax Return for 2010; (3) a letter from Jonatan Jelen; (4) job vacancy announcements; (5) H-1B approval notices for a different beneficiary along with documentation regarding her credentials and pay statements; and (6) a new LCA for the occupational category "Human Resources, Training, and Labor Relations" SOC (ONET/OES) Code 13-1078.[5]

The director reviewed the information provided by counsel to determine whether the petitioner had established eligibility for the benefit sought. 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 September 7, 2012. Counsel submitted an appeal of the denial of the H-1B petition.

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[4] The brief is printed on counsel's letterhead. It is noted that this revised description of the duties and requirements of the proffered position is not probative evidence as information was provided by counsel, not the petitioner. Counsel's brief was not endorsed by the petitioner and the record of proceeding does not indicate the source of the duties and responsibilities that counsel attributes to the proffered position. 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).

[5] The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). The AAO notes that the new LCA was certified over five months after the H-1B petition was submitted. Furthermore, the prevailing wage for the occupational category "Human Resources, Labor Relations, and Training Specialists, All Other" – SOC (ONET/OES) Code 13-1078 for a Level I position was $42,245 per year at the time the petition was submitted. On the Form I-129 petition and offer letter for the beneficiary, the petitioner states that the beneficiary will be compensated at the rate of $33,218 per year for full-time employment.

The database entry for the occupational category "Human Resources Specialists" includes the O*NET occupations falling under the SOC (ONET/OES) Codes 13-1071 and 13-1079. Notably, in response to the RFE, counsel states the following regarding this entry: "Human Resources Specialist (13-1071): This offers a combination of several positions that do not include the duties the Beneficiary will be performing."

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To make this determination, the AAO turns to the record of proceeding. To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition 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."

Upon review of the record of proceeding, the AAO notes that the petitioner did not state that there are any particular requirements for the proffered position.[6] The petitioner simply claims that the beneficiary is qualified for the position. USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].")

In response to the RFE, counsel stated that "[t]he petitioner is looking for a qualified candidate with a baccalaureate degree in Engineering and related experience in Human Resources to perform the required job duties." The AAO notes that, in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes

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[6] As previously noted, the petitioner submitted copies of the beneficiary's academic credentials and an educational evaluation. The petitioner did not submit documentation substantiating the beneficiary's work experience.

how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Here, counsel claims that "[t]he petitioner is looking for a qualified candidate with a baccalaureate degree in Engineering and related experience in Human Resources to perform the required job duties."[7] It must be noted that counsel's claim that a bachelor's degree in engineering is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. The field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is directly related to the duties and responsibilities of the particular position proffered in this matter.

Here, the petitioner, who bears the burden of proof in this proceeding, simply fails to establish that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that normally the minimum requirement for entry into the particular position proffered in this matter is a bachelor's or higher degree *in a specific specialty*, or its equivalent, under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty,* or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

Therefore, absent evidence of a direct relationship between the claimed degree required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.[8]

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[7] In response to the RFE, the petitioner submitted documentation regarding [redacted] The petitioner claims that Ms. [redacted] serves as a human resource specialist. Notably, the educational evaluation for Ms. [redacted] indicates that she possesses "the equivalent of a Bachelor of Arts degree in Education." There is no evidence that Ms. [redacted] possesses a degree in engineering. The petitioner did not submit any documentation regarding Ms. [redacted]'s prior experience.

[8] Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

> [t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of*

In addition, based upon a review of the record of proceeding, the AAO finds that there are discrepancies and inconsistencies in the record of the proceeding with regard to the proffered position.

As previously discussed, the petitioner submitted an LCA with the H-1B petition that designated the proffered position under the corresponding occupational category of "Human Resources Assistants, Except Payroll and Timekeeping" - SOC (ONET/OES) code 43-4161.[9] In response to the RFE, counsel states that the occupational category "Human Resources Assistant (43-4161): This job is the most appropriate for the duties the Beneficiary will be performing." Counsel continues by stating, "It is our belief that the LCA filed with the petition [for the occupational category "Human Resources Assistants, Except Payroll and Timekeeping"] was correct in that it is more closely aligned with the job duties the Beneficiary will perform at [the petitioner's]."[10]

The wage level for the proffered position in the LCA corresponds to a Level II position. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.[11] The LCA was certified on November 9, 2011, and signed by the petitioner on November 18, 2011. The AAO notes that by

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> *Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: elsewise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

[9] In response to the RFE, the petitioner claimed that Ms. serves as a human resource specialist. Counsel stated that a copy of her "educational qualifications, LCA, prior approval notices, and paystubs" were included with the submission. The AAO reviewed the LCA (purportedly for human resources specialist position submitted on behalf of Ms. and notes that it indicates that the position falls under the occupational category "Human Resources, Training, and Labor Relations" SOC (ONET/OES)Code 13-1078. No explanation was provided.

