



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **APR 11 2014** OFFICE: CALIFORNIA 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)

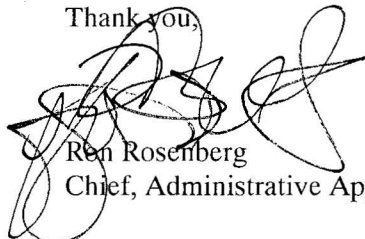
ON BEHALF OF PETITIONER:

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

On the Form I-129 visa petition, the petitioner describes itself as a general business company established in 1989. In order to employ the beneficiary in what it designates as a business manager position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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

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

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

I. Factual and Procedural Background

In the petition signed on September 17, 2012, the petitioner indicates that it wishes to employ the beneficiary in a business manager position on a full-time basis at the rate of pay of \$60,000 per year.¹ In addition, the petitioner indicates that the beneficiary will work at [REDACTED]. Further, on page 7 of the Form I-129, the petitioner states the following:

[The beneficiary] will be spending his time at both hotels. [REDACTED]

On page 11 of the Form I-129, the petitioner describes the beneficiary's proposed duties as follows:

Responsible for all fiscal operations, including accounting, budgeting, purchasing, billing & collections. [The beneficiary] will also be responsible for developing &

¹ On the Form I-129, Part 2, the petitioner indicated that the basis for classification was "Change in previously approved employment." On the LCA, Part B.7, the petitioner indicated that the basis for classification was "Continuation of previously approved employment without change with the same employer." No explanation for the variance was provided by the petitioner or counsel.

implementing business policies & procedures & facilitating communications between the office personnel [sic] & vendors. This position will also involve supervision, direction and evaluation of employees to ensure adherence to quality standards, deadlines and proper procedures according to State & Federal laws for the hospitality business. The business manager must also monitor & introduce new products & services to promote both businesses.

In the support letter dated September 17, 2012, the petitioner states that the beneficiary's "responsibilities are changing, but we still need him as our full-time Business Manager who can manage all fiscal operations including accounting, budgeting, billing, purchasing, and collections." The petitioner further states that "[t]he Business Manager will also need to hire, supervise and evaluate approximately 30-35 employees, including technically skilled employees and to attend other managerial positions as they come." In addition, the petitioner asserts that "the Business Manager will also be the liaison between the company and our franchisors in all future dealings." Furthermore, the petitioner claims that "[d]ue to the complexities of managing both hotels, the Business Manager must have a bachelor's degree in Business Administration or a related field or its equivalent in progressive work experience as a minimum qualification."

With the initial petition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcript, as well as employment verification letters. In addition, the petitioner submitted a credential evaluation from the [REDACTED] which indicates that the beneficiary's foreign education "represents attainment of a level of education comparable to two years of university study [with concentration in General Science Studies: Chemistry, Mathematics and Physics] offered by regionally accredited institutions of higher education in the United States." The petitioner also submitted a credential evaluation from [REDACTED] which indicates that the beneficiary's "undergraduate degree is on par with an undergraduate degree from a university in the USA."

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "General and Operations Managers" - SOC (ONET/OES Code) 11-1021, at a Level I (entry level) wage. Further, the LCA lists the place of employment as 9305 S. [REDACTED]

³ It must be noted that the LCA does not include [REDACTED] as a place of employment. The instructions to the LCA (ETA Form 9035 & 9035E) state the following:

It is important for the employer to define the place of intended employment with as much geographic specificity as possible. The place of employment address listed . . . must be a physical location and cannot be a P.O. Box. The employer may use this section to identify up to three (3) physical locations and corresponding prevailing wages covering each location where work will be performed and the electronic system will accept up to 3 physical locations and prevailing wage information.

Thus, the instructions require that the employer list the place of intended employment "with as much geographic specificity as possible" and, further notes that the employer may identify up to three physical

The petitioner also submitted several documents in support of the petition, including the following: (1) its Articles of Incorporation; (2) tax documents; and (3) a Management Agreement between the [REDACTED], effective June 1, 2012.⁵

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on January 8, 2013. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted. The AAO notes that the director specifically requested the petitioner to provide a more detailed description of the work to be performed by the beneficiary for the entire period requested, including the specific job duties, the percentage of time to be spent on each duty, and level of responsibility, etc.

