



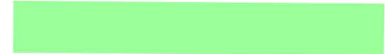
U.S. Citizenship  
and Immigration  
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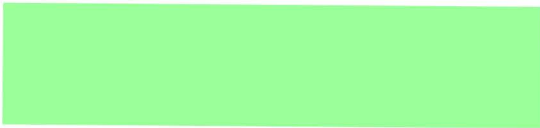


DATE: **APR 09 2014**

OFFICE: VERMONT SERVICE CENTER



IN RE:      Petitioner:  
              Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director of the Vermont Service Center denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO) and the AAO dismissed the appeal. On July 19, 2013, the petitioner filed a combined motion to reopen and motion to reconsider. The combined motion will be dismissed.

On the Form I-129 visa petition, the petitioner describes itself as a retail business established in 2008. In order to continue to employ the beneficiary in what it designates as an accountant position, the petitioner seeks to extend his classification 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 is a specialty occupation. Thereafter, the petitioner submitted an appeal of the director's decision to the AAO. The AAO reviewed the evidence and determined that the record of proceeding contained insufficient evidence to establish that the petitioner was a business in good standing. The AAO dismissed the appeal.

The petitioner and its counsel subsequently submitted a Form I-290B. As indicated by the check mark at Box F of Part 2 of the Form I-1290B, the petitioner filed a combined motion to reopen and motion to reconsider. The combined motion before the AAO contains: (1) the Form I-290B; (2) the AAO's decision dated July 18, 2013; (3) a brief prepared by counsel; (4) an unsigned copy of the petitioner's 2011 federal income tax return; (5) a letter dated July 16, 2013 from the Texas Secretary of State Corporations Section addressed to the petitioner; (6) a tax payment receipt from the Texas Comptroller of Public Accounts dated July 16, 2013; (7) the petitioner's Application for Reinstatement and Request to Set Aside Tax Forfeiture; and (8) a printout from the Texas Comptroller of Public Accounts entitled "Tax Requirements for Filings with the Secretary of State."

The AAO reviewed the record of proceeding in its entirety before issuing its decision. The AAO notes that the petitioner failed to comply with the regulatory filing requirements for motions to reopen and motions to reconsider. Specifically, the regulation at 8 C.F.R. § 103.5(a)(1) states the following:

(iii) Filing Requirements—A motion shall be submitted on Form I-290B and may be accompanied by a brief. It must be:

\* \* \*

(C) Accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding;

In this matter, the submission constituting the motion does not contain a statement as to whether or not the unfavorable decision has been or is the subject of any judicial proceeding as required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Further, if the decision is subject to any judicial proceedings, the

petitioner did not provide any information regarding the court, nature, date, and status or result of the proceeding. Thus, the petitioner and counsel failed to comply with the requirements as set by the regulations for properly filing a motion.

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion does not meet the applicable filing requirement as stated at 8 C.F.R. §103.5(a)(1)(iii)(C), it must be dismissed.

Although the motion will be dismissed for the petitioner's failure to comply with the filing requirements, the AAO nonetheless reviewed the motion, and finds that even if the petitioner had complied with the requirements at 8 C.F.R. § 103.5(a)(1)(iii)(C), both the motion to reopen and the motion to reconsider would have been dismissed, as described below.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be that which was not available and could not have been discovered or presented in the previous proceeding.<sup>1</sup> The new facts submitted on motion must be material and previously unavailable, and could not have been discovered earlier in the proceeding. Cf. 8 C.F.R. § 1003.23(b)(3).

On motion, counsel requests that the AAO reopen its decision based on the additional evidence filed with the motion. The AAO has reviewed all of the evidence submitted in support of the instant motion. Upon review of the submission, the AAO observes that the petitioner and counsel have not provided any "new facts" and that the instant motion does not contain any "new" evidence. Thus, it fails to meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2).

More specifically, the AAO finds that although the petitioner and counsel indicate on the Form I-290B that the evidence submitted with the motion establishes that the "[p]etitioner's business is in good standing," the evidence provided fails to establish this fact. The AAO observes that the petitioner submitted (1) an application for reinstatement; (2) a receipt for payment of the franchise tax; (3) a tax clearance letter for reinstatement; and (4) a printout from the Texas Comptroller of Public Accounts. The AAO notes that the "tax clearance letter," dated July 16, 2013, states that the petitioner is "eligible for reinstatement through May 15, 2014." However, the letter further states that "[t]he reinstatement must be filed with the Texas Secretary of State on or before the expiration date of this letter." The petitioner's application for reinstatement is inexplicably dated "2/26/2013," months prior to the date of the tax clearance letter. The petitioner did not provide evidence indicating that the application for reinstatement was either filed with or approved by the Texas Secretary of State. Thus the evidence provided by the petitioner in support of the instant motion to reopen does not establish that the petitioner is a business in good standing.