[10] The petitioner classified the proffered position in the LCA under the occupational category "Human Resources Assistants, Except Payroll and Timekeeping" and counsel repeatedly asserted in the RFE response that this was the correct occupational category. Thereafter, in the appeal counsel states, "Nowhere did we declare the position was that of an H.R. Assistant or even similar to an H.R. Assistant." No explanation was provided. 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).

[11] The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. *See* Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at http://www.bls.gov/oes/. The OES All Industries Database is available at the Office of Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at http://www.flcdatacenter.com/.

completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) occupational 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.[12]

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 worker) 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.[13] 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 "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level II wage rate is described by DOL 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.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy*

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[12] For additional information regarding prevailing wages, *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.

[13] 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.

Guidance, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

As noted above, a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones would be an indication that a wage determination at Level II would be proper classification for a position. The occupational category "Human Resources Assistants, Except Payroll and Timekeeping," has been assigned an O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, most occupations in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." *See* O*NET OnLine Help Center, at http://www.onetonline.org/help/online/zones, for a discussion of Job Zone 3.

The petitioner designated the proffered position as a Level II position. This suggests that the petitioner's academic and/or professional experience requirements for the proffered position would be "training in vocational schools, related on-the-job experience, or an associate's degree" as stated for occupations designated as O*NET Job Zone 3. However, as previously discussed, according to counsel, "The petitioner is looking for a qualified candidate with a baccalaureate degree in Engineering and related experience in Human Resources to perform the required job duties."

In the instant case, counsel claims that the duties of the proffered position are complex, unique and/or specialized.[14] For instance, in response to the director's RFE, counsel states that "[i]n order

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[14] The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." Level III and a Level IV wage rates are described 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.
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> Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as 'lead' (lead analyst), 'senior' (senior programmer), 'head' (head nurse), 'chief' (crew chief), or 'journeyman' (journeyman plumber) would be indicators that a Level III wage should be considered.
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> **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.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*,

to facilitate the company's growth, a Human Resources Specialist with expertise and knowledge in engineering and human resources or related fields is needed to assist with recruitment of qualified persons, maintain highly technical systems and procedures, and perform HR related duties." In addition, counsel claims the proffered position combines the duties of the occupations "relating to human resources management" and "adds the further dimension of utilizing knowledge of information technology." According to counsel, the "job duties are dispositive in this instance where the employer requires her to understand concepts and perform skills more in line with training that takes place at the Bachelor's level." Counsel continues by claiming that "[i]n our to facilitate the company's growth, a Human Resource Specialist with expertise and knowledge in engineering and human resources or related fields is needed." Counsel further claims that the proffered position "maintain[s] highly technical systems and procedures, and performs HR related duties." Counsel states that "it is imperative that the Human Resources Specialist have knowledge of IT systems and technical knowledge." Moreover, counsel claims that the position is "an essential position that carries tremendous responsibilities" and asserts that the company's success is dependent upon the proffered position. Counsel claims that the specific duties of the proffered position "can only be accomplished by an individual with particular knowledge obtained through higher education and work experience." As previously discussed, counsel asserts that the position requires a degree in engineering and related experience in human resources.

In addition, the petitioner submitted an organizational chart with the initial petition. The chart depicts the hierarchy of the petitioner's organization, including the position of human resources specialist. The proffered position reports to the human resources manager. When reviewing the placement of the proffered position, the AAO notes that there is one position that is more junior than the human resources specialist position, which is the human resources assistant position.[15]

The AAO notes that this characterization of the position and the claimed duties, responsibilities and requirements conflict with the wage rate element of the LCA, which, as reflected in the discussion above, is indicative of a comparatively low-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 attained, either through education or experience, a good understanding of the occupation. Furthermore, she will be expected to perform moderately complex tasks that require limited judgment.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information

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Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

[15] Notably, a slightly revised organizational chart was submitted in response to the RFE. The revised version indicates that , HR Specialist, serves in a position that is depicted as less senior to the proffered position. The petitioner reports that Ms. has served in the position for over 10 years and that her salary is significantly higher than the salary offered to the beneficiary. No explanation was provided.

available as of the time of filing the application. *See* section 212(n) of the Act, 8 U.S.C. 1182(n). The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment.

