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



U.S. Citizenship  
and Immigration  
Services

DATE: APR 01 2014 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director of the California Service Center denied the nonimmigrant visa petition and certified the decision to the Administrative Appeals Office (AAO). The AAO reviewed the record of proceeding in its entirety and finds that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will be affirmed and the petition will be denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on May 22, 2012. In the Form I-129 visa petition, the petitioner describes itself as an eight person enterprise engaged in import, export, e-commerce, consulting and marketing that was established in 2011. In order to employ the beneficiary in what it designates as a procurement manager 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 on January 4, 2013, 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. Thereafter, the director certified the decision to the AAO for review. In response to the director's certification, the petitioner submitted a brief to the AAO as permitted by 8 C.F.R. § 103.4(a)(2). The petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied the evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the RFE; (4) the director's denial letter; (5) the Notice of Certification; and (6) the petitioner's brief to the AAO. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed later in the decision, the AAO agrees with the director's decision that the record of proceeding does not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Accordingly, the director's decision will not be disturbed. The decision certified to the AAO will be affirmed, and the petition will be denied.

Before addressing the director's identified ground of ineligibility, however, the AAO will first address several additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Thus, the petition cannot be approved for these reasons as well.<sup>1</sup>

## **I. Factual and Procedural History**

In this matter, the petitioner reports in the Form I-129 that it seeks the beneficiary's services as a full-time procurement manager at a rate of pay of \$40,706 per year. The petitioner states that the beneficiary has maintained nonimmigrant status as an F-1 student and is employed by the petitioner pursuant to post-degree optional practical training. In a letter dated May 14, 2012, the petitioner provides the following information regarding the duties of its procurement manager position:

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<sup>1</sup> The AAO conducts its review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The company continues to require the services of [the beneficiary] as [a] Procurement Manager to provide warehouse management in respect to commodity procurement within the company. In this capacity[,] [the beneficiary] is directly responsible for establishing, contributing and continually improving an efficient and cost-effective process design, in regards to the procurement of goods. The company has implemented procurement procedures that encompass an online process, accounts payable, and purchasing and receiving in compliance with the company policies. [The beneficiary] will continue to manage and oversee these services. [The beneficiary] will continue to assist the company in achieving these goals.

More specifically, [the beneficiary's] duties will continue to include the following:

- [D]evelop and implement short and long-term procurement strategies designed to reduce costs and improve quality and service;
- [T]rain staff and ensure that members work collaboratively in procurement procedures;
- [W]ork as part of a team in order to manage products and ensure that products are delivered timely and accurately consistent with pricing policies;
- [C]reate and implement internal and external feedback procedures in order to measure effectiveness of business operations, including customer satisfaction and thus propose methods for improvement;
- [O]versee procurement budget and account for team and individual performance and professional development;
- [D]esign and utilize procurement systems to ensure maximum effectiveness;
- [E]nsure that appropriate authorization and documentation are obtained for procurement activities.<sup>2</sup>

Moreover, the petitioner states that "[the] company requires a minimum of a college degree in one of the following areas: Business, Business Administration, Finance, Operations Management or a related field."

The petitioner provided a copy of the beneficiary's diploma and academic transcripts. The documentation indicates that the beneficiary was awarded a Bachelor of Science in Management from [REDACTED] in December 2011. In addition, the petitioner submitted a printout with a description of some of the courses completed by the beneficiary.

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<sup>2</sup> Bullet points added by the AAO for clarity.



The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition, which designates the proffered position as corresponding to the occupational classification "Purchasing Agents, Except Wholesale, Retail, and Farm" at a Level I (entry level) wage.

Additionally, the petitioner provided documentation regarding its business operations, including the following: (1) printouts from the petitioner's website; (2) the petitioner's articles of incorporation (dated March 2011) and related documents; (3) the petitioner's lease agreement; (4) black and white copies of photos, which appear to depict the petitioner's business premises; (5) an unsigned 2011 tax return for the petitioner;<sup>3</sup> (6) an unaudited four-page profit and loss and balance sheet for the petitioner; (7) a printout regarding the petitioner's payroll;<sup>4</sup> (8) catalogue/marketing materials for vendors; (9) purchase orders;<sup>5</sup> (10) a list of inventory; (11) a distribution agreement; and (12) five documents entitled "Form 1099, Miscellaneous Income" that were issued by the petitioner to individuals for nonemployee compensation in 2011.<sup>6</sup> The petitioner did not submit any further documentation regarding its business operations.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on October 1, 2012. The director outlined the evidence to be submitted. Counsel for the petitioner responded to the RFE and provided a brief and additional evidence in support of the H-1B petition.<sup>7</sup> Specifically, the submission included: (1) an excerpt from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, 2012-2013 edition, regarding "Purchasing Managers, Buyers, and Purchasing Agents"; (2) several job postings; and (3) a letter dated December 5, 2012 from [REDACTED]

The director reviewed the documentation. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish

<sup>3</sup> The petitioner's 2011 tax return indicates (on line 12) that its corporate officer was compensated \$123,582. It also indicates (on line 13) that no salaries or wages were paid to employees.

<sup>4</sup> The petitioner provided a document entitled "Payroll Details" and a document entitled "Payroll Summary" for the pay period 04/01/2012 to 04/30/2012. Each document purports to be one-page ("1/1"). The documents indicate that the company has two employees: the beneficiary and the CEO. The beneficiary's monthly salary is \$2,300 (thus, \$27,600 per year), the CEO's salary is \$3,028.14 (thus, \$36,337.68 per year). The entry for "Company Totals" is \$5,328.14 (the two salaries combined).

<sup>5</sup> The petitioner submitted 18 purchase orders, dated between February 2011 and February 2012. Specifically, sixteen of the purchase orders were prepared in 2011, and two of the purchase orders were prepared in February 2012. The H-1B petition was filed approximately three months later on May 22, 2012.

<sup>6</sup> The forms indicate that the individuals received "[n]onemployee compensation" in 2011 as follows: [REDACTED] - \$729; [REDACTED] - \$1,300; [REDACTED] - \$2,826; [REDACTED] - \$3,350; and [REDACTED] - \$19,662.

<sup>7</sup> On page six of the brief, counsel claims that "the proffered position is that of a contract specialist, a specialty occupation." The petitioner had not previously claimed that the beneficiary would serve in a "contract specialist" position. No explanation for the variance in the job title was provided by the petitioner or its counsel.