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<sup>1</sup> The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).



Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden" of proof. *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. As stated above, the instant motion will be dismissed for the petitioner's failure to comply with the filing requirements provided at 8 C.F.R. §103.5(a)(1)(iii). However, had the motion to reopen been properly filed, it would nonetheless have been dismissed pursuant to the above analysis for the petitioner's failure to establish new facts in support of the motion. Thus, this is an independent and alternative basis for dismissal of the motion to reopen.

Turning to the petitioner's motion to reconsider, the AAO again notes that as the motion was not properly filed pursuant to 8 C.F.R. §103.5(a)(1)(iii), it will be dismissed for that reason. However, the AAO reviewed the entire record of proceeding prior to issuing this decision, and finds that even if the petitioner had complied with the filing requirements, the AAO would have nonetheless dismissed the motion. A motion to reconsider must state the reasons for reconsideration and be supported by citations to pertinent statutes, regulations, and/or precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. See 8 C.F.R. § 103.5(a)(3) (requirements for a motion to reconsider) and the instructions for motions to reconsider at Part 3 of the Form I-290B.<sup>2</sup> In his brief, counsel indicates that the new evidence

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<sup>2</sup> The provision at 8 C.F.R. § 103.5(a)(3) states the following:

*Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

This regulation is supplemented by the instructions on the Form I-290B, by operation of the rule at 8 C.F.R. § 103.2(a)(1) that all submissions must comply with the instructions that appear on any form prescribed for those submissions. With regard to motions for reconsideration, Part 3 of the Form I-290B submitted by the petitioner states:

**Motion to Reconsider:** The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part:

[E]very application, petition, 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.



provided establishes that the petitioner is a business in good standing. As described above, the AAO does not find that the evidence provided substantiates this claim. Further, neither the petitioner nor counsel claims that the AAO's prior decision was based on an incorrect application of law or USCIS policy.

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. Upon review of the record of proceeding, the AAO reaffirms its previous finding that the petitioner did not provide sufficient evidence to establish that at the time of filing the Form I-129 petitioner, or at any subsequent time, that the petitioner was a business in good standing, permitted to undertake business activities in the state of Texas. Therefore, even if the petitioner had complied with the filing requirements of a motion to reconsider, the AAO would deny the motion because the petitioner and its counsel did not establish that the prior decision was based on an incorrect application of law or USCIS policy. The motion will therefore be dismissed. This is an independent and alternative basis for dismissal of the motion to reopen.

Counsel dedicates the majority of his brief to the issue of whether the proffered position qualifies as a specialty occupation. The AAO notes that the director denied the underlying petition on this basis. The AAO need not reach a determination on this issue as the AAO has not granted the motion to reopen and/or the motion to reconsider for the above stated reasons. Nevertheless, for the purpose of assisting the petitioner and counsel understand the deficiencies of the petition, the AAO provides the below discussion on the director's decision.<sup>3</sup> 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.

The AAO will also discuss two additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the applicable statutory and regulatory provisions; and (2) failed to submit a Labor Condition Application (LCA) that corresponds to the petition.

In this matter, the petitioner stated in the Form I-129 petition that it seeks the beneficiary's services as an accountant to work on a full-time basis. In a support letter dated February 1, 2012, the petitioner stated that the beneficiary will perform the following duties in the proffered position:

In this position, [the beneficiary's] responsibilities will consist of: (i) compiling and analyzing financial information and preparing financial reports by applying

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<sup>3</sup> As noted, the AAO provides this discussion to assist the petitioner and its counsel in understanding the deficiencies in the record of proceeding. However, the AAO again emphasizes that the issue is moot as the combined motion to reopen and motion to reconsider do not satisfy the requirements of a motion as required by the regulations. Therefore, the AAO's prior decision will not be disturbed pursuant to this dismissed motion.

principles of generally accepted accounting standards; (ii) preparing entries and reconciling general ledger accounts, documenting transactions, and summarizing current and projected financial position; (iii) maintaining payable and receivable records, detailing assets, liabilities, capital, and preparing detailed balance sheet, profit & loss, and cash flow statement; (iv) Auditing orders, contracts, individual transactions and preparing depreciation schedules to apply to capital assets; (v) preparing compliance reports for taxing authorities; and (vi) analyzing operating statements, review cost control programs, and make strategy recommendations to management.

The AAO notes that the petitioner has described the duties of the beneficiary's employment in the same general terms as those used from various sources on the Internet, including excerpts from the *Dictionary of Occupational Titles (DOT)*. That is, the AAO notes that the wording of the above duties as provided by the petitioner for the proffered position is recited almost verbatim from other sources. This type of description may be appropriate when defining the range of duties that may be performed within an occupational category, but it fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, generally cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Moreover, the AAO notes that 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 the 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.