Moreover, the prevailing wage of $33,218 per year on the LCA corresponds to a Level II for the occupational category of "Human Resources Assistants, Except Payroll and Timekeeping" for New Jersey).[16] Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been $38,376 per year for a Level III position, and $43,555 per year for a Level IV position.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it would pay an adequate salary to the beneficiary as required under the Act, if the petition were granted. Thus, even if it were determined that the petitioner overcame the director's ground for denying the petition (which it has not), for this reason also the H-1B petition cannot be approved. It is considered an independent and alternative basis for denial.

The AAO also notes that this aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of counsel'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. 591-92.

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 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

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[16] For additional information regarding the prevailing wage for "Human Resources Assistants, Except Payroll and Timekeeping" in *see* the All Industries Database for 7/2011 - 6/2012 for this occupational category at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at http://www.flcdatacenter.com/OesQuickResults.aspx?code=43-4161&area=20764&year=12&source=1 (last visited July 17, 2013).

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

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

(Italics added.) 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 II 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.

For the foregoing reasons, a review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner and counsel ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial, the petition could still not be approved.

The AAO will now address 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 efficiency's sake, the AAO hereby incorporates the above discussion and analysis into the record of proceeding regarding the beneficiary's proposed employment.

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 make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) and (*2*): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a

degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether DOL's *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[17] As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Human Resources Assistants, Except Payroll and Timekeeping."[18]

The occupational category "Human Resources Assistants" is found in the chapter entitled "Information Clerks" of the *Handbook*. The AAO reviewed the chapter of the *Handbook* entitled "Information Clerks," including the sections regarding the typical duties and requirements for this occupational category.[19] However, the *Handbook* does not indicate that "Information Clerks" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

In the chapter regarding "Informational Clerks," the *Handbook* provides the following information about human resources assistants:

> **Human resources assistants** provide administrative support to human resource departments. They keep personnel records, collecting information about employees, such as their addresses, employment history, and performance evaluations. They post information about job openings and review the resumes and applications of candidates for employment to ensure that they are eligible for the positions for which they have applied.

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[17] The *Handbook*, which is available in printed form, may also be accessed on the Internet, at http://www.stats.bls.gov/oco/. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

[18] With regard to the occupational category "Human Resources Specialists," counsel stated that the occupation "offers a combination of several positions that do not include the duties the Beneficiary will be performing."

[19] For additional information regarding the occupational category "Information Clerks," *see* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Information Clerks, on the Internet at http://www.bls.gov/ooh/office-and-administrative-support/information-clerks.htm#tab-1 (last visited July 17, 2013).

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Information Clerks, available on the Internet at http://www.bls.gov/ooh/Office-and-Administrative-Support/Information-clerks.htm#tab-2 (last visited July 17, 2013).

The *Handbook* states, in part, the following about the requirements for this occupational category:

> A high school diploma is enough for most positions, but some employers prefer workers who have some education beyond high school.
>
> **Education**
> A high school diploma is generally enough for most positions as an information clerk. However, some employers prefer to hire candidates who have some college education or an associate's or higher degree.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Information Clerks, available on the Internet at http://www.bls.gov/ooh/Office-and-Administrative-Support/Information-clerks.htm#tab-4 (last visited July 17, 2013).

When reviewing the *Handbook*, the AAO must again note that the petitioner designated the proffered position as a Level II position (out of four possible wage-levels). This designation is indicative that the beneficiary is expected to have a good understanding of the occupation and that she will perform moderately complex tasks that require limited judgment relative to others within the occupation. Thus, based upon the wage level designated by the petitioner in the LCA, the proffered position does not appear to be a particularly high-level or senior position.