On April 5, 2013, the petitioner and counsel responded by submitting further information regarding the proffered position and additional evidence.⁶ In a letter dated March 26, 2013, submitted in response to the director's RFE, the petitioner provided a revised description of the duties of the proffered position. Specifically, the petitioner stated that the beneficiary will perform the following duties:

[The Beneficiary] manages all fiscal operations of these hotels. His job duties include but are not limited to the following:

1. To oversee the business accounts and prepare financial statements of both entities, which includes tracking and controlling of accounts payable, accounts receivable and ageing accounts. To comply with all the legal requirements including taxation and interaction with company auditors whenever needed.
2. To analyze financial reports and to settle financial disputes with any guests and or venders [sic]. To advice [sic] the General Manager about reducing

locations, including street address, city, county, state, and zip code, where work will be performed. Additionally, the U.S. Department of Labor (DOL) regulations state that "[e]ach LCA shall state . . . [t]he places of intended employment." 20 C.F.R. § 655.730(c)(4) (emphasis added).

⁵ The AAO notes that the Management Agreement indicates the petitioner's address as [REDACTED]. However, in the Form I-129, LCA and its Income Tax Return for 2011, the petitioner indicates its address as [REDACTED].

⁶ In the brief dated March 28, 2013, counsel referred to the occupational category "Administrative Services Managers" in regards to the minimum requirements for the proffered position. Specifically, counsel stated that "the OOH [DOL's *Occupational Outlook Handbook* (hereinafter the *Handbook*)] listing for Administrative Services Managers states that the educational requirements will vary depending on the job responsibilities." As previously noted, the petitioner asserts in the LCA that the proffered position falls under the occupational category "General and Operations Managers." No explanation was provided.

costs and increasing profits and to find opportunities for business expansion. To determine discount rates and special pricing plans. To adjust daily/seasonal rates as comparable to those of competition in the area.

3. To prepare various functional business charts and analytics, in areas such as finance, operations, marketing, and strategy, for the analysis and comparison of current and past business performance. To make estimations of current and future funding requirements of the company.
4. To supervise, evaluate and coordinate the activities of employees. To set employee performance goals and ensure that employees pursue and try to achieve them actively.
5. To oversee the day to day working of the hotels and to ensure that required standards are achieved in all guest services, such as, cleaning, services, greeting etiquette, breakfast quality, pool maintenance, and other key guest satisfaction criteria.
6. To oversee that guest requests for reservation and special services are met, and to ensure that efforts are made to keep the occupancy rate high.
7. To create greater visibility of the business by advertising through online, billboard and print.
8. To negotiate contracts and to keep an active liaison relationship between the hotels and the franchisors in order to ensure the fulfillment of all contractual obligations.

* * *

Duties as described in point number one to three typically relate to job duties of Managing Finance and it takes about 50% of his time. Whereas, job duties described in point number four relate to Managing HR and he spends about 35% of his time on those jobs. Finally duties outlined in point number five to eight relate to Managing Sales/Lodging and for performing these duties he spends 15% of his time. He reports to the General Manager only and comes at number two on hierarchy chart of the company. He works for over sixty hours during a week.⁷

⁷ Here, the petitioner states that the beneficiary works for over sixty hours during a week, at a salary of \$60,000 per year. However, generally, the U.S. Department of Labor considers 40 hours per week to be full-time employment. See 20 C.F.R. § 655.736(a)(2)(iii)(A). The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment. The required wage rate means the rate of pay which is the higher of the actual wage for the specific employment in question or the prevailing wage rate for the occupation in which the beneficiary will be employed in the geographic area of intended employment. 20 C.F.R. § 655.715.

The petitioner further stated that "[t]he nature of duties to be performed is quite complex and it needs at least a Bachelor's degree or its equivalent experience in the field of managing a business."

