

(b)(6)

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



U.S. Citizenship
and Immigration
Services

DATE: **APR 08 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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center. On the Form I-129 visa petition, the petitioner describes itself as an agricultural processing and sales business established in 1987. In order to employ the beneficiary in what it designates as a production/sales manager position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

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

I. STATUTORY AND REGULATORY PROVISIONS – SPECIALTY OCCUPATION

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and

(b)(6)

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

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

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

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See*

Royal Siam Corp. v. Chertoff, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

II. FACTUAL AND PROCEDURAL BACKGROUND

In the petition signed on April 1, 2013, the petitioner indicates that it wishes to employ the beneficiary in a production/sales manager position on a part-time basis at the rate of pay of \$1,100 per week.¹ With the initial petition, the petitioner submitted a job description for the proffered

¹ In the Form I-129 petition, the petitioner was asked to provide the number of hours per week that the beneficiary would be employed. On page 7 of the Form I-129, the petitioner stated that "[t]he beneficiary may return to the Ukraine for 2-3 months during winters for when low humidity hinders processing by causing bean skin splitting and damage." The petitioner further stated that "[d]uring part of this time beneficiary will promote bean and seed sales." No further information was provided. Notably, on the Labor Condition Application, the petitioner stated that the beneficiary would be employed on a full-time basis.

In addition, the AAO observes that in the Form I-129, the petitioner indicates that the beneficiary will be paid \$1,100 per week (which equates to \$57,200 per year). However, on page 17 of the Form I-129, the petitioner indicates that the beneficiary will be compensated "\$55,000/year, \$27.50 hourly." In the letter of support, the petitioner states that the beneficiary will be paid \$55,000 per year. On the LCA, the petitioner indicated that the beneficiary would be paid at an hourly rate of \$27.50. In the appeal brief, counsel states that the beneficiary will be paid \$55,000 per year.

Notably, the prevailing wage for the occupational category "Industrial Production Managers" for a Level I position in the area of intended employment is \$27.28 per hour / \$56,742 per year. 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 application. *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).

position, which indicates the following:

Job Description – Production/Sales Manager

The Production/Sales Manager is involved with the planning, processing, and sales of edible beans.

During planning the Production/Sales Manager provides assistance to customer/growers for product quality assurance and enhancement, including advising clients on best approaches to fertilizing and planting the incoming crop, insect and disease control options, and crop harvesting to ensure the quality of the incoming product.

During processing the Production/Sales Manager directs and manages edible bean processing to assure product is processed efficiently according to specifications while meeting cost and quality goals. The Production/Sales Manager directs pre-processing storage and drying; testing and grading; care and handling; processing; sampling and testing; and packaging and storage of finished products, including all intermediate plant operations. The Production/Sales Manager is responsible for the quality of the product produced and low cost and high efficiency of production.

During the sales phase the Production/Sales Manager is responsible for attending trade shows, developing contacts with, and promoting products to, brokers, food processors, canneries, and direct resellers. With respect to certified and registered seed sales, the Production/Sales Manager is responsible for contacting and promoting [the petitioner's] seed directly to growers, nationally and internationally.

Duties and Responsibilities

- Train, motivate and supervise plant employees.
- Routinely inspect all processing equipment to ensure good working conditions, quality and safety of product.
- Ensure, Implement and Maintain Safety and Health Regulations and Standards.
- Develop and Implement cost effective production practices.
- Manage inventory and ordering processing supplies.
- Sample and test product throughout the production process.
- Promotion and sales of product.
- Monitor customer satisfaction of product and address all grievances and complaints in a timely matter.
- Per customer request, advise customers on best approach to fertilizing, planting, protecting, and harvesting incoming crop to be processed.
- Manage buyer/customer accounts and recruit new buyers and customers.
- Attend meetings and conferences that deal with the product from the field to

the finished product.

- Negotiate fair prices for product between customers and buyers.
- Attend training seminars and take courses as need to ensure best practices.