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* reports that a high school diploma is sufficient for most positions. In addition, the *Handbook* reports that some employers prefer to hire candidates who have some college education or an associate's or higher degree. Obviously, a *preference* for a particular level of education does not indicate a requirement. Thus, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

The AAO notes that counsel submitted copies of H-1B approval notices for another individual as evidence that USCIS has previously approved H-1B petitions submitted by the petitioner. Notably, the petitioner and counsel did not submit copies of the Form I-129 petitions and supporting documents. If a petitioner wishes to have unpublished service center or AAO decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i).

Again, the petitioner in this case failed to submit copies of the petitions. As the record of proceeding does not contain copies of the petitions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding.

When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, the AAO was not required to request and/or obtain copies of the petitions cited by counsel.

Nevertheless, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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. As previously noted, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition 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. 165 (*citing Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Upon review of the record, 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 criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, the AAO will review the record 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.

As stated earlier, 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

Here and as already 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 professional associations or similar firms in the petitioner's industry attesting that a minimum of a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in positions parallel to the proffered position.

In response to the director's RFE, counsel submitted copies of job advertisements in support of the assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, upon review of the documents, the AAO finds that such reliance on the job announcements is misplaced.

In the Form I-129 and supporting documents, the petitioner stated that it is a software/IT services company established in 1996. The petitioner further stated that it has 126 employees and a gross annual income of $37 million. The petitioner also stated its net annual income as $415,000. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541511.[20] The AAO notes that this NAICS code is designated for "Custom Computer Programming Services." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

> This U.S. industry comprises establishments primarily engaged in writing, modifying, testing, and supporting software to meet the needs of a particular customer.

[20] According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. *See* http://www.census.gov/eos/www/naics/ (last visited July 17, 2013).

U.S. Dep't of Commerce, U.S. Census Bureau, 2007 NAICS Definition, 541511 – Custom Computer Programming Services, on the Internet at http://www.census.gov/cgi-bin/sssd/naics/naicsrch (last visited July 17, 2013).

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

Notably, the petitioner and counsel did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documentation, the petitioner fails 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.

For instance, counsel submitted job postings for (staffing firms) for which little or no information regarding the employers is provided. Consequently, the record is devoid of sufficient information regarding the advertising employers to conduct a legitimate comparison of the organizations to the petitioner.

Furthermore, the advertisements include positions with (a company in the healthcare services, and medical devices and supplies industries), (the company's mission is described as " (a company that "help[s] small and medium-sized businesses provide the best possible benefits and advantages to their employees"), ("an international designer and manufacturer of tunnel boring machines and related equipment"), (a company that "design[s] and manufacture[s] systems, services, and products for protection, monitoring, control, automation and metering of utility and industrial electric power systems worldwide"), (a company that "provides automated packaging machinery and robotic packaging equipment for the secondary packaging of today's largest and most well-known food and beverage brands"), and a company that "develops, manufactures and markets premium skin and hair care products sold worldwide and recommended by medical professionals"), (a company that "operates in the industrial services segment of the petroleum and petrochemical market as a

consulting and engineering firm"), and ("one of the premier human resources solutions in North America"). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and/or not in the same industry, and the petitioner has not provided sufficient probative evidence to establish otherwise. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided sufficient information regarding which aspects or traits (if any) it shares with the advertising organizations.

Moreover, some of the advertisements do not appear to be for parallel positions. For example, the position with requires a degree and a "[m]inimum [of] 5 years [of] experience in generalist HR in a corporate environment (2 years [of] experience with recruitment and staffing)." In addition, counsel provided a posting by which requires a degree and "5-7 year[s] minimum Human Resource generalist experience with emphasis on employee relations preferred." Counsel also provided a posting by that requires a degree and "5-7 years of HR experience, some of it in a manufacturing environment." Further, counsel submitted an advertisement by , which requires a degree and a "minimum of 5 years [of] related experience." Moreover, the position with requires a degree, plus "a minimum of 5 years of human resources experience." Counsel also provided an advertisement from which requires a degree and "at least 5 years of recent Human Resources experience." As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level II position. The advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For instance, some of the postings state that a bachelor's degree is required, but they do not provide any further specification. These include the following advertisements: [21] Thus, they do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the duties of the position is required.[22]

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[21] The posting for lists the qualifications for the advertised position as a "[m]inimum of a Bachelor [sic] Degree required; preferably in Human Resources Management, Training and Development or Industrial Psychology with emphasis in Employee Relations and/or Organizational Development (OD), business, operations, engineering or any other related discipline." As previously noted, a *preference* is not an indication of a *requirement* for a degree in a particular discipline.