In response to the director's RFE, the petitioner and counsel submitted several documents, including: (1) an organizational chart; (2) a letter from [REDACTED]; (3) a letter from [REDACTED] an Enrollment (7) the resume and Payroll Detail Report of [REDACTED] (8) a graph of the sales and profits of the [REDACTED] from January 1, 2012 to December 31, 2012; (10) the petitioner's Balance Sheets for the [REDACTED] (11) the Form W-2, Wage and Tax Statement, for 2012 issued to the beneficiary; (12) job vacancy announcements; and (13) tax documents for [REDACTED]

The director reviewed the information provided by the petitioner and counsel to determine whether the petitioner had established eligibility for the benefit sought. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent). The director denied the petition on June 12, 2013. Counsel submitted an appeal of the denial of the H-1B petition, along with a brief and additional evidence.¹⁰ In the brief, counsel states, "Another OOH

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 Labor Condition Application (LCA).⁷ Section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed. Appx. 722, 723 (7th Cir. 2010). The Labor Condition Application serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). *See* 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers").

⁹ The AAO observes that the petitioner did not submit all of the pages of the Income Tax Return. No explanation was provided.

¹⁰ With regard to the evidence submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on

position which may have been applicable is the occupation of Lodging Manager which, depending on the size of the hotel, may or may not require a bachelor's degree in hospitality or hotel management." Counsel further states that "[t]he Business Manager performs many of the same duties as the Lodging Manager." In addition, counsel claims that the "duties and responsibilities reveals that the Business Manager position encompasses the duties and responsibilities of a Lodging Manager (and hotel manager as described in *Sun* [*Matter of Sun*, 12 I&N Dec 535 (D.D. 1966)]), but also has additional responsibilities."¹²

II. Beyond the Director's Decision

The AAO reviewed the record of proceeding in its entirety and, as will be discussed later in the decision, agrees with the director that the petitioner has not established eligibility for the benefit sought. Moreover, the AAO has identified several, additional issues that preclude the approval of the H-1B petition that were not identified by the director. Consequently, even if the petitioner overcame the grounds for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought.¹³

More specifically, the record of proceeding contains discrepancies between what the petitioner claims about the level of responsibility and requirements inherent in the proffered position set against the contrary level of responsibility and requirements conveyed by the wage level indicated in the LCA submitted in support of petition.

As previously discussed, the petitioner submitted an LCA in support of the instant petition that designated the proffered position to the corresponding occupational category of "General and Operations Managers" - SOC (ONET/OES Code) 11-1021. The wage level for the proffered position in the LCA corresponds to a Level I (entry). The prevailing wage source is listed in the

appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's RFE. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not consider the sufficiency of such evidence submitted for the first time on appeal. Nevertheless, the AAO reviewed the documents, but the evidence does not establish eligibility or the benefit sought.

¹² On appeal, counsel refers to *Matter of Sun*, 12 I&N Dec 535 (D.D. 1966) to state that hotel management positions have been recognized by the Service to be professional occupations. Notably, *Sun* pertains to an immigrant visa petition and whether the beneficiary in that case was a member of the profession as defined in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and as interpreted at those times. Furthermore, it must be noted that *Sun* did not find that all hotel managers are members of the profession but rather that some hotel managers, under certain circumstances, may qualify for professional status. The issue before the AAO is whether the petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation under the applicable statutory and regulatory provisions and not whether it is a profession. Thus, the matter cited by counsel is irrelevant to the instant petition. Counsel's reliance on the case is misplaced.

¹³ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

LCA as OFLC (Office of Foreign Labor Certification) Online Data Center.¹⁴ The LCA was certified on August 30, 2012. The petitioner signed the LCA on September 17, 2012. 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 Occupational Information Network (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.

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) 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.¹⁵ The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The 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

¹⁴ 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 Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

¹⁵ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

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.