In its letter of support accompanying the initial Form I-129 petition, the petitioner stated the following regarding the requirements of the proffered position:

Due to the complex and demanding requirements of an Accountant, only a person of exceptional ability and skills in business administration, accounting, and/or financial management is capable of qualifying as an Accountant for [the petitioner]. These minimum prerequisites for the offered position require a skilled professional with a Bachelor's degree in Accounting, Business Administration, or a related field.

The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of his professional experience. The petitioner further stated that the beneficiary's "more than thirteen years of employment reflect experience and training in positions of progressively increasing responsibility." The petitioner provided an evaluation of the beneficiary's credentials prepared by [redacted] indicating that the beneficiary has



attained the equivalent of a Bachelor of Science degree in accounting.<sup>4</sup>

In addition, the petitioner submitted an LCA in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification "Accountants and Auditors" - SOC (ONET/OES) code 13-2011, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 9, 2012. Thereafter, on July 30, 2012, counsel responded to the director's RFE by providing a brief and additional evidence, including: (1) tax documents; (2) a printout of the Occupational Information Network (O\*NET) OnLine Summary Report for the occupation "Accountants"; (3) an excerpt from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* regarding "Accountants and Auditors"; (4) copies of several job postings;<sup>5</sup> (5) a letter from [REDACTED] (6) letters regarding the beneficiary's prior employment; (7) advertisements for the proffered position; (8) a Form W-2, Wage and Tax Statements, for 2011 issued by the petitioner to the beneficiary; (7) and copies of two checks in the name of the beneficiary.

The AAO observes that counsel provided a revised description of the duties of the proffered position, along with the approximate percentage of time that the beneficiary will spend performing each duty.<sup>6</sup>

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<sup>4</sup> The AAO notes that evaluation indicates that the beneficiary is from "The Republic of the Congo." The Form I-129 petition indicates that the beneficiary is from India. No explanation for the discrepancy was provided.

<sup>5</sup> The AAO observes that the petitioner provided poor photocopies of the job announcements that are partially or completely illegible. The AAO will not attempt to decipher or "guess" the meaning or the probative value of information provided in poor, illegible photocopies.

<sup>6</sup> In response to the RFE, counsel provided a letter on the law firm's letterhead which includes a revised description of the proffered position. It is noted that the revised job description provided by counsel is not probative evidence. The description was submitted by counsel, not the petitioner, and counsel's brief was not endorsed by the petitioner. The record of proceeding does not indicate the source of the expanded duties and responsibilities (and the percentages of time allocated to each duty) that counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Moreover, the expanded description provided by counsel describes duties common to the occupational category rather than the specific duties of this particular position (i.e., "[c]ommon duties for accountants..."; "[t]hey monitor..."; "[t]heir duties..."; "[a]ccountants are responsible . . ."; "[t]he majority of an accountant's day is spent . . ."; "[t]hese managers and supervisors oversee . . ."; "[t]hey must oversee all aspects of the accounting department . . .").

The director reviewed the information provided in response to the RFE. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on August 31, 2012. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.

The AAO notes the following preliminary findings that are material to the issue of whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. However, the AAO here reiterates that this issue is moot, as the petitioner has failed to comply with the requirements for the filing of a motion, and the AAO provides this analysis solely to assist the petitioner and counsel understand the deficiencies of the petition.

To ascertain the intent of a petitioner USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. 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."

Moreover, the AAO finds that the petitioner describes the proposed duties in terms of generalized and generic functions that fail to convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will be responsible for "compiling and analyzing financial information and preparing financial reports." However, the statement fails to provide any insight into the beneficiary's actual duties, nor does it include any information regarding the specific tasks that the beneficiary will perform. Additionally, the petitioner claims that the beneficiary will be responsible for "preparing entries and reconciling general ledger accounts, documenting transactions, and summarizing current and projected financial position." Notably, the petitioner fails to demonstrate how the performance of these duties, as described in the record, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

The petitioner further claims that the beneficiary will be responsible for "preparing compliance reports for taxing authorities" and "analyzing operating statements, review cost control programs, and make strategy recommendations to management." The petitioner's statements fail to convey any pertinent details as to the actual work involved in these tasks. The petitioner does not explain the beneficiary's specific role and how his work will be conducted and/or applied within the scope of the petitioner's business operations. Furthermore, the petitioner fails to convey how a baccalaureate level of education (or higher) in a specific specialty, or its equivalent, would be



required to perform these tasks. Thus, 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.

It is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position.

The petitioner fails to convey the substantive nature of the work that the beneficiary would actually perform in the context of the petitioner's business operations. The responsibilities for the proffered position contain general 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.

