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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: SEP 0 4 2013 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, ("the director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner on the Form I-129, Petition for a Nonimmigrant Worker, describes its business as a "Chain of Three Hotels, Liquor Store, and Convenience Stores." The petitioner states that it was established in 2004, currently employs 22 personnel in the United States, and reported a gross annual income of $4,500,000 when the petition was filed. It seeks to continue the employment of the beneficiary as a financial controller and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition determining that the petitioner had not provided evidence sufficient to establish that the proffered position is a specialty occupation. The director also noted that the petitioner had not provided a valid Labor Condition Application (LCA) for the beneficiary's duty location.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for a Nonimmigrant Worker, 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) Form I-290B, Notice of Appeal or Motion, counsel's brief, and additional documentation.

Preliminary Issue Proscribing Approval of the Petition

As a preliminary matter, a review of the record demonstrates a more critical issue pertaining to the petitioner's eligibility to extend its employment of the beneficiary in H-1B status. Specifically, the petition must be denied as it was filed after the expiration of the petition it sought to extend. *See* 8 C.F.R. § 214.2(h)(14) (stating that a "request for a petition extension may be filed only if the validity of the original petition has not expired"). In this matter, the petition that the petitioner is seeking to extend [redacted] expired on September 30, 2011. The instant petition was filed on Wednesday, October 12, 2011, 12 days after the original petition's expiration.

As opposed to a discretionary extension of stay application, there is no discretion to grant a late-filed petition extension. In this matter, the director did not raise this issue in the denial and, thus, it appears that the director may have erroneously exercised favorable discretion to the petitioner under the provisions of 8 C.F.R. § 214.1(c)(4)(i). The director's error is harmless, however, because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility, and the omission of this non-discretionary ground for denial did not result in the improper granting of a benefit in this matter, i.e., the error did not change the outcome of this case. *See Soltane v. DOJ,* 381 F.3d 143, 145 (3d Cir. 2004); *Black's Law Dictionary* 563 (7th Ed., West 1999) (defining the term "*harmless error*" and stating that it is not grounds for reversal).

As noted above, the petition must be denied as it was filed after the expiration of the petition it sought to extend. *See* 8 C.F.R. § 214.2(h)(14). This non-discretionary basis for denial renders the

remaining issues in this proceeding moot. For this reason alone, the appeal must be dismissed and the petition denied.

Upon review of the entire record of proceeding, even if the remaining issues in this proceeding were not moot, however, the AAO finds that the petitioner has failed to overcome the director's stated grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will remain denied for these additional reasons, *infra*.

Facts and Procedural History

In the October 7, 2011 letter in support of the petition, the petitioner stated that it is organized into various departments, one of which is a financial department. The petitioner noted that it wishes to continue the beneficiary's employment as a financial controller in charge of all aspects of finance and investments. The petitioner noted further that the beneficiary will retain overall responsibility for the finance department. The petitioner listed the beneficiary's proposed duties in the letter in support of the petition and in an addendum to the Form I-129 petition. In the addendum, the petitioner also allocated the time the beneficiary will spend performing the duties of the position as follows:

- Preparation of reports which summarize and forecast our financial position relating to income, expenses, and earnings based on past, present and expected operations - 3 percent.
- Financial planning and investment of funds with some elements of market analysis – 15 percent.
- Preparation of financial information, including tax information, financial statement data, business activity reports, financial forecasts, annual budgets and reports required by regulatory agencies – 15 percent.
- Supervise employees performing financial reporting, accounting, billing, collections, payroll and budgeting duties – 15 percent.
- Delegate authority for the receipt, disbursement, banking, protection and custody of funds, securities and financial instruments – 10 percent.
- Maintain current organization policies and procedures, Federal and State policies and direct current accounting standards – 8 percent.
- Conduct and coordinate audits of company accounts and financial transactions to ensure compliance with state and Federal requirement and Statutes – 15 percent.
- Receive and record request for disbursement, authorize disbursements in accordance with policies and procedures, and monitor financial activities ensuring reserve levels meet all legal and regulatory requirements – 5 percent.
- Monitor and evaluate the performance of accounting and other financial staff, recommend and implement personnel actions such as promotions and dismissals – 3 percent.
- Develop and maintain relationships with banking, insurance and non-organizational accounting personnel in order to facilitate financial activities – 5 percent.

- Make market analysis of the market and other competitors – 6 percent.