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, or its equivalent. The director denied the petition on January 4, 2013. Subsequently, on October 15, 2013, the director certified the decision to the AAO for review. In response to the director's certification, the petitioner submitted a brief to the AAO.

## II. Standard of Proof

The "preponderance of the evidence" standard requires that the evidence demonstrate that the petitioner's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Further, with respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

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The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

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Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Consistent with this standard, U.S. Citizenship and Immigration Services (USCIS) examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the

basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As will be discussed, in the instant case, that burden has not been met.

### **III. Beyond the Director's Decision – Additional Grounds for Denial of the H-1B Petition**

The AAO reviewed the record of proceeding in its entirety and, as will be discussed below, has identified several issues that preclude the approval of the H-1B petition that were not identified by the director. Consequently, the issue certified to the AAO is essentially moot. Thus, even if the petitioner overcame the grounds for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought for these additional reasons.

#### **A. The Petitioner Has Not Establish that It Would Pay the Beneficiary the Required Wage for Her Work if the Petition Were Granted**

More specifically, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational category "Purchasing Agents, Except Wholesale, Retail, and Farm" – SOC (ONET/OES) Code 13-1023. The petitioner stated that the corresponding prevailing wage for a Level I position falling under this occupational category was \$40,706 per year.<sup>8</sup> The LCA was certified on May 11, 2012 and signed by the petitioner on May 16, 2012.

In the RFE, the director stated that the proffered position is similar to a purchasing agent. In response to the RFE, counsel claimed that the director's statement was incorrect. He continued by asserting, for the first time, that the proffered position falls under the occupational category "Purchasing Managers" – SOC (ONET/OES) Code 11-3061. In support of the assertion, counsel stated that a purchasing agent and a purchasing manager have different job duties.

The AAO agrees with counsel that the occupational categories "Purchasing Agents" and "Purchasing Managers" are distinct occupational categories with different job duties (and requirements). Counsel's claim regarding the proper classification for the proffered position is not, however, in accordance with the petitioner's representation on the LCA. The petitioner and its counsel did not provide an explanation for the discrepancies in their claims.

In response to an RFE, a petitioner (or its counsel) cannot offer a new position to the beneficiary, or materially change its associated job responsibilities, or the occupational category. The petitioner

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<sup>8</sup> The prevailing wage source is listed as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center. The 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/> (last visited March 31, 2014). The OES All Industries Database is available at the OFLC Online 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.flcdatabase.com/>.



and counsel must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If material changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

With respect to the LCA, DOL provides specific guidance for selecting the most relevant Occupational Information Network (O\*NET) classification code. The "Prevailing Wage Determination Policy Guidance" prepared by DOL states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O\*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification . . . . If the employer's job opportunity has worker requirements described in a combination of O\*NET occupations, the [determiner] should default directly to the relevant O\*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the [determiner] shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

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](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

To determine the nature of the job offer, DOL guidance indicates that the first step is to review the requirements of the job offer and determine the appropriate occupational classification. The O\*NET description that corresponds to the job offer is used to identify the appropriate occupational classification. If the petitioner believes that its position is described as a combination of O\*NET occupations, then according to DOL guidance the petitioner should select the relevant occupational code for the highest paying occupation. *Id.*

A search of the OFLC Online Wage Library reveals that (for the pertinent time period and relevant area of intended employment) the prevailing wage for "Purchasing Agents, Except Wholesale, Retail, and Farm" for a Level I position was \$40,706, whereas the prevailing wage for "Purchasing Managers" for a Level I position was \$65,562 per year. The difference in wages is over \$24,850 per year.<sup>9</sup>

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<sup>9</sup> For more information regarding the prevailing wage for "Purchasing Agents, Except Wholesale, Retail, and Farm" for a Level I position in Los Angeles County, 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?area=31084&code=13-1023&year=12&source=1> (last visited March 31, 2014).

For more information regarding the prevailing wage for "Purchasing Managers" for a Level I position in Los Angeles County, 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

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Thus, if the petitioner believed the duties and requirements of the proffered position fell under the occupational category "Purchasing Managers," then it should have selected this occupation (and corresponding prevailing wage) for the LCA. Moreover, if the petitioner believed that the proffered position was a combination of occupations, then according to DOL guidance the petitioner should have chosen the relevant occupational code for the highest paying occupational category, in this case "Purchasing Managers." Here, the petitioner selected the lowest paying occupation.

On the Form I-129 petition and LCA, the petitioner stated that it intended to employ the beneficiary on a full-time basis at a rate of pay of \$40,706 per year. Accordingly, the offered wage to the beneficiary is below the prevailing wage for the occupational category "Purchasing Managers" in the area of intended employment.

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 available as of the time of filing the LCA.<sup>10</sup> See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed. Appx. 722, 723 (7th Cir. 2010). The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]").

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational classification in order for it to be found to correspond to the petition.<sup>11</sup> To permit otherwise would result in a petitioner paying a wage lower than that required by section

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<http://www.flcdatacenter.com/OesQuickResults.aspx?area=31084&code=11-3061&year=12&source=1> (last visited March 31, 2014).

<sup>10</sup> 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. The required wage rate means the rate of pay which is the higher of the actual wage for the specific employment in question or the prevailing wage rate for the occupation in which the beneficiary will be employed in the geographic area of intended employment. See 20 C.F.R. § 655.715.

<sup>11</sup> To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between DOL and the U.S. Department of Homeland Security (DHS), a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(I); 20 C.F.R. § 655.700(b)(2). Upon receiving DOL's certification, the prospective employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(I). DOL reviews LCAs "for completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition. 20 C.F.R. § 655.705(b); see generally 8 C.F.R. § 214.2(h)(4)(i)(B).



212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupational category at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, assuming that the proffered position is a purchasing manager as subsequently claimed in response to the RFE, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted.

Moreover, the general requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petitioner, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission. . . .

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner 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) and 214.2(h)(4)(iii)(B)(I). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of an LCA with DOL when submitting the Form I-129.

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 regulations note that the U.S. 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 . . . and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) therefore requires that USCIS ensure that the LCA actually supports the H-1B petition filed on behalf of the beneficiary. In the instant case, assuming again that the proffered position is a purchasing manager as now claimed by the petitioner's counsel,

the record does not establish that, at the time of filing, the petitioner had obtained a certified LCA for the proper occupational category and prevailing wage that applied at the time the petition was filed. Therefore, the petitioner has failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) by providing a certified LCA that corresponds to the instant petition. For this reason also, the petition may not be approved.