Although the beneficiary has served in the proffered position for approximately three years, the petitioner did not provide sufficient documentation to establish the job duties and responsibilities of the proffered position. The petitioner did not submit probative evidence to substantiate the beneficiary's work product, nor did the petitioner submit financial documentation regarding the company's business operations, aside from its 2010 and 2011 tax returns and a few invoices. The record of proceeding lacks documentation regarding the petitioner's business activities and the actual work that the beneficiary will perform to substantiate the claim that the petitioner 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. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In the instant case, the petitioner claims that the beneficiary has served in the proffered position since 2009, however, the petitioner failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or substantive evidence regarding the actual work that the beneficiary performs. The tasks as described fail to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner's assertion with regard to the educational requirement is conclusory and unpersuasive, as it is not supported by the job description or substantive evidence.

Furthermore, the AAO notes that it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position.<sup>7</sup> 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 position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in 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. The petitioner and counsel elected not to address or provide probative documentation as to how the beneficiary will be relieved from performing non-qualifying duties. Further, the record of proceeding does not contain the job titles and job descriptions of the petitioner's other employees.

Moreover, the petitioner and counsel state that a bachelor's degree in business administration is acceptable for the proffered position. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.<sup>8</sup> Again, the petitioner and counsel in this matter claim that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision could therefore be affirmed and the petition denied on this basis alone.

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<sup>7</sup> In the instant case, the petitioner stated on the Form I-129 petition that it employs three people.

<sup>8</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.

*Id.*



Further, in the instant case, the record of proceeding also contains discrepancies between what the petitioner claims about the level of responsibility inherent in the proffered position set against the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of petition. As previously noted, the petitioner submitted an LCA in support of the petition that designated the proffered position to the corresponding occupational category of "Accountants and Auditors" - SOC (ONET/OES) code 13-2011. The wage level for the proffered position in the LCA corresponds to a Level I (entry) position. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.<sup>9</sup> The LCA was certified on February 7, 2012 and signed by the petitioner. The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant 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>10</sup>

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) position 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>11</sup> DOL emphasizes that these guidelines should not be implemented in a mechanical fashion

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<sup>9</sup> The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Office of Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatcenter.com/>.

<sup>10</sup> For additional information regarding prevailing wage determinations, 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>11</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

and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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

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

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).

The AAO acknowledges that the petitioner and its counsel may believe that the duties of the proffered position are complex, unique and/or specialized. For instance, the AAO notes that in the February 1, 2012 letter of support, the petitioner references the "complex and demanding requirements of the position" and claims that "only a person of exceptional ability and skills in business administration, accounting, and/or financial management is capable of qualifying as an Accountant for [the petitioner]."

Moreover, in the May 9, 2012 letter, submitted in response to the director's RFE, counsel claims that the specific responsibilities and knowledge of the position is "specialized" and "complex." Further, counsel references "the complexity of the voluminous transactions taking place [by the petitioner]." Additionally, counsel claims that the beneficiary's "responsibilities primarily include managing and directing the financial activities, rather than performing day-to-day bookkeeping function." Counsel also states, "In addition to supervising individuals who perform routine bookkeeping services, [the beneficiary] will spend [the] bulk of his time in establishing operational and financial security procedures and advising upper management with cost saving and investment strategies."<sup>12</sup>

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"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.

<sup>12</sup> The Form I-129 indicates that the petitioner's business operations consist of three employees. No specific information was provided as to the identity or positions of the "individuals who perform routine bookkeeping services" that the beneficiary will purportedly supervise.



On appeal, counsel asserted that the beneficiary's "job will coordinate activities involved with management of the entire financial operation." Counsel referenced the "challenging tasks of the position." According to counsel, the petitioner seeks new opportunities and it "fears that it may not be able to meet the aggressive goals without assistance of an Accountant." Counsel stated that the beneficiary "will have overall responsibility for developing, organizing, and managing the financial operations of [the petitioner]." Counsel further reported that the beneficiary "would be spending the majority of its [sic] time in preparing, reviewing, and evaluating financial and tax records, implementing cost management techniques, and advising management in financial investment decisions to contribute to the financial success of [the petitioner]." Counsel noted that it is "critical asset" for business to be able to hire "an individual who can carry out the responsibility of the position with little or no supervision," and further noted that the petitioner is "largely dependent on the ability and expertise of an Accountant . . . as the specialized duties of this individual directly and indirectly affect the company's operations, revenue and profits, and ultimately the overall success of the company."

The AAO observes that the petitioner and counsel indicate that the petitioner will be relying heavily on the beneficiary to make critical decisions regarding the petitioner's business. Such reliance on the beneficiary's work appears to surpass the expectations of a Level I position, as described above, in which the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and has limited exercise of judgment. Here, rather than the beneficiary's work being "monitored and reviewed for accuracy," counsel indicates that the beneficiary will be supervising others and claims that the petitioner is relying on the beneficiary services to ensure the growth and success of the petitioner's business.

Thus, upon review of the assertions made by the petitioner and counsel, the AAO must question the level of complexity, independent judgment and understanding actually required for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described in the record of proceeding conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary, in comparison to others in the occupation, 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. As noted above, a job offer for a research fellow, a worker in training, or an internship is an indicator that a Level I wage should be considered.