The petitioner stated that the position offered requires the services of an individual who possesses a bachelor's degree in financial accounting and auditing and has prior experience as a financial controller as well as knowledge of accounting. The petitioner also included the required LCA which indicates that the occupational classification for the position is "Financial Managers," with the SOC (ONET/OES) Code 11-3031, at a Level I (entry-level) wage. *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. The LCA identified the beneficiary's work location as [redacted] The LCA was certified on October 6, 2011, for a validity period from October 1, 2011 to September 30, 2014. The LCA was signed on behalf of the petitioner by its managing partner on October 7, 2011.

Upon review of the initial record, the director requested additional information from the petitioner to demonstrate that the position's duties constitute the duties of a specialty occupation. The director also requested clarification of the beneficiary's work location as the work location identified on the LCA appeared to be a residential dwelling.

In response, the petitioner clarified the nature of its business by indicating that it owns and operates three chain hotels, one liquor store, and three convenience stores. The petitioner also noted that the beneficiary's work location is [redacted] and that the [redacted] address was only a temporary mailing address for the business. The petitioner repeated the previously provided job description. The petitioner also provided: copies of income statements, inventory statements, and profit and loss statements for the petitioner's properties; quarterly performance reports for portions of 2009, 2010, and 2011 evaluating employees in the positions of manager, cashier, trainee, and clerk; and a market analysis report on convenience stores and energy drinks taken from an Internet source and projections regarding a car wash project. The record also included photographs of hotels and convenience stores.

Upon review, the director denied the petition. The director determined that the petitioner had not established the proffered position is a specialty occupation. The director specifically found, in part, that the petitioner had copied the beneficiary's purported duties from the U.S. Department of Labor's (DOL) Occupational Information Network's (O*NET) description of a finance manager and had not described the duties of its particular position. The director also questioned the authorship of the market analysis report submitted and determined that the financial reports and the car wash proposal were insufficient to establish the proffered position as a specialty occupation. The director concluded that the evidence of record failed to support the petitioner's claim that the proffered position is a specialty occupation.

The director again noted that the record did not include a valid certified LCA for the beneficiary's work location and indicated that the petitioner must provide an LCA for the duty location in [redacted] that was certified prior to the filing of the petition if it appealed the decision.

On appeal, counsel for the petitioner first asserts that the LCA filed and submitted with the petition was prepared by its prior counsel who had been ill. Counsel submits two letters from its prior counsel's doctors stating that he had been ill. Counsel contends that the error in the duty location on the LCA was due to prior counsel's illness and had not been noticed by the petitioner's representative. The petitioner submits a new LCA certified January 16, 2013, a date subsequent to the filing date of the instant petition, and requests that the new LCA be accepted due to exceptional circumstances.

Counsel also asserts that the petitioner has provided evidence that the combination of duties to be performed for the position is so complex that the position is a specialty occupation. Counsel avers that the petitioner's minimum requirement to perform the duties of the position is a master's degree in business administration, which counsel alleges is a specific degree requirement. Counsel also states, however, that the petitioner's minimum requirement to perform the duties of the position is a bachelor's degree in business administration. Counsel contends that the petitioner in this matter has not indicated that a broad range of degrees is acceptable to perform the duties of the proffered position but rather "only one as the specific preparation for this position in supply chain management." In addition, counsel references DOL's *Occupational Outlook Handbook's* (*Handbook*) chapters on financial managers, accountants, and economists to demonstrate that several closely related degrees are acceptable to perform the duties of these positions.[1] Counsel reiterated that the duties of the proffered position include "analyzing and producing financial reports, financial planning, supervising employees and delegating bookkeeping functions, coordinating the banking relationships and maintaining policies and procedures." Counsel claims that the duties of the proffered position incorporate a combination of the duties of a financial controller and a market analyst and that the combination of duties is so complex that the position is a specialty occupation. Counsel also asserts that the degrees set out in the *Handbook* for financial managers are degrees of "business specialties" as set out in the regulations.

Analysis

The primary issue on appeal is whether the 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 following statutory and regulatory requirements.

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

> (A) theoretical and practical application of a body of highly specialized knowledge, and

[1] When the AAO references the *Handbook*, the references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site http://www.bls.gov/OCO/.

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

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

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

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this 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.