Qualifications Requirements:

- Bachelor's degree in agriculture or related field.
- Ability to travel, communicate efficiently, and to be knowledgeable and respectful of other cultures with buyers overseas.

In addition, the petitioner submitted a copy of the beneficiary's foreign academic credentials, as well as a credential evaluation from the [REDACTED]. The credential evaluation indicates that the beneficiary's foreign education is equivalent to a "U.S. degree of Bachelor of Science in Agriculture and Biology awarded by a regionally accredited college or university in the United States, as well as the completion of one year of graduate study in Agriculture and related subjects at a regionally accredited college or university in the United States."

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Industrial Production Managers" - SOC (ONET/OES Code) 11-3051, at a Level I (entry level) wage.

Further, the petitioner provided several documents in support of the petition, including the following: (1) corporate documents; (2) photographs of its business; (3) copies of its licenses; and (4) articles regarding the company.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 18, 2013. The director outlined the evidence to be submitted.

On July 12, 2013, counsel responded by submitting a brief and additional evidence. Counsel submitted excerpts from the U.S. Department of Labor's (DOL) Occupational Outlook Handbook regarding the occupational categories "Industrial Production Managers" and "Sales Managers." In the July 11, 2013 brief, counsel states that the petitioner "is appropriately sized for one individual to occupy the dual positions of Production Manager and Sales Manager." Counsel further states that "[w]hen dealing with crossover positions, no single bachelor's degree will ever be appropriate as required preparation for positions with dual responsibilities."

In response to the RFE, counsel submitted a revised description of the duties of the proffered position from the petitioner, along with the percentage of time that the beneficiary will spend performing each duty. Specifically, the document indicated the following:

Job Duty	%	Hours	Additional Explanation	Level Education Required

The basic functions of the Production/Sales Manager are that of providing assistance to customers/growers for product quality assurance and enhancement, directing and managing edible bean processing to assure product is processed efficiently according to specifications while meeting cost and quality goals, and attending trade shows, developing contacts with, and promoting products to, brokers, food processors, canneries, and direct resellers. The Production/Sales Manager will:			This is a summary. Please see comments and percentages next to specified duties below.	This is a summary. Please see comments below.
Advise clients on best approaches to fertilizing and planting the incoming crop, insect and disease control options, and crop harvesting to ensure the quality of the incoming product.			See above.	See above.
Direct pre-processing storage and drying; testing and grading; care and handling; processing; sampling and testing; and packaging and storage of finished products, including all intermediate plant operations.			See above.	See above.
In regards to certified and registered seed sales, Production/Sales Manager will contact and promote [the petitioner's] seed directly to growers, nationally and internationally.			See above.	See above.
Duties and Responsibilities				
Train, motivate and supervise plant employees.	20%	Variable, depending upon	Employee supervision	Bachelor's degree.

		season.		
Routinely inspect all processing equipment to ensure good working conditions, quality and safety of product.	5%	See above.	Directing and managing bean processing, Quality control.	Bachelor's degree.
Ensure, Implement and Maintain Safety and Health Regulations and Standards.	10%	See above.	Oversight of processing plant operations, Quality Control.	Bachelor's degree.
Develop and implement cost effective production practices.	5%	See above.	Developing and implementing production practices[.]	Bachelor's degree.
Manage inventory and ordering processing supplies.	5%	See above.	Directing and managing bean processing.	Bachelor's degree.
Sample and test product throughout the production process.	5%	See above.	Product Testing, Quality Control[.]	Bachelor's degree.
Promotion and sales of product.	25%	See above.	Managing customer accounts[.]	Bachelor's degree.
Monitor customer satisfaction of product and address all grievances and complaints in a timely matter.	10%	See above.	Resolving customer grievances, Managing customer accounts[.]	Bachelor's degree.
Per customer request, advise customers on best approach to fertilizing, planting, protecting, and harvesting incoming crop to be processed.	10%	See above.	Managing customer accounts, Quality Control.	Bachelor's degree.
Manage buyer/customer accounts and recruit new buyers and customers.	5%	See above.	Managing customer accounts[.]	Bachelor's degree.
Attend meetings and conferences that deal with the product from the	2.5%	See above.	Quality control[.]	Bachelor's degree.

field to the finished product.				
Negotiate fair prices for product between customers and buyers.	10%	See above.	Managing customer accounts[.]	Bachelor's degree.
Attend training seminars and take courses as need to ensure best practices.	2.5%	See above.	Quality control[.]	Bachelor's degree.