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

In the instant case, the petitioner designated the proffered position as a Level I position. This suggests that the petitioner's academic and/or professional experience requirements for the proffered position would be *less than* the preparation listed for Job Zone 3 occupations (i.e., "training in vocational schools, related on-the-job experience, or an associate's degree"). However, the AAO observes that the petitioner claims in its letter of support (dated September 17, 2012) that a "bachelor's degree in Business Administration or a related field or its equivalent in progressive work experience as a minimum qualification" is required for the proffered position.¹⁶

The petitioner and counsel claim that the duties of the proffered position are complex, unique and/or specialized. In the September 17, 2012 letter of support, the petitioner states that the beneficiary will "hire, supervise and evaluate approximately 30-35 employees, including technically skilled employees and to attend other managerial positions as they come." In addition, the petitioner references the complexities of managing the hotels. In response to the director's RFE, counsel asserts that "[t]he position of Business Manager for the petitioner is unique in that the position encompasses many responsibilities which would be handled by multiple people in a larger hotel." In the March 26, 2013 letter, submitted in response to the RFE, the petitioner claims that the beneficiary will "oversee the day to day working of the hotels." The petitioner further asserts that "[t]o accomplish [the] above duties effectively, in depth knowledge of accounts, administration and management is required." In addition, the petitioner states that the job is "quite challenging and complex" and "[t]he nature of duties to be performed is quite complex."

On appeal, counsel claims that the proffered position of business manager is "more complex than

¹⁶ Thereafter, the petitioner revised its requirements for the position, stating in response to the RFE that "[t]he nature of duties to be performed is quite complex and it needs at least a Bachelor's degree or its equivalent experience in the field of managing a business."

the General and Operations Manager position." In addition, counsel asserts that "[the business manager] makes high level decisions impacting [the] Petitioner's future." Counsel also states that "[t]he position's marketing responsibilities provide another example of how this unique position is more complex than that of a typical General and Operations Manager." Moreover, counsel claims that "the complexity and uniqueness of this position would require a candidate to have a minimum of a baccalaureate degree in order to perform the duties assigned to [a] 'Business Manager.'" According to counsel, the beneficiary "will also be tasked with making legally-binding decisions on Petitioner's behalf." Further, counsel indicates that the "duties of managing hotel properties valued at over \$3.5 million combined" requires specialized and complex knowledge.

Thus, the petitioner and counsel assert that the petitioner will be relying heavily on the beneficiary's work product to make critical decisions regarding the company's business and operations. Such reliance on the beneficiary's work appears to surpass the expectations of a Level I position, as described above, where the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and limited exercise of judgment. In the instant case, rather than the beneficiary's work being "monitored and reviewed for accuracy," it appears that the petitioner and counsel claim that the petitioner will be relying on the accuracy of the beneficiary's work product to make major business decisions about the direction of the company.

In addition, the petitioner and counsel submitted an organizational chart in response to the RFE. The chart depicts the hierarchy of the petitioner's organization, including the position of business manager. The proffered position reports to the general manager. When reviewing the placement of the proffered position, the AAO notes that there are 26 positions that are more junior than the business manager position.

Upon review of the assertions regarding the proffered position, the AAO must question the level of complexity, independent judgment and understanding that are actually needed 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, responsibilities and requirements 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. Furthermore, a Level I designation is appropriate for a position such as a research fellow, a worker in training, or an internship.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010). The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an

LCA] with [DOL]").

The prevailing wage on the LCA corresponds to a Level I position for the occupational category of "General and Operations Managers" for Sarpy County (Omaha, Nebraska).¹⁷ Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$86,362 per year for a Level II position, \$115,752 per year for a Level III position, and \$145,122 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.¹⁸ 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. Therefore, 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 for a higher-level and more complex position as claimed elsewhere in the petition.

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. As previously mentioned, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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

¹⁷ For additional information regarding the prevailing wage for this occupation in Sarpy County, see the All Industries Database for 7/2012 - 6/2013 for General and Operations Managers at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?code=11-1021&area=36540&year=13&source=1> (last visited April 10, 2014).

¹⁸ To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between DOL and the U.S. Department of Homeland Security (DHS), a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2). Upon receiving DOL's certification, the prospective employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). DOL reviews LCAs "for completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition. 20 C.F.R. § 655.705(b); see generally 8 C.F.R. § 214.2(h)(4)(i)(B).

occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

While DOL is the agency that certifies LCA applications before they are submitted to U.S. Citizenship and Immigration Services (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 or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, provided the proffered position was in fact found to be a higher-level and more complex position as asserted by the petitioner and counsel elsewhere in the petition, the petitioner would have failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position. That is, the LCA submitted in support of the petition would then fail to correspond to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance section 212(n)(1)(A) of the Act and the pertinent LCA regulations.