**B. The LCA Filed in the Instant Matter Would Not Correspond to a Higher-Level and More Complex Position**

The AAO finds the proffered position's wage level designated by the petitioner on the LCA questionable. More specifically, the record of proceeding contains discrepancies between what the petitioner claims about the level of responsibility and requirements inherent in the proffered position set against the contrary level of responsibility and requirements conveyed by the wage level selected on the LCA. As noted above, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Purchasing Agents, Except Wholesale, Retail, and Farm" at a Level I (entry) wage.

Wage levels should be determined only after selecting the most relevant O\*NET code classification. Then, a prevailing-wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.<sup>12</sup> It is important to note that prevailing wage determinations start with an entry level wage (Level I) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.<sup>13</sup> 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 as indicated by the job description.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the

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<sup>12</sup> For additional information on wage levels, see DOL, 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>13</sup> 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.



wage levels. A Level I wage rate is described by DOL as follows:

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

See 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

DOL guidance indicates that 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 "Purchasing Agents, Except Wholesale, Retail, and Farm" has been assigned an O\*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, "[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree."<sup>14</sup> See O\*NET OnLine Help Center, on the Internet at <http://www.onetonline.org/help/online/zones#zone3> for a discussion of Job Zone 3.

In the instant case, the petitioner designated the proffered position as a Level I position. This suggests that the petitioner's academic and/or professional experience requirements for the proffered position would be *less than* "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. The petitioner claims, however, that "[d]ue to the strong analytical, negotiation, and problem-solving skills involved in respect to [its] business activities, [the] company requires a minimum of a college degree in one of the following areas: Business, Business Administration, Finance, Operations Management or a related field." The petitioner did not provide an explanation for classifying the proffered position as a Level I entry position on the LCA initially submitted to DOL and then claiming to USCIS that it requires more preparation than most occupations falling under this job zone.

The petitioner's designation of the proffered position at a Level I wage-rate indicates that the beneficiary will be expected to "perform routine tasks that require limited, if any, exercise of judgment" and that she will work "under close supervision." The petitioner indicates in its letter of

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<sup>14</sup> The AAO hereby incorporates into the record of proceeding the O\*NET OnLine Help Center printout regarding Job Zones. See O\*NET OnLine Help Center, on the Internet at <http://www.onetonline.org/help/online/zones#zone3> for a discussion of Job Zone 3.

support, however, that it will rely on the beneficiary to manage and oversee its procurement services, and that the beneficiary will develop and implement short and long-term procurement strategies designed to reduce costs and improve quality and service. Additionally, she will train staff and ensure that members work collaboratively and that she will account for team and individual performance and professional development. According to the petitioner, the beneficiary will oversee the procurement budget and design and utilize procurement systems to ensure maximum effectiveness. Furthermore, she will create and implement internal and external feedback procedures.

The petitioner therefore appears to claim that it will be relying heavily on the beneficiary's expertise for the management of its services and employees, as well as to make critical decisions regarding the company's business operations. Such reliance on the beneficiary's work appears to surpass the expectations of a Level I purchasing agent position, as described above, where the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and limited exercise of judgment. In the instant case, rather than the beneficiary's work being "monitored and reviewed for accuracy," it appears that the petitioner claims that it will be relying on the accuracy of the beneficiary's work with regard to the growth of its operations and important business decisions for the company.

Further, in response to the RFE, counsel for the petitioner submitted an opinion letter from [REDACTED] of [REDACTED]. The letter is dated December 5, 2012. The petitioner and counsel rely heavily on this letter to support their assertions. In the letter, Mr. [REDACTED] states that "the duties are complex and specialized – exceeding industry or normal standards." Mr. [REDACTED] also claims that the duties of the proffered position require extensive knowledge and skills in various areas. Further, he claims that the beneficiary "must perform at an extremely high level of knowledge, skills and business competencies" in order to perform the duties of the proffered position.

Mr. [REDACTED] conclusions do not appear to correspond to the petitioner's designation of the proffered position as a Level I position. For instance, a Level I wage is appropriate for a position requiring only "a basic understanding of the occupation" for an employee who will "receive specific instructions on required tasks and results expected" at a level expected of a "worker in training" or an individual performing an "internship."

Thus, upon review of the assertions regarding the proffered position, the AAO must question the stated requirements for the proffered position, as well as the level of complexity, independent judgment and understanding that are actually needed for the proffered position as the petitioner designated this position as a Level I entry-level job on the LCA certified by DOL. The petitioner's assertions that the duties require a significant level of responsibility and expertise, as well as the petitioner's stated academic requirement for the position, do not appear to be reflected in the wage level chosen by the petitioner on the LCA for the proffered position.

As previously discussed, under the H-1B program, the petitioner must pay the beneficiary at least the same wage rate as that paid to other employees with similar experience and qualifications or the local prevailing wage for the occupation in the area of employment, whichever is higher. In the instant case, the petitioner designated the proffered position as a Level I position. Notably, if the



proffered position had been designated at a higher level, the prevailing wage at that time (for the claimed occupational category "Purchasing Agents, Except Wholesale, Retail, and Farm") would have been \$51,626 per year for a Level II position, \$62,566 per year for a Level III position, and \$73,486 per year for a Level IV position.<sup>15</sup>

This aspect of the LCA undermines the credibility of the petition and, in particular, the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. As previously mentioned, 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).

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, provided the proffered position was in fact found to be a higher-level position that exceeded industry or normal standards as asserted elsewhere in the petition, the petitioner would have failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position; that is, specifically, the LCA submitted in support of the petition would then fail to correspond to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such aspects in accordance section 212(n)(1)(A) of the Act and the pertinent LCA regulations.

The statements regarding the requirements and claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record of proceeding, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

As such, a review of the enclosed LCA indicates that the information provided therein does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements, which if accepted as accurate would result in the beneficiary being paid a salary below that required by law. As a result, even if it were determined that the proffered position were a higher-level and more complex position as described and claimed elsewhere in the petition in support of the petitioner's assertions that this position qualifies as a specialty occupation, the petition could still not be approved for this additional reason.<sup>16</sup>

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<sup>15</sup> As discussed, assuming the proffered position falls under the occupational category "Purchasing Managers" (as claimed by counsel), then the prevailing wage would have been significantly higher (i.e., the \$65,562 per year for a Level I position, \$87,506 per year for a Level II position, \$109,470 per year for a Level III position, \$131,414 per year for a Level IV position).