In response to the RFE, counsel also submitted a letter from Jill Wilkey of North Dakota State University (NDSU).

The director reviewed the information provided by the petitioner and counsel to determine whether the petitioner had established eligibility for the benefit sought. Although the petitioner claimed that the beneficiary would serve in a specialty occupation capacity, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent). The director denied the petition on July 23, 2013. Counsel submitted an appeal of the denial of the H-1B petition. With the Form I-290B, counsel submitted a brief, along with copies of documents previously submitted and additional evidence.²

III. PREPONDERANCE OF THE EVIDENCE STANDARD

In the appeal brief, counsel references the "preponderance of the evidence" standard. The AAO notes that 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

² With regard to the documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO is not required to accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not consider the sufficiency of such evidence submitted for the first time on appeal. Nevertheless, the AAO reviewed the documentation but, as discussed in this decision, the evidence does not establish that the proffered position qualifies as a specialty occupation.

that he or she is eligible for the benefit sought.

* * *

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.

* * *

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.

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. 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.

IV. REVIEW OF THE DIRECTOR'S DECISION

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. When determining whether a position is a specialty occupation, it is important to consider the nature of the business offering the employment and the description of the specific duties and requirements of the position as it relates to the particular employer.³ To ascertain the intent of a petitioner, USCIS looks to the Form I-129

³ The record contains varying statement with regard to the academic requirements for the proffered position. In the April 1, 2013 letter of support, the petitioner states that "[t]he Production/Sales Manager position requires a bachelor[']s in agriculture or a related field." In response to the director's RFE, counsel provided a

and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty (or its equivalent) is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty (or its equivalent). Factors considered by the AAO when determining these criteria include: the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Industrial Production Managers."

The AAO reviewed the chapter of the *Handbook* entitled "Industrial Production Managers,"

letter from [REDACTED] who claims that the position requires "a Bachelor's Degree in Agronomy or Plant Sciences." In the appeal brief, counsel asserts that the proffered position requires "a minimum of a bachelor's degree in plant or agricultural sciences or related degree." On appeal, counsel submitted a letter from [REDACTED] who states that the proffered position requires "a candidate with a Bachelor's degree in Agricultural Science, Agricultural Management, or a closely related field."

⁴ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2014 – 2015 edition available online. The AAO hereby incorporates into the record of proceeding the excerpt of the *Handbook* regarding the duties and requirements of the occupational category "Industrial Production Managers."

including the sections regarding the typical duties and requirements for this occupational category.⁵ However, the *Handbook* does not indicate that "Industrial Production Managers" comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "How to Become an Industrial Production Manager" states, in part, the following about this occupation:

Education

Employers prefer managers have at least a bachelor's degree. While the degree may be in any field, many industrial production managers have a bachelor's degree in business administration or industrial engineering. Sometimes, production workers with many years of experience take management classes and become a production manager. At large plants, where managers have more oversight responsibilities, employers may look for managers who have a Master of Business Administration (MBA) or a graduate degree in industrial management.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Industrial Production Managers, available on the Internet at <http://www.bls.gov/ooh/Management/Industrial-production-managers.htm#tab-4> (last visited April 7, 2014).

When reviewing the *Handbook*, the AAO must note that the petitioner designated the wage level of the proffered position as a Level I position on the LCA.⁶ This designation is indicative of a

⁵ For additional information regarding the occupational category "Industrial Production Managers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Industrial Production Managers, on the Internet at <http://www.bls.gov/ooh/Management/Industrial-production-managers.htm#tab-1> (last visited April 7, 2014).