[22] Furthermore, many of the advertisements state that a range of disparate fields are acceptable. Again, since there must be a close correlation between the required "body of highly specialized knowledge" and the position, a minimum entry requirement of a degree in disparate fields would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

Notably, in response to the RFE, counsel provided a list of the job postings and claimed that the proffered position qualifies as a specialty occupation under this criterion of the regulations. In support of this assertion, counsel claimed that the job postings state that a bachelor's degree (no specific specialty) is required. The AAO here reiterates 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 AAO reviewed the advertisements submitted in support of the petition.[23] However, as discussed, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry for parallel positions in organizations similar to the petitioner.

It must be noted that even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty (or its equivalent) is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.

That is, although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

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

In support of the proffered position qualifying as a specialty occupation, the petitioner provided a letter from [redacted] in response to the RFE. The letter is dated May 17, 2012. In the letter, Mr. [redacted] states that the proffered position is a specialty occupation and, therefore, "requires the

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[23] As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

theoretical and practical application of an advanced highly specialized body of knowledge in the field of Human Resources Management, which requires the attainment of at least a Bachelor's degree or its equivalent as the minimum requirement for entry into the occupation." In addition, Mr. states that "the degree is considered an industry standard requirement for the position."

Mr. provided a summary of his education and experience.[24] He described his qualifications, including his professional experience. Based upon a complete review of Mr. s letter, the AAO notes that, while Mr. may be a recognized authority on various topics, he has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. Mr. claims that he is qualified to comment on the position of human resources specialist because of the positions he holds at various universities and colleges, as well as his professional experience. However, without further clarification, it is unclear how his experience would translate to expertise or specialized knowledge regarding the current hiring practices of software/IT services companies in the custom computer programming services industry (as designated by the petitioner in the Form I-129 and with the NAICS code) similar to the petitioner for human resources specialist positions (or parallel positions).

Mr. s opinion letter does not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for *human resources specialists* (or parallel positions) *in the petitioner's industry for similar organizations*, and no indication of recognition by professional organizations that he is an authority on those specific requirements. The opinion letter contains no evidence that it was based on scholarly research conducted by Mr. in the specific area upon which he is opining. In reaching this determination, Mr. provides no documentary support for his ultimate conclusion regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies). Mr. asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement. His statements are not supported by copies or citations of the research material used.[25]

Upon review of the opinion letter, there is no indication that Mr. possesses any knowledge of the petitioner's proffered position beyond the job description. The fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. Mr. does not demonstrate or assert 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. His opinion does not relate his conclusion to specific, concrete

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[24] Mr. 's letter states, "For a detailed statement of qualifications and experience of evaluator, see attached resume." Notably, the resume was not provided to USCIS by the petitioner.

[25] 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).

aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. There is no evidence that Mr. has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Mr. provides general conclusory statements regarding human resource specialist positions, but he does not provide a substantive, analytical basis for his opinion and ultimate conclusions.

Also, it does not appear that the petitioner and its counsel informed Mr. that the petitioner designated the proffered position under the occupational category "Human Resources Assistants, Except Payroll and Timekeeping" as a Level II position on the LCA, indicating that it is a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. Furthermore, there is no indication that Mr. was notified that the occupational category chosen by the petitioner for the proffered position is designated under the category of O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. As previously noted, most occupations in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." *See* O*NET OnLine Help Center, at http://www.onetonline.org/help/online/zones, for a discussion of Job Zone 3. It appears that Mr would have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that Mr. 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.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the advisory opinion rendered by Mr. is not probative evidence to establish the proffered position qualifies as a specialty occupation. The conclusions reached by Mr. lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. There is an inadequate factual foundation established to support the opinion and the AAO finds that the opinion is not in accord with other information in the record.

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, and for the reasons discussed above, the AAO finds the advisory opinion letter 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 Mr. 's opinion letter into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2)

located in organizations that are similar to the petitioner. 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.