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

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

approved for these additional reasons.¹⁹

III. Review of the Director's Decision

Specialty Occupation

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. For efficiency's sake, the AAO hereby incorporates the above discussion and analysis into the record of proceeding regarding the beneficiary's proposed employment.

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

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

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

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

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

¹⁹ Fundamentally, it appears that (1) the petitioner previously claimed to DOL that the proffered position is a Level I, entry-level position to obtain a lower prevailing wage; and (2) the petitioner is now claiming to USCIS that the position is a higher-level and more complex position in order to support its claim that the position qualifies as a specialty occupation. Either the position is a more senior and complex position (based on a comparison of the petitioner's job requirements to the standard occupational requirements) and thereby necessitates a higher required wage, or it is an entry-level position for which the lower wage offered to the beneficiary in this petition is acceptable. To permit otherwise would be directly contrary to the U.S. worker protection provisions contained in section 212(n)(1)(A) of the Act and its implementing regulations.

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.

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.

The AAO notes that if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. *See Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000). The AAO does not find, however, that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner. Instead, 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. Furthermore, the AAO does not find (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

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

Second, in promulgating the H-1B regulations, the former Immigration and Naturalization Service (INS) made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

In the instant case, the petitioner initially stated that the position requires "a bachelor's degree in Business Administration or a related field or its equivalent in progressive work experience as a minimum qualification." Thereafter, in response to the RFE, the petitioner stated that "[t]he nature of duties to be performed is quite complex and it needs at least a Bachelor's degree or its equivalent experience in the field of managing a business." Upon review, however, the petitioner has not asserted and the record of proceeding does not support the conclusion that the petitioner's claimed requirements are the equivalent to a bachelor's or higher degree in a specific specialty.

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

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.²² As previously noted, the petitioner asserts in the LCA that the proffered position falls under the occupational category "General and Operations Managers." In response to the RFE, counsel references the occupational category "Administrative Services Managers" as relevant. In the appeal brief, counsel states,

²² The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2014 – 2015 edition available online. The AAO hereby incorporates into the record of proceeding the chapter of the *Handbook* regarding "Top Executives."

"Another OOH position which may have been applicable is the occupation of Lodging Manager which, depending on the size of the hotel, may or may not require a bachelor's degree in hospitality or hotel management." Counsel further states that "[t]he Business Manager performs many of the same duties as the Lodging Manager."

The AAO reviewed these chapters of the *Handbook*, including the sections regarding the requirements for these occupational categories. However, the *Handbook* does not indicate that these occupational categories require at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "What Top Executive Do" states, in part, the following about this occupation:

General and operations managers oversee operations that are too diverse and general to be classified into one area of management or administration. Responsibilities may include formulating policies, managing daily operations, and planning the use of materials and human resources. They make staff schedules, assign work, and ensure that projects are completed. In some organizations, the tasks of chief executive officers may overlap with those of general and operations managers.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Top Executives, available on the Internet at <http://www.bls.gov/ooh/management/top-executives.htm#tab-2> (last visited February 12, 2014).

Upon review, the AAO finds that the section of the *Handbook* entitled "How to Become a Top Executive" does not specifically address "General and Operations Managers." Nevertheless, when reviewing the *Handbook*, the AAO must note again that the petitioner designated the wage level of the proffered position as a Level I position on 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 and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. Furthermore, DOL guidance indicates that a Level I designation is appropriate for a position as a research fellow, a worker in training, or an internship. Further, while "many" top executives may have a bachelor's or master's degree, the *Handbook* does not indicate that such a degree is normally the minimum requirement for entry into this occupational category. Rather, the *Handbook* describes an array of preparatory paths to the occupational category of top executives, including the observation that in some industries "workers without a college degree may work their way up to higher levels in the company to become executives or general managers." Thus, the *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty (or its equivalent) is normally the minimum requirement for entry into this occupational category.

The AAO also reviewed the chapter of the *Handbook* entitled "How to Become an Administrative Services Manager." The *Handbook* reports that a high school diploma or a GED diploma is

typically required for entry into administrative services manager positions. While the *Handbook* states that some administrative services managers need at least a bachelor's degree, the *Handbook* does not report that such a degree is normally the minimum requirement for entry into the occupation.