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).

The AAO notes that the prevailing wage of \$43,451 per year on the LCA corresponds to a Level I for the occupational category of "Accountants and Auditors" for [REDACTED] Texas).<sup>13</sup> The petitioner stated in the Form I-129 petition and LCA that the offered salary for the proffered position was \$43,451 per year. Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$57,699 per year for a Level II position, \$71,926 per year for a Level III position, and \$86,174 per year for a Level IV position.

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

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

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

Certification by the Department of Labor 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.

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<sup>13</sup> For additional information regarding the prevailing wage for accountants in [REDACTED] see the All Industries Database for 7/2011 - 6/2012 for Accountants and Auditors at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?code=13-2011&area=26420&year=12&source=1> (last visited April 7, 2014).



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

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

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

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

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

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

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position.

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also*



*COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

In the instant case, the petitioner has failed to establish nature of the proffered position and in what capacity the beneficiary will actually be employed. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the

focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Nevertheless, the AAO will now address in detail the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Assuming, *arguendo*, that the duties of the proffered position as described by the petitioner would in fact be the duties performed by the beneficiary, the AAO will continue its discussion regarding the duties and the evidence in the record of proceeding to determine whether the proffered position as described would qualify as a specialty occupation in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). This criterion requires that the petitioner establish 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 the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>14</sup> As previously discussed, the petitioner designated the proffered position in the LCA under the occupational category "Accountants and Auditors."

In the instant case, the AAO finds that the petitioner has not provided sufficient information to establish that the proffered position falls under the occupational category "Accountants and Auditors." Nevertheless, the AAO reviewed the chapter of the *Handbook* entitled "Accountants and Auditors" including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that "Accountants and Auditors" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

When reviewing the *Handbook*, the AAO must note that the petitioner designated the proffered position as a Level I (entry) position in the LCA. This designation is indicative of a 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. Furthermore, the petitioner's designation of the position under this wage level signifies that the beneficiary will be expected to work under close supervision and receive specific instructions on required tasks and expected results. Additionally, the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment. Moreover, the beneficiary's work will be closely monitored and reviewed for accuracy. DOL guidance indicates that a job offer for a research fellow, a worker in training, or an internship is an indicator that a Level I wage should be considered.

The *Handbook* reports that certification may be advantageous or even required for some accountant positions. However, the AAO notes that there is no indication that the petitioner requires the beneficiary to have obtained the designation Certified Public Accountant (CPA), Certified

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<sup>14</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/>.



Management Accountant (CMA) or any other professional designation to serve in the proffered position.

While the *Handbook* states that most accountant positions require at least a bachelor's degree in accounting or a related field, the *Handbook* continues by stating the following:

In some cases, those with associate's degrees, as well as bookkeepers and accounting clerks who meet the education and experience requirements set by their employers, get junior accounting positions and advance to accountant positions by showing their accounting skills on the job.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Accountants and Auditors, on the Internet at <http://www.bls.gov/ooh/business-and-financial/accountants-and-auditors.htm#tab-4> (last visited April 7, 2014).

The *Handbook* does not support a finding that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. More specifically, the *Handbook* reports that some graduates from junior colleges, as well as bookkeepers and accounting clerks meeting education and experience requirements set by employers, can advance to accountant positions by demonstrating their accounting skills. According to the *Handbook*, individuals who have less than a bachelor's degree in a specific specialty, or its equivalent, can obtain junior accounting positions and then advance to accountant positions. The *Handbook* does not state that this education and experience must be the equivalent to at least a bachelor's degree in a specific specialty.

The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is normally the minimum requirement for entry into this occupation. Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. The *Handbook* states that most accountants and auditors need at least a bachelor's degree, however, this statement does not support the view that any accountant job qualifies as a specialty occupation as "most" is not indicative that a particular position within the wide spectrum of accountant jobs normally requires at least a bachelor's degree in a specific specialty, or its equivalent.<sup>15</sup> More specifically, "most" is not indicative that a position normally requires at least a

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<sup>15</sup> For instance, the first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of the positions require at least a bachelor's degree in a specific specialty, it could be said that "most" of the positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner (which as noted above is designated as a Level I entry position in the LCA). Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part

bachelor's degree in a specific specialty, or its equivalent, (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)), or that a position is so specialized and complex as to require knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)). Therefore, even if the proffered position were determined to be an accountant position, the *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

The AAO also reviewed the section of the *Handbook* relating to "Bookkeeping, Accounting, and Auditing Clerks," and finds that the *Handbook* does not indicate that bookkeeping, accounting, and auditing clerks comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree, in a specific specialty, or the equivalent. The *Handbook* provides the following information in the subsection entitled "How to Become a Bookkeeping, Accounting or Auditing Clerk" for this occupational category:

#### **Education**

Most bookkeeping, accounting, and auditing clerks need a high school diploma. However, some employers prefer candidates who have some postsecondary education, particularly coursework in accounting.