⁶ The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level 1 wage rate is described by DOL as follows:

Level 1 (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.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

The occupational category "Industrial Production Managers" is grouped among occupations designated as

comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. Furthermore, DOL guidance indicates that a Level I designation is appropriate for a position as a research fellow, a worker in training, or an internship.

The *Handbook* does not support the assertion that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. The *Handbook* indicates that employers prefer managers who have at least a bachelor's degree. However, obviously a *preference* is not a minimum degree *requirement*. The *Handbook* further states that the degree may be in any field. Thus, there is a wide-range of disparate fields that employers find to be acceptable for these positions. The *Handbook* further reports that some production workers with many years of experience take management classes to become a production manager. The *Handbook* does not indicate that such experience and courses must be the equivalent to a bachelor's degree in a specific specialty.⁷ Upon review, the *Handbook* does not support the assertion that the proffered position falls under an occupational category for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

In response to the RFE, counsel submitted a letter from [REDACTED]

[REDACTED] The letter is dated July 10, 2013. In the letter, Ms. [REDACTED] states that she believes "that the Production/Sales Manager position requires a Bachelor's Degree in Agronomy or Plant Sciences." Upon review of the letter, the AAO is not persuaded by Ms.

Job Zone 3. A designation of Job Zone 3 groups it among occupations for which medium preparation is needed. More specifically, most occupation in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." See O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3.

⁷ Although it does not appear relevant here, the *Handbook* describes the credentials that employers at large plants may seek. The AAO notes that it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's business is 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 the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the 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. On the Form I-129, the petitioner stated that it currently has six employees. The record of proceeding does not contain the job titles and job descriptions of the petitioner's six employees. The petitioner and counsel did not address or provide probative documentation as to how the beneficiary would be relieved from performing non-qualifying duties.

assertions.

First, as a preliminary matter, Ms. [REDACTED] has not adequately established her expertise to render the opinion made in this matter. She did submit her curriculum vitae, nor did she provide any information regarding her professional and academic credentials (aside from the signature line on the letter). While presumably her role at the university career center involves assisting students and recent graduates of the university in finding jobs, the letter does not provide any information regarding her job duties and responsibilities, length of service in the position, etc. Ms. [REDACTED] does not claim that she possesses any specific knowledge of the educational requirements for production/sales manager positions (or parallel positions) in the petitioner's industry for similar organizations based upon actual research or any particular authoritative sources (e.g., statistical surveys, authoritative industry or government publications, or professional studies). Ms. [REDACTED] opinion letter does not cite specific instances in which her past opinions have been accepted or recognized as authoritative on this particular issue. Rather, it appears that she is relying upon her experience at the university career center, which deals with a limited group of people – students and recent college graduates of the [REDACTED]

Further, Ms. [REDACTED] does not discuss the duties of the proffered position in any substantive detail. To the contrary, she simply listed a few tasks in bullet-point fashion with no further discussion. As a result, it is not evident that she analyzed the duties prior to formulating her letter. Additionally, there is no indication that Ms. [REDACTED] possesses any knowledge of the petitioner's proffered position beyond these duties. The fact that she attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of her opinion. Ms. [REDACTED] 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.

Moreover, it must be noted that there is no indication that the petitioner and counsel advised Ms. [REDACTED] that the petitioner characterized the proffered position as a low, entry-level position relative to others within the occupation (as indicated by the wage-level on the LCA). It appears that Ms. [REDACTED] would have found this information relevant for her opinion letter. Moreover, without this information, the petitioner has not demonstrated that Ms. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine similar positions based upon job duties and responsibilities.

On appeal, counsel submitted an opinion letter from [REDACTED] from the [REDACTED]. The letter is dated August 22, 2013. As previously discussed, where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764; *see also Matter of Obaigbena*, 19 I&N Dec. 533.

⁸ In the appeal brief, counsel states that the [REDACTED] website indicates that the career center will educate and provide career resources to students and alumni and encourage partnerships to connect them with employers. He further states that the career center has prepared annual employment reports of the university baccalaureate degrees since 1995.