The AAO also reviewed the chapter of the *Handbook* entitled "How to Become a Lodging Manager." According to the *Handbook*, many applicants can qualify for lodging manager positions by having a high school diploma and several years of experience working in a hotel. The *Handbook* states that most large, full-service hotels require applicants to have a bachelor's degree, and that hotels that provide fewer services generally accept applicants who have an associate's degree or certificate in hotel management or operations.²⁴ The *Handbook* does not conclude that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.

In response to the director's RFE, the petitioner and counsel submitted a letter by [REDACTED] from [REDACTED]. The letter is dated March 22, 2013. In the letter, [REDACTED] states that the position of business manager "requires a Bachelor's degree."

First, it must be noted that [REDACTED] stated that a bachelor's degree is required for the business manager position, but he did not indicate that a bachelor's degree in a *specific specialty* is required. A general-purpose bachelor's degree (no specific specialty) is inadequate to establish that a position qualifies as a specialty occupation. 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 and responsibilities of the position.

[REDACTED] provided a summary of his education and professional experience and attached a copy of his curriculum vitae. He claims that he is "considered a subject matter expert in the fields of human resources, human capital, and business strategy per professional qualification and academic

²⁴ On the Form I-129, the petitioner stated that it is a general business company with 30 to 35 employees. The petitioner reported its gross annual income as approximately \$387,300, and its net annual income as approximately \$38,170. The petitioner designated its business operations under the NAICS code 447110 – 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, 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.

See 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 10, 2014). The petitioner submitted an organizational chart and corporate documents. 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 10, 2014).

qualification criteria in academia." In addition, [REDACTED] states that he has "13 publications and 20 conference presentations in these topic areas." Based upon a complete review of [REDACTED] letter and curriculum vitae, the AAO notes that he has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. Without further clarification, it is unclear how his education or professional experience would translate to expertise or specialized knowledge regarding the current recruiting and hiring practices of companies similar to the petitioner for business manager positions (or parallel positions).

[REDACTED] letter and curriculum vitae do not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. In fact, he states that this is his "first opportunity to provide such an opinion to an outside agency." There is no indication that he has published any work or conducted any studies pertinent to the educational requirements for *business managers* (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. The opinion letter contains no evidence that it was based on scholarly research conducted by [REDACTED] in the specific area upon which he is opining. In reaching this determination, [REDACTED] provides no documentary support for his ultimate conclusion regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies).²⁷ [REDACTED] asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement.

Further, there is no indication that [REDACTED] possesses any knowledge of the petitioner's proffered position beyond the job description. The fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. Mr. [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the business enterprise. His opinion does not relate his conclusion to specific, concrete aspects of the petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. For instance, there is no evidence that [REDACTED] has visited the place of employment, observed the employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Mr. [REDACTED] provides general conclusory statements regarding business manager positions, but he does not provide a substantive, analytical basis for his opinion and ultimate conclusions.

Also, it must be noted that there is no indication that the petitioner advised Mr. [REDACTED] that the petitioner characterized the proffered position as a low, entry-level position relative to others within the occupation (as indicated by the wage-level on the LCA). It appears that Mr. [REDACTED] would have found this information relevant for his opinion letter. Moreover, without this information, the

²⁷ [REDACTED] provided the uniform resource locator (URL) for Internet pages that he says he reviewed, however, he did not submit printouts of the information. If he wished for the director and the AAO to review the information he should have provided printouts. The director and the AAO are not required to attempt to locate the specific web URL pages he references. Notably, the content of the links may have changed since accessed the sites.

petitioner has not demonstrated that Mr. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

The petitioner and counsel also submitted a letter from [REDACTED]²⁸. The letter is dated March 11, 2013. In the letter, [REDACTED] states that "[s]omeone who is managing two mid-economy hotels and handling the same responsibilities would most certainly need to have a bachelor's degree, as well as experience." Similar to the opinion letter from Mr. [REDACTED] does not indicate that a bachelor's degree in a *specific specialty* is required for the position.