#### **Training**

Bookkeeping, accounting, and auditing clerks usually get on-the-job training. Under the guidance of a supervisor or another experienced employee, new clerks learn how to do their tasks, including double-entry bookkeeping. (Double-entry bookkeeping means that each transaction is entered twice, once as a debit (cost) and once as a credit (income) to ensure that all accounts are balanced.)

Some formal classroom training also may be necessary, such as training in specialized computer software. This on-the-job training typically takes around 6 months.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Bookkeeping, Accounting, or Audit Clerks, on the Internet at <http://www.bls.gov/ooh/office-and-administrative-support/bookkeeping-accounting-and-auditing-clerks.htm#tab-4> (last visited April 7, 2014).

The AAO notes that the *Handbook* does not report that, as an occupational group, "Bookkeeping, Accounting or Auditing Clerks" normally require at least a bachelor's degree in a specific specialty for entry. The *Handbook* explains that most bookkeeping, accounting, and auditing clerks need a high school diploma. The *Handbook* continues by stating that some employers prefer candidates

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"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." Section 214(i)(1) of the Act.



who have some postsecondary education, particularly coursework in accounting. The *Handbook* further states that workers usually receive on-the-job training.

In response to the RFE, counsel submitted a copy of the O\*NET summary report for the occupational category of "Accountants," and highlighted the portion related to the "Job Zone." The AAO reviewed the printout in its entirety. However, the AAO finds that it is insufficient to establish that the position qualifies as a specialty occupation for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. A designation of Job Zone 4 indicates that a position requires considerable preparation. It does not, however, demonstrate that a bachelor's degree in any specific specialty is required, and does not, therefore, demonstrate that a position so designated qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). More specifically, the OWL statement is a condensed version of what the O\*NET actually states about its Job Zone 4 designation. See the O\*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones> (explaining that Job Zone 4 signifies only that *most* but not all of the occupations within it require a bachelor's degree). Further, the Help Center's discussion confirms that Job Zone 4 does not indicate any requirements for particular majors or academic concentrations. *Id.* Therefore, the O\*NET information is not probative of the proffered position qualifying as a specialty occupation. It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers 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.

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that 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 by the petitioner do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, 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 its previous discussion on the matter. The record does not contain any letters from the industry's professional association, indicating that it has made a degree a minimum entry requirement.

In response to the director's RFE, counsel submitted copies of job advertisements in support of the assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations.<sup>16</sup> The petitioner also submitted an opinion letter from [REDACTED]

[REDACTED] However, upon review of the evidence, the AAO finds that counsel's reliance on the job announcements and letter is misplaced.

In regard to the job announcements, the AAO notes that counsel did not provide any independent evidence of how representative the job advertisements are of the advertising employers' recruiting history for the type of jobs advertised. As the advertisements are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Furthermore, in the Form I-129, the petitioner stated that it is a retail company established in 1997. The petitioner also stated that it has three employees, a gross annual income of \$855,411, and a net annual income of \$41,669. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 447110.<sup>17</sup> The AAO notes that this NAICS code is designated for "Gasoline Stations with Convenience Stores." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments engaged in retailing automotive fuels (e.g., diesel fuel, gasohol, gasoline) in combination with convenience store or food mart items. These establishments can either be in a convenience store (i.e., food mart) setting or a gasoline station setting. These establishments may also provide automotive repair services.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 447110 – Gasoline Stations with Convenience Stores, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch#> (last visited April 7, 2014).

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<sup>16</sup> The AAO notes that counsel did not provide the entire job advertisement for the positions with several of the companies. That is, portions of the text are missing or have been cut-off. In addition, many of the job advertisements are illegible. Consequently, information regarding the requirements for these positions cannot be ascertained.

<sup>17</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 April 7, 2014).



For the petitioner to establish that an advertising 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.

Upon review of the documentation, the petitioner fails to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

The job postings do not establish eligibility under this criterion of the regulations. For instance, the advertisements include positions with organizations such as [REDACTED] (a sports apparel business); [REDACTED] (a nonprofit charitable organization);

[REDACTED]

[REDACTED] The petitioner also submitted postings from [REDACTED] a convenience store company with "over 4,500 employees" and "450 corporately owned and franchise locations," which claims "annual revenues in excess of two billion dollars." 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. The petitioner and counsel failed to supplement the record of proceeding to establish that the employers are similar to it.