<sup>16</sup> Fundamentally, it appears that (1) the petitioner previously claimed to DOL that the proffered position is a Level I, entry-level position to obtain a lower prevailing wage; and (2) the petitioner is now claiming to USCIS that the position is a higher-level and more complex position in order to support its claim that the position qualifies as a specialty occupation. The petitioner cannot have it both ways. Either the position is a

For the reasons discussed above, assuming the proffered position is a higher-level purchasing manager as claimed by the petitioner and its counsel, the petitioner has failed (1) to establish that it will pay the beneficiary an adequate salary for her work in accordance with the applicable statutory and regulatory provisions; and (2) to submit an LCA that supports the instant petition.<sup>17</sup>

#### IV. The Director's Basis for Denial of the H-1B Petition

The director determined 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 does not establish that the proffered position more likely than not constitutes a specialty occupation. It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below for affirming the director's decision.

##### A. Statutory and Regulatory Provisions for a Specialty Occupation Position

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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more senior and complex position (based on a comparison of the petitioner's job requirements to the standard occupational requirements) and thereby necessitates a higher required wage, or it is an entry-level position for which a lower wage would be acceptable. To permit otherwise would be directly contrary to the U.S. worker protection provisions contained in section 212(n)(1)(A) of the Act and its implementing regulations.

<sup>17</sup> The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Moreover, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The regulations at 8 C.F.R. § 214.2(h)(2)(i)(E) instead require that the petitioner "file an amended or new petition, with fee, with the service center where the original petition was filed to reflect any material changes in the terms and conditions of employment . . . ."



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

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

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

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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.

**B. The Petitioner Does Not Require a Baccalaureate or Higher Degree in a Specific Specialty, or Its Equivalent**

In the March 14, 2012 letter of support, the petitioner states that it "requires a minimum of a college degree in one of the following areas: Business, Business Administration, Finance, Operations Management or a related field." Thus, although the petitioner states that it requires a "college degree," it does not provide any further specification as to the level of degree required. Thus, absent clarification and evidence to the contrary, it appears that a two-year associate's degree from a community college may be an acceptable "college degree" for the proffered position according to the petitioner's letter of support.

Furthermore, the petitioner's claim that a degree in business or business administration is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. 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. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business or business administration (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).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, 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. Although a general-purpose bachelor's degree, such as a degree in business or 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.<sup>18</sup>

Again, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose degree, i.e., a degree in business or business administration. This assertion 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.

### C. Review of the Letter Submitted for Consideration as an Expert Opinion

In support of the H-1B petition, the petitioner and counsel submitted a letter from [REDACTED]. In his letter, Mr. [REDACTED] (1) describes the credentials that he asserts qualify him to opine upon the nature of the proffered position and claims that he is considered a "recognized authority"; (2) lists the duties proposed for the beneficiary; (3) states his belief that the performance of the duties he lists requires at least a bachelor's degree in business, business administration, finance, operations management, or a related field; and (4) claims that these qualifications represent a common standard for parallel positions among similar organizations.

The AAO reviewed the opinion letter in its entirety; however, the letter from Mr. [REDACTED] is not persuasive in establishing the proffered position qualifies as a specialty occupation position. It does not constitute probative evidence of the proffered position satisfying any criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

First, as a preliminary matter, Mr. [REDACTED] has not adequately established his expertise to render the opinion made in this matter. Specifically, although Mr. [REDACTED] provided a copy of his curriculum vitae, it is dated March 1998. Mr. [REDACTED] does not address how his experience from 14+ years ago is relevant in establishing himself as a "recognized expert" on the current requirements for procurement manager positions, nor does he address how procurement manager positions may have evolved since then.

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<sup>18</sup> 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 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: otherwise, 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.

Upon review of the information provided in the curriculum vitae (albeit from 1998 and earlier), the vast majority of Mr. [REDACTED] experience has been in the academic setting. In the opinion letter (dated December 5, 2012), Mr. [REDACTED] provides a brief summary of his education and experience. The opinion letter is on [REDACTED] letterhead, and Mr. [REDACTED] indicates that he is a professor emeriti, but does not provide the date of his retirement. He does not provide any specific information with regard to his experience and credentials since 1998, aside from stating that he serves as president of [REDACTED]

Further, Mr. [REDACTED] 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 conducted any research or studies pertinent to the educational requirements for such positions (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. His curriculum vitae does not reflect that he has published any works on the academic/experience requirements for procurement managers (or related issues).<sup>20</sup>

Based upon a complete review of Mr. [REDACTED] letter and curriculum vitae, the AAO finds that he has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. The documentation does not establish his expertise pertinent to the hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. Without further clarification, it is unclear how his education, training, skills or experience would translate to expertise or specialized knowledge regarding the current recruiting and hiring practices of an enterprise engaged in "import, export, e-commerce, consulting, and marketing" (as designated by the petitioner in the Form I-129) or similar organizations for purchasing agents or procurement manager positions (or parallel positions).

Second, with regard to the opinion letter itself, Mr. [REDACTED] does not reference or discuss any studies, surveys, industry publications, authoritative publications, or other sources of empirical information which he may have consulted in the course of whatever evaluative process he may have followed. Mr. [REDACTED] provides a brief, general description of the petitioner's business activities; however, he 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. For instance, there no evidence that he has any in-depth knowledge of the petitioner's business operations gained through such means as visiting the petitioner's premises, observing the petitioner's employees, interviewing them about the nature of their work, or documenting the knowledge that they apply on the job.

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<sup>19</sup> Mr. [REDACTED] states that he serves as president of [REDACTED] which he describes as a family investment company. The curriculum vitae does not contain any further information regarding his job duties or the business activities of the company. In the opinion letter, Mr. [REDACTED] states that [REDACTED] is a consulting company and that he oversees the staffing and reviews academic credentials and compensation issues. Mr. [REDACTED] did not provide any further information regarding the nature of the company, the particular scope of operations, the level of revenue, number of employees, etc.

<sup>20</sup> Mr. [REDACTED] states that he has authored several articles and books; however, according to his curriculum vitae his most recent publications were in the late 1990s and were unrelated to the issue here.