Nevertheless, even considering Mr. [REDACTED] opinion letter, the AAO finds that the letter would not be probative in this matter. The AAO will briefly address a few of the deficiencies it observes in Mr. [REDACTED] letter.

At the beginning of the letter, Mr. [REDACTED] provides a conclusory statement regarding the beneficiary's credentials being the equivalent to a bachelor's degree in agricultural science/agricultural management in the United States. Notably, his assertion differs from the conclusion reached by [REDACTED] educational evaluation report that was submitted with the Form I-129.

While Mr. [REDACTED] continues by stating that the evaluation is prepared to demonstrate that the beneficiary possesses the equivalent of a bachelor's degree based upon his work experience, the letter does not contain any specific information regarding the beneficiary's work experience. Mr. [REDACTED] then claims that he is qualified (to comment on the beneficiary's work experience) based upon the work he has performed at the [REDACTED] asserts that the evaluation relies upon copies of original documents provided by the beneficiary. He then describes what he believes to be the necessary academic credentials for a production/sales manager, but he does not describe, evaluate or analyze the beneficiary's credentials. Mr. [REDACTED] concludes that he has provided an evaluation of the beneficiary's credentials (although the letter does not contain any analysis on this topic) and he again states that he has the opportunity to evaluate experience, training and/or courses through his own work at the university.⁹ Importantly, while Mr. [REDACTED] references the beneficiary by name in his opinion letter, Mr. [REDACTED] also references another individual ("Mr. [REDACTED]"). The record provides no explanation for this inconsistency. Upon review, the AAO must question the accuracy of Mr. [REDACTED] letter and whether the information provided is correctly attributed to this particular position and this beneficiary.

Further, Mr. [REDACTED] provided a summary of his experience and attached a copy of his curriculum vitae. Based upon a complete review of Mr. [REDACTED] letter and curriculum vitae, the AAO notes that, while Mr. [REDACTED] may, in fact, be a recognized authority on various topics, he has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue.

Mr. [REDACTED] claims that he is qualified to comment on the topic because of the position he holds and

⁹ The AAO notes that [REDACTED] website includes a section entitled "Frequently Asked Questions" regarding transfer credit to the university. To the question "Can I receive credit . . . for work experience?" the response is the following:

The [REDACTED] does not award credit for non-traditional or experiential learning not supervised by our own faculty. Examples include internships, externships, practicum, or co-op work. Nor will we transfer credits awarded at other institutions for such work. In some instances, we may recommend sitting for a departmental exam or attempting to earn credit through the College-Level Examination Program.

[REDACTED] The Transfer Credit Center, available on the Internet at [REDACTED] (last accessed April 7, 2014).

has held at the [REDACTED].⁹ He then provides a summary of his professional experience. Despite Mr. [REDACTED] extensive resume, he has not established his expertise pertinent to the hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. That is, without further clarification, it is unclear how his experience would translate to expertise or specialized knowledge regarding the *current* recruiting and/or hiring practices of agricultural processing and sales companies in the postharvest crop activities industry (as designated by the petitioner in the Form I-129 and with the North American Industry Classification System code) similar to the petitioner for production/sales manager positions (or parallel positions).¹¹

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. That is, there is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for *production/sales managers* (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. The opinion letter contains no evidence that it was based on scholarly research conducted by Mr. [REDACTED] in the specific area upon which he is opining. In reaching this determination, Mr. [REDACTED] provides no authoritative documentary support for his ultimate conclusion regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies). Mr. [REDACTED] asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement. His statements are not supported by copies or citations of the research material used.¹² Mr. [REDACTED] provides general conclusory statements regarding production/sales manager positions, but he does not provide a

¹⁰ Although Mr. [REDACTED] letter is printed on the [REDACTED] letterhead, Mr. [REDACTED] states that the letter is strictly his opinion and is not the opinion of any of the universities with which he is affiliated or any of its departments or affiliates. In the letter, Mr. [REDACTED] indicates that his title is dean emeritus. It appears from his curriculum vitae that he retired from the [REDACTED] in 2003 (ten years prior to the letter). A review of Mr. [REDACTED] curriculum vitae indicates that he has authored several articles, books and related materials; however, according to his curriculum vitae these occurred in 2003 and earlier and were unrelated to the issue here. The undated curriculum vitae also indicates that Mr. [REDACTED] holds a position with the [REDACTED] in Maryland; however, Mr. [REDACTED] letter states that his role in the position ended in 2007 (six years prior to the issuance of the letter).