Moreover, some of the advertisements do not appear to be for parallel positions. More specifically, counsel provided a posting for a senior accountant, which requires a degree and "5-7 years experience in the apparel industry." Additionally, counsel submitted a job posting for a senior tax accountant position, which requires candidates to possess a degree with "3-5 years of Tax experience including federal and state tax returns." In addition, counsel submitted a posting for a senior staff accountant position, which requires a degree and "three to five years[of] experience." Counsel also submitted a job posting for a senior staff accountant position, which requires candidates to possess a degree with "5 to 7 years [of] experience in accounting, preferably in [the] food processing industry" and "3-5 years [of] experience with fixed asset accounting." As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) position. The advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently

established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Contrary to the purpose for which the advertisements were submitted, 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, some of the postings state that a bachelor's degree is required, but they do not provide any further specification. Thus, they do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required. The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the duties of the position. Moreover, the AAO observes that counsel submitted advertisements indicating that a bachelor's degree in business is acceptable. As previously mentioned, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Further, counsel submitted postings that do not specify the level of education required (e.g., associate's degree, vocational degree/diploma, baccalaureate, master's degree). The advertisements do not indicate that the employer requires at least a baccalaureate level of education.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. 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.<sup>18</sup>

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

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<sup>18</sup> Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error.")

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



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.

Counsel states on motion that the petitioner's "goal is to turn [its operations] into a leading retailer and premier fuel supplier." According to counsel the petitioner is "seeking new opportunities to establish an internet business for a retail store." On appeal, counsel claimed that the petitioner intends to "open the opportunities for development and expansion of the business." Although counsel claims that the petitioner has plans to expand its business operations, the petitioner did not provide probative documentation to support the claim (e.g., a business plan; documentation substantiating the expansion of physical facilities; plans to hire staff; evidence substantiating that the petitioner intends to establish branch, subsidiary or affiliate offices; probative evidence substantiating investments or new revenue sources; or other documentation regarding development/expansion plans).<sup>19</sup>

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted tax documents and several invoices. The AAO reviewed the record of proceeding in its entirety. However, upon review of the record, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

That is, a review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent.<sup>20</sup> Furthermore, the petitioner has not established why a few related courses or industry experience alone is insufficient preparation for the proffered position. Additionally, the AAO finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only

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<sup>19</sup> Counsel's claim that the petitioner intends to expand its business operations in the future is insufficient to demonstrate that the proffered position qualifies as a specialty occupation. That is, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. See 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

<sup>20</sup> Moreover, the petitioner has not provided sufficient evidence to establish that the beneficiary has been performing, and will continue to perform, the duties as described by the petitioner.

be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition.

More specifically, the LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level 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."<sup>21</sup>

The petitioner fails to demonstrate how the duties of the position as described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

The AAO observes that the petitioner has indicated that the beneficiary's background and his prior experience working for the petitioner will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner fails to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To

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<sup>21</sup> For additional information regarding wage levels as defined by DOL, 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)



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

To merit approval of the petition under this criterion, the record must 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. Upon review of the record of proceeding, the petitioner has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

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

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

In response to the director's RFE, counsel submitted copies of advertisements that he claims represent the petitioner's "recruitment efforts."<sup>22</sup> Notably, the advertisements that were placed in the Houston chronicle indicate that "2 yrs. experience" is required for the position. The advertisement placed with the University of Houston describes the position as "Full-time (degree not required)." The advertisement posted on Yahoo! Hotjobs indicates that "2-5 Years Experience" is required. None of these advertisements indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is required. The AAO further notes that an internet posting for the proffered position provided by counsel that appears to have been posted with the Texas Workforce Commission also does not indicate that a bachelor's degree is required for the position. Thus, the evidence provided of the petitioner's recruitment efforts does not establish that the petitioner satisfied this criterion of the regulations.

In response to the RFE, counsel claimed that "[p]rior to hiring [the beneficiary], [redacted] has performed the Accountant job duties." Counsel stated that [redacted] has "15 years of progressively advanced work experience in accounting and finance field." However, no evaluation of [redacted] credentials was provided. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has not submitted sufficient 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. The petitioner did not provide probative evidence demonstrating that it has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position.

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

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

In response to the RFE, counsel submitted an opinion letter from [redacted] associate professor of management science at the [redacted] who states that "the nature of [the specific responsibilities of the proffered position] and knowledge is so specialized and complex that knowledge required to perform these duties is usually associate with the attainment of a bachelor's degree."

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<sup>22</sup> However, counsel also stated that the "[p]etitioner recruited for this position through company contacts."



As a preliminary matter, the AAO notes that the term "recognized authority" means a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. 8 C.F.R. § 214.2(h)(4)(ii). A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. *Id.*

describes his expertise as pertaining to the field of "business and technology." restates the duties of the proffered position, which as previously discussed, were taken virtually verbatim from Internet sources, including the section of the Dictionary of Occupational Titles regarding "Accountants." Mr. Chen then opines that "[a]fter examining the responsibilities of the [proffered] position in detail, it becomes apparent that a minimum of a Bachelor's Degree in Accounting or a related area, or the equivalent, provides the student with the core competencies and skills needed for an Accountant position with the [listed] responsibilities."