Mr. [REDACTED] does not discuss the duties of the proffered position in any substantive detail. To the contrary, he simply listed the tasks in bullet-point fashion with little discussion. As a result, it is not evident that he analyzed the duties prior to formulating his letter. Furthermore, it must be noted that the job duties submitted by Mr. [REDACTED] differs from the job description provided by the petitioner to USCIS. For example, Mr. [REDACTED] job description states that the beneficiary will "[f]orecast costs and negotiate pricing along to obtain goods at the optimal value to reduce costs," "[r]eport proven track record in category management within packaging on a national and international basis by reviewing procurement records of materials and supplies ordered and received," and "[a]nalyze market and delivery systems to assess present and future material availability." No explanation was provided as to the reason the job duties submitted by Mr. [REDACTED] do not correspond to the job description provided by the petitioner to USCIS.

Importantly, there is also no indication that the petitioner advised Mr. [REDACTED] that it characterized the proffered position as a low, entry-level procurement manager position (under the occupational classification of "Purchasing Agents, Except Wholesale, Retail and Farm"), for a beginning employee who has only a basic understanding of the occupation (as indicated by the wage-level on the LCA). The wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. It appears that Mr. [REDACTED] would have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that Mr. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon the job duties and responsibilities.

Mr. [REDACTED] does not provide a substantive, analytical basis for his opinion and ultimate conclusion. His opinion does not relate his conclusion to specific, concrete 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. Moreover, he did not support his conclusions by providing copies or citations of any research material used. He has not provided sufficient facts that would support the assertion that the proffered position requires at least a bachelor's degree in a specific specialty (or its equivalent).

In summary, and for each and all of the reasons discussed above, the AAO concludes that the opinion letter rendered by Mr. [REDACTED] is not probative evidence to establish the proffered position qualifies as a specialty occupation. The conclusions reached by Mr. [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. Further, the opinion is not in accord with other information in the record.

As such, neither Mr. [REDACTED] findings nor his ultimate conclusions are worthy of deference, and his opinion letter is not probative evidence towards satisfying any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

**D. The Petitioner Does Not Claim that It Satisfied the Criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), (2) and/or (3)**

Further, upon review of the record, the AAO notes that the petitioner does not claim that the proffered position satisfies the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), (2) and/or (3). Rather the petitioner asserts that it satisfies the fourth criterion of the regulations at C.F.R. § 214.2(h)(4)(iii)(A). Specifically, in response to the director's certification, the petitioner states the following (emphasis added to the last sentence):

Under this first criteria indicating that a bachelor's or higher degree is normally the minimum requirement for entry into the particular position, you stated that even though the Occupational Outlook Handbook indicated that Purchasing Managers "usually" have at least a bachelor's degree, the position of Purchasing Manager did not meet this first criteria because it did not require a bachelor's level of education "**in a specific specialty as a normal, minimum for entry into the occupation.**" Rather, as indicated in your correspondence, there was no apparent standard for how one prepares for [a] career as a Purchasing Manager. Consequently, being that there was no requirement for a degree in a specific specialty, [the beneficiary's] Bachelor's Degree in Management from California State University, Northridge was irrelevant under this criteria. There is no disagreement with this point or the points that were made in your letter regarding the second and third criterium [sic] (other than your comments regarding the "expert" which will be addressed later in this letter). **Therefore, the sole issue that we are raising at this time is whether the position met the requirements as a "specialty occupation" under the fourth criteria.**

Thus, it must be noted that the petitioner does not assert that the proffered position satisfies any of the first three criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Nevertheless, the AAO will address each criterion of the regulations for the purpose of providing a comprehensive discussion as to the reasons that the proffered position does not qualify as a specialty occupation.

**E. Discussion of the Regulatory Provisions at 8 C.F.R. § 214.2(h)(4)(iii)(A)**

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

The AAO recognizes DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>21</sup> As previously discussed, the petitioner filed the LCA to indicate that the proffered position corresponds to "Purchasing Agents,

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<sup>21</sup> All of the AAO's references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The AAO hereby incorporates the excerpt of the *Handbook* regarding the duties and requirements of the occupational category "Purchasing Managers, Buyers, and Purchasing Agents" into the record of proceeding.



Except Wholesale, Retails and Farm" – SOC (ONET/OES) Code 13-1023, but in response to the RFE counsel asserted that the proffered position falls under the occupational category "Purchasing Managers," which corresponds to SOC (ONET/OES) Code 11-3061. The *Handbook* addresses these occupational categories in the chapter entitled "Purchasing Managers, Buyers, and Purchasing Agents."<sup>22</sup> Importantly, in the initial submission, the petitioner indicated that the duties, responsibilities, and requirements of the proffered position are most similar to those of a purchasing agent (rather than those of a purchasing manager).

In the instant case, the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform these functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position, and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically, or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

The subchapter of the *Handbook* entitled "How to Become a Purchasing Manager, Buyer, or Purchasing Agent" states the following about this occupational category:

#### **Education**

Educational requirements usually vary with the size of the organization. A high school diploma is enough at many organizations for entry into the purchasing agent occupation, although large stores and distributors may prefer applicants who have completed a bachelor's degree program and have taken some business or accounting classes. Many manufacturing firms put an even greater emphasis on formal training, preferring applicants who have a bachelor's or master's degree in engineering, business, economics, or one of the applied sciences.

Purchasing managers usually have at least a bachelor's degree and some work experience in the field. A master's degree may be required for advancement to some

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<sup>22</sup> According to the *Handbook*, purchasing agents buy items for the operation of an organization, whereas purchasing managers plan and coordinate the work of buyers and purchasing agents. The *Handbook* continues by stating that purchasing managers usually handle purchases that are more complicated. For additional information, see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Purchasing Managers, Buyers and Purchasing Agents, on the Internet at <http://www.bls.gov/ooh/Business-and-Financial/Purchasing-managers-buyers-andpurchasingagents.htm#tab-2> (last visited March 31, 2014).

Based upon the evidence provided by the petitioner, it does not appear that the beneficiary will be responsible for planning and coordinating the work of buyers and purchasing agents. For instance, in the Form I-129 petition, the petitioner states that it has eight employees. With the initial H-1B petition, the petitioner provided its payroll records indicating that it has two employees: the beneficiary and the CEO. No explanation was provided for the discrepancy in the number of employees. In response to the RFE, counsel states that all of the other employees have different job duties and responsibilities. The petitioner, however, did not submit a job description or provide any further information regarding the duties and roles of its other employee(s). The petitioner also did not provide an organizational chart to USCIS. Without further information, the petitioner has not established that the beneficiary will be responsible for planning and coordinating the work of buyers and purchasing agents.

top-level purchasing manager jobs.