As a preliminary matter with regard to the specialty occupation issue, the AAO notes that the lack of evidence in the record with regard to the proposed job duties of the proffered position renders it impossible to ascertain what the beneficiary will actually do on a day-to-day basis. Specifically, the petitioner states that the beneficiary will: (1) spend 15 percent of his time supervising employees performing financial reporting, accounting, billing, collections, payroll and budgeting duties; (2) 10 percent of his time delegating authority for the receipt, disbursement, banking, protection and custody of funds; (3) three percent of his time monitoring and evaluating the performance of accounting and other financial staff; and (4) five percent of his time developing and maintaining relationships with banking, insurance and non-organizational accounting personnel. The petitioner, however, provides no corroborating evidence that it employs other accounting or financial staff including billing, collections, and payroll clerks. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The only employees even listed as being possibly supervised or evaluated by the beneficiary are managers, cashiers, and trainees. The petitioner offers no evidence as to the duties of these individuals and whether they perform the necessary daily bookkeeping duties of the petitioner's organization such that they would relieve the beneficiary from having to perform these lower-level tasks. The printouts regarding a gas station/liquor store and a car wash do not

depict the authorship of the studies and, upon review, fail to demonstrate that they were produced by the beneficiary or any of his claimed subordinates. Accordingly, the petitioner has failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

Nevertheless, assuming, *arguendo*, that the proffered duties as described by the petitioner would in fact be the duties to be performed by the beneficiary, the AAO will nevertheless analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation. To that end and to make its determination as to whether the employment described in the petition qualifies as a specialty occupation, the AAO turns next to the whether the proffered position meets the basic elements of the statutory and regulatory definition of the term "specialty occupation."

Counsel asserts that although the *Handbook* reports that the educational qualifications for a financial manager include different degrees, the different degrees are all degrees of "business specialties." Accordingly, counsel implies that the degrees are included in the regulatory definition of specialty occupation at 8 C.F.R. § 214.2(h)(4)(ii).[2] As stated above, 8 C.F.R. § 214.2(h)(4)(ii) reads as follows (second italics added):

> *Specialty occupation* means an occupation which 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 requires the

[2] The *Handbook* reports that a "bachelor's degree in finance, accounting, economics, or business administration is often the minimum education needed for financial managers. However, many employers now seek candidates with a master's degree, preferably in business administration, finance, or economics." *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Financial Managers," http://www.bls.gov/ooh/management/financial-managers.htm#tab-4 (last visited August 30, 2013).

> 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.

Contrary to counsel's implied assertion, a position that accepts degrees in finance, accounting, or economics is not by default a specialty occupation just because these degrees may fall within the broad parameters of "business specialties." While highly specialized knowledge in business specialty fields is referenced in 8 C.F.R. § 214.2(h)(4)(ii), such a reference does not mean that a petitioner, by merely stating that it requires at least a bachelor's degree or higher in financial accounting and auditing, has demonstrated that the proffered position is a specialty occupation.[3] The petitioner must also satisfy the remaining parts of the regulatory definition of specialty occupation by submitting corroborating evidence that (1) the proffered duties entail the theoretical and practical application of a body of highly specialized knowledge and (2) the position requires at least a bachelor's degree in a *specific specialty* or its equivalent for entry into the occupation in the United States. *Id.*

Further, while 8 C.F.R. § 214.2(h)(4)(ii) lists "business specialties" as an example of a field in which the application of highly specialized knowledge may be required, the regulation does not state that an occupation in this field meets this first criterion by default. Even if it did, a general business degree without a concentration or specialization is not a degree in a business specialty. According to *Webster's New College Dictionary* 1085 (3rd ed. 2008), specialty means both "[a] special occupation, pursuit, aptitude, or skill. . . ." and "[a] special feature or characteristic." Of all the fields listed as examples in the regulation, only business has the word "specialties" written after it, which means that the regulation was not intended to include business generally as an example of those fields entailing a theoretical and practical application of a body of highly specialized knowledge.[4] Upon review, the record in this matter does not include a position

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[3] In this matter, the petitioner initially stated that the position offered to the beneficiary required a bachelor's degree in financial accounting and auditing and prior experience as a financial controller as well as knowledge of accounting. On appeal, counsel for the petitioner asserts that the petitioner's minimum requirement to perform the duties of the position is a *master's degree* in business administration, which is a specific degree requirement. However, in the same brief counsel also states that the petitioner's minimum requirement to perform the duties of the position is a *bachelor's degree* in business administration. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight, the AAO will consider the petitioner's statement of its requirements for the position, not counsel's inconsistent statements. *See e.g. INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

[4] On the other hand, if the regulation at 8 C.F.R. § 214.2(h)(4)(ii) were somehow read as stating that any position found to be within a field of human endeavor qualifies as a specialty occupation, it would effectively render any occupation a specialty occupation, e.g., a nursing aide within the field of medicine, even when such a position has not been established as meeting the statutory and regulatory definition of the term "specialty occupation" at section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Such a result is not permitted as it would not give the law its full and desired effect. Instead, this provision must be read as stating a necessary but not necessarily sufficient criterion for establishing a proffered position

description that describes duties and tasks that demonstrate that the proffered position requires the theoretical and practical application of highly specialized knowledge, contrary to counsel's assertion. As such, the petitioner has failed to establish that the proffered position meets the first criterion of the statutory and regulatory definition of specialty occupation. § 214(i)(1)(A) of the Act; 8 C.F.R. § 214.2(h)(4)(ii).