Upon review of the opinion letter, there is no indication as to how Mr. Chen obtained information regarding the petitioner and the proffered position, nor is there any indication that Mr. Chen possesses any knowledge of the petitioner's proffered position and its business operations beyond the description that he provided in his letter. For instance, there is no evidence that Mr. Chen 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. 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. The very fact that he attributes various attributes to such a generalized treatment of the proffered position undermines the credibility of his opinion.

Notably, it does not appear that Mr. Chen is aware that the petitioner designated the proffered position as a Level I (entry) position in the LCA. As previously discussed, this designation is indicative of a 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. The petitioner's designation of the position under this wage level signifies that the beneficiary will be expected to work under close supervision and receive specific instructions on required tasks and expected results. Additionally, the beneficiary will be expected to perform routine tasks that require limited, if any exercise of judgment. Moreover, the beneficiary's work will be closely monitored and reviewed for accuracy. It appears that Mr. Chen would have found this information relevant for the opinion letter. Moreover, without this information, the petitioner has not demonstrated that Mr. Chen possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

As previously discussed, counsel claims that the petitioner plans to expand and develop its business operations. However, the petitioner failed to provide probative evidence to substantiate counsel's claims. Moreover, even in light of the claimed plans for expansion/development, the petitioner and

counsel did not establish that the proffered position qualifies as a specialty occupation.

That is, the AAO reviewed all of the evidence in the record of proceeding, including the job description and the evidence regarding the petitioner's business operations, such as the petitioner's tax documents, invoices, and other documentation. The AAO finds that the petitioner's statements and the submitted documentation fail to support the assertion that the proffered position qualifies as a specialty occupation under 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.

The AAO also reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is 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, requiring a significantly higher prevailing wage. For instance, as previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

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

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. Thus, had the AAO reopened the instant case, which it did not, the appeal would nonetheless have been dismissed for this reason.

The AAO observes that the instant petition seeks to extend the beneficiary's H-1B employment with the petitioner, and notes that the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988).

In addition to the above described deficiencies of the instant petition, the AAO notes a further issue that precludes approval of requested benefit. Although the AAO does not need to examine the issue of the beneficiary's qualifications where the petitioner has not provided sufficient evidence to



demonstrate that the position is a specialty occupation, the AAO notes that the petitioner has not demonstrated to the beneficiary is qualified to perform services in a specialty occupation position.

Specifically, the claimed equivalency was based in work experience. However, there is no evidence that the evaluators had the authority to grant college-level credit for work experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience and that the beneficiary also has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. *See* 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and (D)(1).

In the instant case, there is no independent evidence in the record from appropriate officials, such as deans or provosts, to establish that either [REDACTED]

[REDACTED] is, in the language of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), "an official [with] authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience."<sup>23</sup>

Furthermore, upon review of the beneficiary's employment letters, the AAO finds that the letters provide insufficient information regarding the beneficiary's work history and duties (e.g., complexity of the job duties; the level of judgment; the amount and level of supervision; the level of understanding required to perform the job duties). The letters describe the beneficiary's duties in terms a few functions that do not convey the substantive nature of the work that the beneficiary performed. The letters do not present an adequate factual foundation for the evaluators to determine that the beneficiary has the education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and that he has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. *See* 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). Thus, the AAO finds that the evaluations fails to establish that the beneficiary's education, training and/or work experience are the equivalent of a bachelor's degree in a specific specialty based upon the information provided. In light of the lack of a sufficient factual foundation discussed above, the

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<sup>23</sup> The AAO notes that The University of [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.

evaluations are insufficient even if they had been rendered by an official qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I).

Moreover, when USCIS determines a beneficiary's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), it must be demonstrated that the beneficiary's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the beneficiary has documented recognition of expertise in the specialty. In the instant case, the documentation from the beneficiary's prior employers does not establish that his work experience included the theoretical and practical application of specialized knowledge and that his experience was gained while working with peers, supervisors, or subordinates who have a degree in the specialty occupation, or its equivalent. Additionally, the petitioner did not submit probative documentation establishing that the beneficiary has recognition of expertise in the specialty. As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in any specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

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.

As previously discussed, in this matter, the submission constituting the motion does not contain a statement as to whether or not the unfavorable decision has been or is the subject of any judicial proceeding as required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Thus, the petitioner and counsel failed to comply with the requirements as set by the regulations for properly filing a motion.

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion does not meet the applicable filing requirement as stated at 8 C.F.R. § 103.5(a)(1)(iii)(C), it must be dismissed.

Finally, it should be noted for the record that, unless USCIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.



Accordingly, the combined motion to reopen and motion to reconsider will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

**ORDER:** The combined motion to reopen and motion to reconsider is dismissed.