[REDACTED] described his professional experience and attached a copy of his curriculum vitae. He states that "[m]y professional experience includes consulting, training, writing and speaking before groups of hotel owners and managers." He fails to specifically describe how any of this experience is relevant to, or equipped him with any particular knowledge of the issue here. [REDACTED] does not establish how his professional experience is pertinent to the current recruiting and hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case.

Notably, Mr. [REDACTED] does not state his experience giving advisory opinions on this matter and he fails to cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. [REDACTED] does not claim that he possesses any specific knowledge of the educational requirements for business manager positions (or parallel positions) in the petitioner's industry for similar organizations based upon actual research or any particular authoritative sources (e.g., statistical surveys, authoritative industry or government publications, or professional studies). [REDACTED] states that he reviewed "the material I was sent on [the beneficiary]," however, he does not clarify what material he reviewed.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the opinion letters rendered by [REDACTED] are not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which they reached such conclusions. There is an inadequate factual foundation established to support the opinions. As such, neither the findings nor the ultimate conclusions are worthy of any deference, and the opinion letters are not probative evidence towards satisfying any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letters as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and

²⁸ In the contact section of [REDACTED] letter, he provided his street address, but failed to include the city and state.

analysis regarding the opinion letters into each of the bases in this decision for dismissing the appeal.

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

Next, the AAO will now 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 objective, authoritative source), reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter.

The AAO acknowledges that the record of proceeding contains opinion letters from [REDACTED] and [REDACTED]. However, as previously discussed in detail, the AAO finds that the opinion letters do not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

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

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the 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 an organization is 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.

For instance, the advertisements include positions with [REDACTED]

[REDACTED] (a "246 room hotel"). 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. Furthermore, the petitioner and counsel provided advertisements for which little or no information regarding the employers is provided. Consequently, the record is devoid of sufficient information regarding the advertising employers to conduct a legitimate comparison of the organizations to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided sufficient information regarding which aspects or traits (if any) it shares with the advertising organizations.

Additionally, the petitioner has not established that all of the advertisements are for parallel positions. The job postings include positions for a hotel manager, controller, general manager, assistant general manager, regional revenue manager. Notably, the duties of some of the advertised positions are described in brief, general terms. Thus, it is not possible to determine important aspects of jobs, such as the day-to-day responsibilities, complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, it is unclear whether the duties and responsibilities of these positions are the same or parallel to the proffered position.

Moreover, the AAO notes that it appears that some of the advertised positions may be for more senior positions. For example, the petitioner and counsel provided a job posting with [REDACTED] which requires a degree and a minimum of three years of management experience at a full service hotel, resort or cruise ship. In addition, the petitioner and counsel submitted a job posting with the [REDACTED], which requires a degree and a minimum of five years of experience. The petitioner and counsel also submitted a posting with the [REDACTED] which requires a degree and a minimum of five years of experience. The AAO reiterates its earlier comments and findings regarding the implications of the designation of the proffered position in the LCA as a Level I (entry level) position. After reviewing the job postings, the AAO notes that without further clarification, the petitioner has not sufficiently established that the duties and responsibilities of all of the advertised positions are parallel to the proffered position.

Additionally, contrary to the purpose for which the advertisements were submitted, the postings do

not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For instance, the petitioner submitted postings in which a general degree is acceptable and/or a degree in a wide variety of disciplines is acceptable.²⁹ Thus, upon review, the advertisements do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the duties of the position is required.

The AAO reviewed all of the advertisements submitted in support of the petition.³⁰ However, as discussed, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry for parallel positions in organizations similar to the petitioner.

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

In support of the assertion that the proffered position is a specialty occupation under this criterion of the regulations, the petitioner and counsel also submitted a letter from [REDACTED]. Although the writers appear to represent hotels, it must be noted that the letters lack sufficient information regarding the organizations to conduct a meaningfully substantive comparison of the companies' business operations to the petitioner. The letters do not provide information regarding which specific aspects or traits (if any) they share with the petitioner. Notably, the petitioner failed to provide any supplemental information to establish that the organizations are similar to the petitioner. Thus, from the onset, this prong of the regulations has not been established by [REDACTED].