To begin with and as discussed previously, the petitioner itself does not require a baccalaureate or higher degree in a specific specialty, or its equivalent. In addition, the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. Furthermore, the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

In the instant case, the record of proceeding contains information regarding the petitioner's business operations, including an organizational chart; the petitioner's Employee Handbook and Recruiting Training Manual (as well as related materials); the petitioner's Form W-2 for 2011 and Federal Income Tax Return for 2010; and a letter from Mr. Upon review of the record of proceeding, the AAO finds that the petitioner failed 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 of the proffered position. While related courses may be beneficial, or in some cases even essential, 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 particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Human Resources Assistants, Except Payroll and Timekeeping" at a Level II wage (and O*NET Job Zone 3). This designation indicates that it is a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. 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 instance, 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."[26]

Therefore, the evidence of record does not establish that this position is significantly different from

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[26] For additional information on wage levels, *see* U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), *available at* http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

other positions such that it refutes the *Handbook's* information to the effect that a bachelor's degree in a specific specialty, or its equivalent, is not normally required for entry into such positions. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than similar 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 will assist her 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. The petitioner and counsel do not sufficiently explain or clarify 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. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this prong of the criterion at 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 merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that 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").

To satisfy this criterion, the evidence of record must show that the specific performance

requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

As previously noted, counsel submitted copies of H-1B approval notices as evidence that USCIS has previously approved H-1B cases submitted by the petitioner. As previously discussed, the petitioner and counsel did not submit copies of the prior H-1B petitions and the respective supporting documents. As the record of proceeding does not contain sufficient evidence of the prior petitions to determine whether they are the same position, there are no underlying facts to be analyzed and, therefore, no prior, substantive reasons could have been provided to explain why deference to the approval of the prior H-1B petitions were not warranted. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act.

In response to the director's RFE, counsel claims that the petitioner "employs one other person as a Human Resources Specialist." In support of this assertion, counsel submitted pay statements issued to [redacted] along with a copy of her foreign academic credentials and a credential evaluation from The [redacted][27] Notably, the pay statements indicate that Ms. [redacted] is being paid at the rate of $20.59 per hour ($42,827.20 per year). The rate of pay for Ms. [redacted] is significantly higher than the offered salary to the beneficiary of $15.97 per hour ($33,218 per year). Based upon the rate of pay, it appears that Ms. [redacted] is employed in a more senior position. However, the organizational chart (submitted in response to the RFE) indicates that the proffered position is more senior than the position occupied by Ms. [redacted]. No explanation was provided.

Moreover, the academic evaluation for Ms. [redacted] indicates that she possesses the educational equivalent of a Bachelor of Arts degree in Education. The documentation does not support the assertion that a baccalaureate degree in engineering is required for the human resources specialist position (as claimed by counsel) or that a bachelor's degree in human resources management is necessary to perform the job duties (as reported by [redacted]).

The petitioner stated in the Form I-129 petition that it has 126 employees and that it was established

[27] It must be noted that some of the foreign academic credentials are issued to "[redacted]" The petitioner nor counsel have established that [redacted] and [redacted] are the same person.

in 1996 (approximately 15 years prior to the H-1B submission). Consequently, it cannot be determined how representative the petitioner's claim regarding *one individual over a 15 year period* is of the petitioner's normal recruiting and hiring practices. It must be noted that without further information, the submission of *the educational credentials of one individual* (who has a degree in education) is not persuasive in establishing that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

Upon review of the record, the petitioner has not provided sufficient 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 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.

As previously noted, the petitioner provided information regarding its business operations, including an organizational chart; its Employee Handbook and Recruiting Training Manual (and related materials); its Form W-2 for 2011 and Federal Income Tax Return for 2010; and a letter from Mr. . However, upon review of the record of the proceeding, the AAO finds that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. That is, the petitioner has not presented the proposed duties with sufficient specificity and substantive content to establish relative specialization and complexity as distinguishing characteristics of the duties of the proffered position, let alone that they are at a level that would require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, also, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge requiring attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

In this regard, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level II position (out of four possible wage-levels). Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, 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" and requires a significantly higher wage.

Again, the AAO acknowledges that the petitioner submitted an opinion letter from Mr. . However, as discussed in detail, the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

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.

A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner has failed to establish that the proffered position requires a baccalaureate or higher degree in a specific specialty, or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

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 (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. Here, that burden has not been met.

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