The record lacks specific information or examples demonstrating what advanced theories are necessary to perform the routine tasks initially set out in the petitioner's description. Upon review of the duties of the proffered position, there is an overriding lack of information and detail for a conclusion that the duties of the proffered position require the theoretical and practical application of a body of highly specialized knowledge which requires the attainment of a bachelor's degree or higher in a specific specialty. As will be discussed in more detail below a general purpose bachelor's degree is acceptable to perform the duties of the proffered position. Upon review of the duties described, the prerequisite of a general business degree might be helpful to perform some of the duties of the proffered position; however, the record is devoid of any specific evidence that the proffered position requires a precise and specific course of study relating directly and closely to the described duties of the position.

A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988) ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). Therefore, while 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 (1st Cir. 2007).

Accordingly, the petitioner's assertion that its minimum requirement for the proffered position is only a general bachelor's degree in business administration is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Although the petitioner's failure to establish that the proffered position meets the statutory and regulatory definition of specialty occupation obviates the need to examine this issue further, for purposes of a complete and thorough analysis, the AAO will also review the additional requirements imposed by 8 C.F.R. § 214.2(h)(4)(iii)(A).

To that end and to make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), to determine if the petitioner has established what the normal minimum

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as a specialty occupation.

educational entry requirement is for the proffered position. The petitioner identifies the proffered position as that of a financial manager.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The AAO reviewed the information in the *Handbook* regarding the occupational category of financial manager. The *Handbook* reports:

> Financial managers typically do the following:
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> - Prepare financial statements, business activity reports, and forecasts
> - Monitor financial details to ensure that legal requirements are met
> - Supervise employees who do financial reporting and budgeting
> - Review company financial reports and seek ways to reduce costs
> - Analyze market trends to find opportunities for expansion or for acquiring other companies
> - Help management make financial decisions

See http://www.bls.gov/ooh/management/financial-managers.htm.

The petitioner provides the same general overview of the duties of the proffered position as the position described in the *Handbook* for financial managers. As footnoted above, the *Handbook* reports that financial managers typically require a bachelor's degree in finance, accounting, economics, or business administration. The *Handbook* indicates that a bachelor's or higher degree is required while also acknowledging degrees in various fields are acceptable for entry into the occupation. More importantly, the *Handbook* states that a "business administration" degree is acceptable. As previously discussed, while a general-purpose bachelor's degree, such as a degree in business administration, 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.

Therefore, the *Handbook's* recognition that a general, non-specialty business administration degree is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not a standard, minimum entry requirement for this occupation. As an element in the *Handbook's* overview of the duties of a finance manager, the *Handbook* recognizes that a financial manager may "[a]nalyze market trends to find opportunities for expansion or for acquiring other companies." However, the Handbook does not report that a financial manager needs a degree in market research analysis. Thus, although the petitioner may require the beneficiary to perform some market analysis, the petitioner has not established that the proffered position requires diverse, specific degrees to perform the general duties attributed to a financial manager position. The petitioner has not established that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position of financial manager.

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This prong alternatively requires a petitioner to establish that a

bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava,* 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports a standard, industry-wide entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. The petitioner has not satisfied the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The petitioner in this matter provided an overview of the duties of the proffered position, repeating many of the elements directly from the *Handbook* and/or the O*NET. As previously discussed, *supra*, the evidence of record is insufficient to permit the AAO to ascertain what the beneficiary will actually do on a day-to-day basis. Accordingly, the petitioner has 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. The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of financial manager.

Specifically, even though the petitioner and its counsel claim that the proffered position's duties are so complex and unique that a bachelor's degree is required, the petitioner failed to demonstrate how the financial manager's duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex and unique. While courses in business or accounting or marketing may be beneficial in performing certain duties of a financial manager, 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.

Therefore, the evidence of record does not establish that this position is significantly different from other financial manager positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred degrees acceptable for financial manager positions,

including degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than financial managerial positions or other closely related positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position of financial manager is so complex or unique relative to other financial manager positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Turning to the third criterion, the AAO notes that the petitioner claims repeatedly that the duties of the proffered position can only be employed by a degreed individual. While a petitioner may believe or otherwise assert that a proffered position requires a degree in a specific specialty, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

Furthermore, although the beneficiary was previously approved for H-1B employment with the petitioner, if the previous nonimmigrant petition was 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 prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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 petitions on behalf of the beneficiary, 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).

Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) based on its normal hiring practices.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than a financial manager position that is not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.[5]

Upon review of the totality of the record, 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 additional reason.

The AAO will now address the director's finding that the petitioner did not provide a valid LCA for the beneficiary's duty location. With regard to the LCA basis for denial, the AAO agrees with the director and finds that the petitioner failed to establish filing eligibility at the time the Form I-129 was received by USCIS. That is, the petitioner in this matter failed to submit a valid LCA for the beneficiary's actual work location. Although counsel and the petitioner in this matter requested that an LCA certified subsequent to the filing of the petition be accepted due to exceptional circumstances, there is no legal exception available that permits USCIS to excuse a failure to submit a valid, certified LCA with the Form I-129 that corresponds to the petition and establishes eligibility at the time of filing. USCIS does not have the discretion to disregard its own regulations, even if it would benefit a petitioner. *See Reuters Ltd. v. F.C.C.*, 781 F.2d 946

[5] Counsel's assertion on appeal that the proffered position qualifies as a specialty occupation on the basis that its duties are so complex is not persuasive. In addition to the lack of sufficient specificity to distinguish the proffered position from other financial manager positions for which a bachelor's or higher degree in a specific specialty, or its equivalent, is not required to perform their duties, the petitioner has designated the proffered position as a Level I position on the submitted LCAs, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. *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. Therefore, it is not credible that the position is one with complex duties (for purposes of either the second or fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)), as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage. 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. at 591-92.

(C.A.D.C. 1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned).

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. § 103.2(a)(1) in pertinent part as follows:

> Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

> *Demonstrating eligibility.* An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.

In matters where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states in pertinent part:

> [A] benefit request shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the benefit request was filed. . . .

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified LCA from DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must submit evidence that an LCA has been certified by DOL when submitting the Form I-129.

Moreover, the DOL regulation at 20 C.F.R. § 655.705(c)(1) states, in pertinent part, the following:

> The employer shall submit a completed labor condition application (LCA) on Form ETA 9035E or Form ETA 9035 in the manner prescribed in § 655.720. By completing and submitting the LCA, and by signing the LCA, the employer makes certain representations and agrees to several attestations regarding its responsibilities, including the wages, working conditions, and benefits to be provided to the H-1B nonimmigrants (8 U.S.C. 1182(n)(l)); these attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. . . . The employer reaffirms its acceptance of all of the attestation obligations by submitting the LCA to the U.S. Citizenship and Immigration Services (formerly the Immigration and Naturalization Service

> or INS) in support of the Petition for Nonimmigrant Worker, Form I-129, for an H-1B nonimmigrant. See above 8 CFR 214.2(h)(4)(iii)(B)(2), which specifies the employer will comply with the terms of the LCA for the duration of the H-1B nonimmigrant's authorized period of stay.

Further, the regulation at 20 C.F.R. § 655.730(c)(1), in pertinent part, states the following:

> *Undertaking of the Employer.* In submitting the LCA, and by affixing the signature of the employer or its authorized agent or representative on Form ETA 9035E or Form ETA 9035, the employer (or its authorized agent or representative on behalf of the employer) attests the statements in the LCA are true and promises to comply with the labor condition statements (attestations) specifically identified in Forms ETA 9035E and ETA 9035, as well as set forth in full in the Form ETA 9035CP.

Lastly, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether 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 (emphasis added):

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

In the instant matter, the petitioner filed the Form I-129 with USCIS on October 12, 2011. The LCA provided at the time of filing indicated the beneficiary's work location will be in [redacted] The LCA was signed by the petitioner's managing partner on October 7, 2011, attesting that the statements in the LCA are true. However, the petitioner also indicated in other supporting documents that the beneficiary's work location would be in [redacted], a location not referenced on the certified and signed LCA. The petitioner confirmed the beneficiary's work location as in [redacted] in response to the director's RFE and again on appeal. Thus, the record establishes that, at the time of filing, the petitioner had not obtained a certified LCA in the occupational specialty for the requested employment location and, therefore, as determined by the director, had failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

Regarding counsel's assertion that prior counsel was responsible for filing the LCA and had submitted an incorrect LCA due to illness, we observe that the petitioner's managing partner also signed the LCA. As noted above, the managing partner's signature is evidence that the petitioner attested to the accuracy of the LCA submitted with the petition. Thus, the petitioner is

responsible for its failure to sign and submit a valid LCA for the beneficiary's actual work location.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). 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 has been certified for the actual permanent worksite of the beneficiary, and the petition must be denied for this additional reason.

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

Accordingly, the appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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