**Training**

Buyers and purchasing agents typically get on-the-job training for more than 1 year. During this time, they learn how to perform their basic duties, including monitoring inventory levels and negotiating with suppliers.

**Licenses, Certifications, and Registrations**

There are several recognized credentials for purchasing agents and purchasing managers. These certifications involve oral or written exams and have education and work experience requirements.

The Certified Professional in Supply Management (CPSM) credential, offered by the Institute for Supply Management, covers a wide scope of duties that purchasing professionals do. The exam requires applicants to either have a bachelor's degree and 3 years of supply management experience, or for those without a bachelor's degree, 5 years of supply management experience and the successful completion of three CPSM exams.

The American Purchasing Society offers two certifications: the Certified Purchasing Professional (CPP) and Certified Professional Purchasing Manager (CPPM). Candidates become eligible for these certifications through a combination of purchasing-related experience, education, and professional contributions (such as published articles or delivered speeches).

APICS offers the Certified Supply Chain Professional (CSCP) credential.

The Universal Public Procurement Certification Council offers two certifications for workers in federal, state, and local government: Certified Professional Public Buyer (CPPB) and Certified Public Purchasing Officer (CPPO). NIGP: The Institute for Public Procurement offers preparation courses for these certification exams.

**Work Experience in a Related Occupation**

Purchasing managers typically must have at least 5 years of experience as a buyer or purchasing agent. At the top levels, purchasing manager duties may overlap with other management functions, such as production, planning, logistics, and marketing.

**Advancement**

An experienced purchasing agent or buyer may become an assistant purchasing manager before advancing to purchasing manager, supply manager, or director of materials management.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Purchasing Managers, Buyers and Purchasing Agents, on the Internet at <http://www.bls.gov/ooh/business-and-financial/purchasing-managers-buyers-and-purchasing-agents.htm#tab-4> (last visited March 31, 2014).



The *Handbook* does not state that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into purchasing agent positions. The narrative of the *Handbook* indicates that the educational requirements usually vary with the size of the organization. It continues by stating that at many organizations, a high school diploma is sufficient for entry into purchasing agent positions.<sup>23</sup> The *Handbook* also reports that an experienced purchasing agent or buyer may become an assistant purchasing manager before advancing to purchasing manager, supply manager, or director of materials management.

The *Handbook* states that large stores and distributors may prefer applicants who have completed a bachelor's degree program and have taken some business or accounting classes. According to the *Handbook* many manufacturing firms put an even greater emphasis on formal training, preferring applicants who have a bachelor's or master's degree in engineering, business, economics, or one of the applied sciences. However, based upon the petitioner's statements on the Form I-129 and the supporting evidence, the petitioner does not appear to be a "large store or distributor" or a manufacturing firm.<sup>24</sup> Thus, these statements of the *Handbook* appear to be irrelevant to the instant petition. Moreover, the text suggests that a baccalaureate degree may be a *preference* among employers of purchasing agents in some environments, but that many employers hire candidates with less than a bachelor's degree, including candidates possessing a high school diploma. A preference for a candidate with a degree is not an indication of a requirement for the same.

According to the *Handbook*, purchasing managers usually have at least a bachelor's degree and some work experience in the field.<sup>25</sup> The *Handbook* does not state, however, that any particular field of study or discipline is required for purchasing manager positions.<sup>26</sup> The *Handbook*

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<sup>23</sup> When reviewing the *Handbook*, the AAO must again note that the petitioner designated the proffered position on the LCA under the occupational category "Purchasing Agents, Except Wholesale, Retail, and Farm." The AAO reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). This designation is indicative of a comparatively low, entry-level position relative to other purchasing agents. DOL guidance indicates that a Level I designation is appropriate for a position as a research fellow, a worker in training, or an internship.

<sup>24</sup> In the Form I-129, the petitioner states that it is an enterprise engaged in import, export, e-commerce, consulting, and marketing services with eight employees. The petitioner provided its payroll records for April 2012, which indicate that it paid wages to two employees: the beneficiary and the CEO. The petitioner's tax return states that the company was incorporated in March 2011 and that its business activities are "import/export." The tax return also indicates that its officer (the CEO) was compensated in 2011, but that the company did not pay any salaries and wages to employees. Thus, the evidence submitted to USCIS does not support a finding that the petitioner is a "large store or distributor" or a manufacturing firm.

<sup>25</sup> As previously discussed, the petitioner initially claimed that the proffered position falls under the occupational category for purchasing agents. Thereafter, in response to the RFE, counsel asserted that the proffered position falls under the occupational category for purchasing managers. No explanation was provided for this discrepancy by the petitioner or its counsel.

<sup>26</sup> To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish in part that the position

continues by stating that purchasing managers typically must have at least five years of experience as a buyer or purchasing agent.

The *Handbook* reports that there are several recognized certification credentials for purchasing agents and purchasing managers. It also provides basic information, including the general requirements for these credentials. There is no indication, however, that the petitioner requires the beneficiary to have obtained any certification credential or other professional designation to serve in the proffered position.

Upon review, the *Handbook* does not support a finding that normally the minimum requirement for entry into purchasing agent positions (or purchasing manager positions) is at least a bachelor's degree in a specific specialty, or its equivalent. Moreover, in response to the director's certification, the petitioner does not assert that it satisfied this criterion of the regulations.

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

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

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

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source) reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Thus, the AAO

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requires the attainment of a bachelor's or higher degree in a specific specialty or its equivalent. As discussed *supra*, USCIS has consistently interpreted 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. Again, 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.



incorporates by reference the previous discussion on the matter. Further, the petitioner did not provide documentation from the industry's professional association as to whether it has made a specialty degree a minimum entry requirement.

In support of the petitioner's assertion that the proffered position qualifies as a specialty occupation position, the record of proceeding contains several job announcements. Upon review of this evidence, however, the AAO finds that the petitioner's reliance on the job announcements is misplaced.