¹¹ 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 April 7, 2014).

¹² The AAO notes that the term recognized authority means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must include how the conclusions were reached, as well as the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

substantive, analytical basis for his opinion and ultimate conclusions.

Similar to the opinion letter from Ms. [REDACTED] there is no indication that Mr. [REDACTED] possesses any knowledge of the petitioner's proffered position beyond the job description. Furthermore, there is no evidence that he has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Likewise, it does not appear that the petitioner informed Mr. [REDACTED] that it classified the proffered position on the LCA as a Level I (entry) position relative to others within the occupation.

Mr. [REDACTED] states that "it is clear that a position such as a Production/Sales Manager would require a candidate with a Bachelor's degree in Agricultural Science, Agricultural Management, or a closely related field." The AAO observes that Mr. [REDACTED] makes an assertion, but fails to provide any supporting authority or any empirical basis for the pronouncement and the AAO finds that the opinion is not in accord with other information in the record.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the opinion letters rendered by Ms. [REDACTED] and Mr. [REDACTED] are not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by Ms. [REDACTED] and Mr. [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which they reached such conclusions. There is an inadequate factual foundation established to support the opinions. As such, neither the findings nor the ultimate conclusions are worthy of any deference, and the opinion letters are 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). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letters as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the opinion letters into each of the bases in this decision for dismissing the appeal.

Upon review of the record, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry 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 do not indicate that position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other 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 incorporates by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association. The petitioner submitted letters from Ms. [REDACTED] and Mr. [REDACTED]. However, as discussed in detail, the evidence does not support a conclusion that the proffered position qualifies as a specialty occupation.

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

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

In support of the petition, the petitioner provided information regarding the proffered position and documentation regarding the petitioner's business operations, including photographs of its business; copies of its licenses; and articles regarding the company. However, upon review of the record of proceeding, the AAO finds that the petitioner has failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. That is, the AAO reviewed the record in its entirety and finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. Although Mr. [REDACTED] provided a skills and related courses for product/sales manager positions, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While a few related courses may be beneficial, or even essential, in performing certain duties of a production/sales manager position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition.

Again, the LCA indicates a wage level at a Level I (entry level) wage. The wage level of the proffered position indicates that (relative to others within the occupational category "Industrial Production Managers") the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. Thus, the wage level designated by the petitioner in the LCA is not consistent with claims that the position would entail any particularly complex or unique duties. It appears that 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 example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹³ The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than similar positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's academic and professional background and will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has failed to establish 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 a bachelor's degree in a specific specialty, or its equivalent, for the position. The AAO usually reviews the petitioner's current or past recruiting and hiring practices, as well as information regarding employees who previously held the position, along with any other documentation submitted by the petitioner.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

¹³ For additional information on Level IV 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.

While a petitioner may claim that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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

The petitioner stated in the Form I-129 petition that it has six employees and was established in 1987 (approximately 26 years prior to the filing of the H-1B petition). However, upon review of the record, the petitioner did not provide any documentary evidence regarding current or past recruitment efforts for this position. Furthermore, the petitioner did not submit any information regarding employees who currently or in the past held the position. 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.

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

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

(b)(6)

of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

As previously noted, the petitioner provided information regarding the proffered position, along with documentation regarding its business operations, including photographs of its business; copies of its licenses; and articles regarding the company. The AAO acknowledges that the petitioner and its counsel may believe 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. Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category of "Industrial Production Managers." 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 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 Level IV (fully competent) position. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the nature of the specific duties of the proffered position 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).

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

V. CONCLUSION AND ORDER

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).

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

The petition 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, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.