In the Form I-129 petition, the petitioner describes itself as an enterprise, established in 2011, that is engaged in import, export, e-commerce, consulting, and marketing. The petitioner states in the Form I-129 that it has eight employees, and it reports its gross annual income as \$2 million and its net annual income as \$200,000. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 4243.<sup>27</sup> According to the U.S. Department of Commerce, Census Bureau website, the NAICS code 4243 is for "Apparel, Piece Goods, and Notions Merchant Wholesalers." No further description is provided for this NAICS code.

On the 2011 tax return submitted by the petitioner to USCIS, the petitioner designated its business operations under the NAICS code 423120, which is designated for "Wholesale Trade Agents and Brokers." The NAICS website describes this industry as follows:

This industry comprises wholesale trade agents and brokers acting on behalf of buyers or sellers in the wholesale distribution of goods. Agents and brokers do not take title to the goods being sold but rather receive a commission or fee for their service. Agents and brokers for all durable and nondurable goods are included in this industry.

See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 423120 – Wholesale Trade Agents and Brokers, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited March 31, 2014). The petitioner did not provide a reason for designating its business operations under different NAICS codes.

The AAO reviewed the job advertisements submitted by the petitioner. For many of the advertisements, the petitioner did not provide the entire printout. Rather, the petitioner submitted only the first page of some of the advertisements (page 1/2). No explanation was provided by the petitioner for failing to include the entire job postings (page 2/2).

Further, the petitioner and its 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 job advertised. Further, as they are only solicitations for hire, they are not evidence of what qualifications were ultimately required for the positions. Upon review of the job postings, the petitioner fails to establish that a requirement of a bachelor's or higher degree in a specific specialty,

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<sup>27</sup> 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 March 31, 2014).

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, 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, postings submitted by a petitioner are 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 advertising 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 the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. See *Matter of Soffici*, 22 I&N Dec. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Here, the advertisements include positions with the following companies/organizations:

- (computer/IT services);
- (technology company focusing on secure information infrastructure);
- (producer of glass, ceramics and plastics);
- (industry - engineering services);
- (nonprofit charitable organization);
- (recruitment company on behalf of an automotive supplier);
- (technology leader specializing in defense, homeland security, and other government markets with sales of \$25 billion);
- (producer of specialty chemicals, resins, and polymers);
- ("provide[s] engineering, procurement and construction services for utility scale power generation");
- (manufacturer of premium distilled spirits);
- (provider of in-flight entertainment and connectivity systems to airlines);
- (consists of brands and more);
- (residential and commercial/office construction); and
- flooring manufacturer).

Without further information, the advertisements appear to be for organizations that are not similar to the petitioner, and the petitioner has not provided any probative evidence to suggest otherwise.

Further, the petitioner provided several job postings that contain limited information regarding the advertising employers' industries and business operations. For instance, the petitioner provided an advertisement for an unnamed sports facility. The petitioner also submitted an advertisement for an unnamed organization that is described as "a manufacturing company known as an innovator and leader in [the] industry" with a "\$100-200M plant in TN." The job postings do not provide further information regarding the advertising employers' business activities. Upon review,



the petitioner has not provided sufficient information regarding which general characteristics, aspects or traits (if any) it believes it shares with the advertising organizations.

The petitioner also submitted advertisements placed by staffing companies. For example, the petitioner provided job postings from [REDACTED] (a staffing agency), but the advertisements do not provide specific information about the actual employers. In addition, the petitioner submitted a posting for [REDACTED] (a recruitment company) that also does not contain any information regarding the actual employer. The record also contains an advertisement for [REDACTED] (a recruitment company) on behalf of [REDACTED] (a multinational medical devices, pharmaceutical and consumer packaged goods manufacturer). Further, the petitioner provided an advertisement from [REDACTED] for a position "to join the management team of a Hospital in Central Florida." The record lacks sufficient information regarding the advertising employers to conduct a legitimate comparison of the organizations to the petitioner.

Furthermore, many of the advertisements do not appear to be for parallel positions. For instance, it appears that the advertised positions may be more senior-level jobs than the proffered position. Some of the advertising employers require a degree and ten or more years of experience. This includes the positions with [REDACTED]. Similarly, the petitioner submitted advertisements for positions that require a degree and five to seven years of experience, including the following postings: [REDACTED]

and [REDACTED]. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position. Some of the advertising employers only provided brief and/or vague job descriptions for the advertised positions. Thus, these advertisements do not contain sufficient information regarding the day-to-day duties, complexity of the job duties, supervisory duties (if any), independent judgment required, the amount of supervision received, and/or other relevant factors within the context of the advertising employers' business operations to make a legitimate comparison of the advertised positions to the proffered position.

Contrary to the purpose for which the advertisements were submitted, some of 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 example, several job postings indicate that at least a bachelor's degree is required, but they do not state that such a degree must be in a specific specialty (this includes the postings for [REDACTED]).

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 duties of the position.

Further, some of the employers (such as [REDACTED] an unnamed sports facility, [REDACTED] and [REDACTED]) indicate that a general-purpose degree, i.e., a degree in business administration is acceptable. Again, 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.

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, as the evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions, not every deficit of every job posting has been addressed.<sup>28</sup>

In response to the director's certification, the petitioner acknowledges that it has not satisfied this criterion of the regulations. Further, the record does not 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 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 the proffered 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.

As a preliminary matter, it must be noted that in the initial H-1B submission and in response to the RFE, the petitioner did not assert that the proffered position qualifies as a specialty occupation under this prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record of proceeding contains several documents regarding the proffered position and the petitioner's business operations, including: (1) the petitioner's job description; (2) the petitioner's articles of incorporation and related documents; (3) a lease agreement; (4) financial documents, including an unsigned 2011 tax return and printouts regarding the petitioner's payroll; (5) printouts from the petitioner's website; (6) a distributorship agreement; (7) black and white copies of photos, which appear to depict the petitioner's business premises; (8) product catalogues/promotional materials from vendors; (9) purchase orders; and (10) an inventory list.

While the petitioner submitted documents regarding its business operations, the petitioner did not explain how the documents relate to the beneficiary's duties, and the evidence does not establish the relative complexity or uniqueness of the proffered position. Upon review of the job description, the overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work and associated educational requirements into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations. Further, the petitioner failed to demonstrate exactly what the beneficiary will

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<sup>28</sup> USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. at 376. As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).



do on a day-to-day basis such that the complexity or uniqueness of this particular position can even be determined.

Overall, the record lacks sufficient probative evidence to distinguish the proffered position as more complex or unique from other positions in the occupation that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. 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 position. While a few related courses may be beneficial, or in some cases even required, to perform certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty is not required for the proffered position.

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 "Purchasing Agents, Except Wholesale, Retail, and Farm" at a Level I (entry level) wage. The petitioner designated the position as a Level I position (the lowest of four assignable wage levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is not credible that the duties of the petitioner's proffered position are complex or unique relative to other purchasing agents, as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."<sup>29</sup>

The petitioner indicated in the support letter (dated May 14, 2012) that the beneficiary's educational background and employment with the petitioner will assist her in carrying out the duties of the proffered position.<sup>30</sup> However, the test to establish a position as a specialty occupation is not the credentials or skills of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge and attainment of at least a baccalaureate-level degree in a specialized area, or its equivalent, for entry into the position.

Again, in the instant case, the petitioner did not claim in its initial submission or in response to the RFE that the proffered position is so complex or unique that it can be performed only by an individual with a baccalaureate (or higher degree) in a specific specialty, or its equivalent.

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<sup>29</sup> 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>30</sup> The record of proceeding indicates that, when the petition was filed, the beneficiary was in F-1 (student) classification and was employed by the petitioner pursuant to post-degree optional practical training. In the letter of support dated May 14, 2012, the petitioner states the "[the beneficiary] has been employed in the position of Procurement Manager with [the] company since her graduation in 2011."

Moreover, upon review of the record of proceeding, the evidence does not demonstrate the proffered position as satisfying the second 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 at least a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, USCIS usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To satisfy this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence will not 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 a 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 created only to 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").

The petitioner states in the Form I-129 petition that it has eight employees and that it was established in 2011. In response to the RFE, counsel indicated that "all other petitioner's employees have different job duties and responsibilities." The petitioner did not indicate whether anyone else currently or in the past has served in its "procurement manager" position. Furthermore, the petitioner does not claim that it satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). Upon review, the petitioner has not demonstrated that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

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.

In the brief submitted in response to the director's certification, the petitioner claims, "In our reading of the four[th] criteria[,] the 'in the specific specialty' language clearly is relevant to the first criteria. However, in direct contrast, the status may equally be conferred where it is established that the nature of the specific duties of the position is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a bachelor's degree." The petitioner



further asserts that "since [the beneficiary] the individual that we have sponsored for this position, obtained a bachelor's degree in management, it is our view that she satisfied the fourth criteria."

As previously discussed, when determining whether a proffered position qualifies as a specialty occupation, the applicable statutory and regulatory provisions must be read together. See 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) and (iii)(A). Accordingly, the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) (including the fourth criterion) is interpreted to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Thus, contrary to the petitioner's assertion, to satisfy this criterion of the regulations, the petitioner must establish that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree *in a specific specialty*, or its equivalent. Further, the test to establish a position as a specialty occupation is not the education or qualifications of a proposed beneficiary, but whether the position itself requires both the theoretical and practical application of a body of highly specialized knowledge and the attainment of at least a bachelor's degree in the specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States. See section 214(i)(1) of the Act.

Importantly and as previously discussed, the petitioner itself does not require at least a baccalaureate degree in a specific specialty, or its equivalent. Moreover, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. As reflected in the above comments and findings with regard to the proposed duties as described, the petitioner has not presented the proposed duties with sufficient specificity and substantive content to establish relative specialization and complexity as distinguishing characteristics of those duties, nor has it established 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.

Moreover, it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's operations are relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in a position requiring both the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate degree or higher in a specific specialty, or its equivalent. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties. Here, the petitioner stated on the Form I-129 that it employs eight people, but the pay records indicate that it employs just the CEO and the beneficiary. In addition, as the petitioner has not provided information regarding the duties and responsibilities of the other employee(s), the AAO cannot ascertain in this case how the beneficiary would be relieved from spending a significant portion of her time performing non-qualifying duties such that (1) it would not affect the occupational

classification of the position, and (2) it would permit an analysis of the position's claimed relative specialization and complexity.

Further, the AAO reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). As previously noted, the petitioner designated the proffered position under the occupational category "Purchasing Agents, Except Wholesale, Retail, and Farm" as a Level I (entry) position. The designation of the procurement manager position at a Level I is indicative of a low, entry-level position relative to others within the same claimed occupational category and, hence, one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." DOL guidance states that a job offer for a research fellow, a worker in training, or an internship would be an indication that a Level I wage should be considered.

Without further evidence establishing otherwise, it is 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 III (experienced) or a Level IV (fully competent) position, requiring a significantly higher prevailing wage of \$62,566 per year (for a Level III) or \$73,486 per year (for a Level IV), a difference of over \$20,000 to \$30,000 per year (for the occupational category "Purchasing Agents, Except Wholesale, Retail, and Farm" as designated by the petitioner on the LCA).<sup>31</sup> As previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

Overall, the petitioner has not provided sufficient probative evidence to satisfy this criterion of the regulations. For instance, in addition to the evidentiary deficiencies discussed above, the petitioner stated in the May 14, 2012 letter of support that the beneficiary has been employed in the position of procurement manager with the petitioner since her graduation in 2011. Although the beneficiary had served in the proffered position for almost a year when the petitioner responded to the RFE, the petitioner did not provide probative evidence establishing the job duties and responsibilities of the proffered position. While the petitioner submitted several documents regarding its business operations, the AAO observes that the petitioner did not establish how this evidence specially relates to the beneficiary's duties.<sup>32</sup> The record of proceeding lacks documentation regarding the actual work that the beneficiary performs to substantiate the claim that the nature of the specific duties is 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.

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<sup>31</sup> For the occupational category "Purchasing Managers," the difference in wages would be even greater.

<sup>32</sup> For example, the petitioner's submission included printouts from its website; a distribution agreement dated June 28, 2011; eighteen purchase orders (16 of these purchase orders are for 2011 and two of the purchase orders are for February 2012); financial documents; an inventory list; and catalogue/marketing materials for vendors.



Upon review of the record of proceeding, the petitioner has submitted inadequate probative evidence to establish that the nature of the specific duties is 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).

The petitioner has submitted insufficient evidence to satisfy 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. Accordingly, the director's decision must be affirmed and the petition denied on this basis.

## V. Conclusion

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 145 (noting that the AAO conducts appellate review on a *de novo* basis).

The petition must be denied 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The director's decision is affirmed. The petition is denied.