²⁹ Although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Moreover, since there must be a close correlation between the required "body of highly specialized knowledge" and the position, a minimum entry requirement of a degree in disparate fields would not meet the statutory requirement that the degree be "in the specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

³⁰ 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.

and [REDACTED] ("the writers").

Furthermore, the writers failed to provide any specific job duties and day-to-day responsibilities for their position. There is no information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, there is insufficient information regarding the duties and responsibilities of the position to determine whether it is the same or parallel to the proffered position. Moreover, the AAO observes that the writers did not provide any documentary evidence to corroborate that they currently or in the past employed individuals in parallel positions to the proffered position, nor did they provide any documentation to substantiate the claimed academic requirements. The writers have failed to submit any probative evidence of their recruitment and hiring practices. Thus, the letters do not establish that the proffered position qualifies as a specialty occupation.

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

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

USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence. The evidence submitted, however, fails to establish that the petitioner's proffered position qualifies for the requested classification under the applicable statutory and regulatory provisions. It is not the volume of documentation that establishes eligibility for the benefit sought, but rather the relevance, probative value, and credibility of the documentation – both individually and within the context of the totality of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

The record of proceeding contains information regarding the petitioner's business operations, including the petitioner's Articles of Incorporation, a Management Agreement between the petitioner and [REDACTED]; tax documents; an organizational chart; a graph of the sales and profits of the [REDACTED]; the petitioner's Income Statement for the [REDACTED] from January 1, 2012 to December 31, 2012; the petitioner's Balance Sheets for the [REDACTED] and related materials. While the petitioner submitted various documents relating to its operations, the AAO notes that the petitioner failed to establish how the documents relate to the beneficiary's day-to-day responsibilities and how such documents demonstrate that its particular position is so complex or unique that it can only be performed only by an individual with a baccalaureate (or higher degree) in a specific specialty, or its equivalent.

The petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate

or higher degree in a specific specialty, or its equivalent. That is, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position (through the job duties, the petitioner's business operations or by any other means) that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent.

For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even essential, in performing certain duties of a business manager position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the petitioner's proffered position.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "General and Operations Managers" at a Level I (entry level) wage, which is the lowest of four assignable wage levels. The wage level of the proffered position indicates that (relative to other positions falling under this occupational category) 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.

The petitioner claims that the beneficiary's educational background and professional experience 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 does not explain or clarify which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has thus failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

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

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

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

In response to the director's RFE, the petitioner and counsel submitted documentation indicating that [REDACTED] was awarded a bachelor's degree in business finance on December 23, 1989. Counsel states that Mr. [REDACTED] is an assistant manager at the [REDACTED] but did not provide evidence to support the statement. The petitioner did not provide information regarding [REDACTED] job duties and responsibilities. Based upon the information provided, [REDACTED] does not serve in the proffered position of business manager, and there is no evidence that Mr. [REDACTED] serves in a position that is similar to the proffered position. Moreover, the evidence does not establish that the petitioner requires a degree for the position. Rather, without more, it appears that [REDACTED] just happens to possess a degree.

In addition, the petitioner provided the resume and payroll report of [REDACTED] states that [REDACTED] was hired "to manage the [REDACTED]". Counsel did not further describe [REDACTED] role. Without more, it cannot be concluded that [REDACTED] served in the same or similar role to the proffered position. Moreover, the payroll report indicates that Mr.

salary was significantly less than the proffered position suggesting that the positions are not the same or similar.

It must be noted that the petitioner stated in the Form I-129 petition that it has 30-35 employees and that it was established in 1989 (approximately 23 years prior to the submission of the H-1B petition). The petitioner did not provide the total number of people it currently employs, or in the past has employed, to serve in the proffered position. Consequently, it cannot be determined how representative the petitioner's claim regarding *two individuals over a 23' year period* is of the petitioner's normal recruiting and hiring practices.³² The petitioner has not persuasively established that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

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

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

In the instant case, the petitioner provided documents regarding its business operations, including the documentation previously outlined. The AAO acknowledges that the petitioner and its counsel claim that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

Furthermore, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category of "General and Operations Managers." The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be

³² Further, the petitioner has not established that these positions are the same or similar to the proffered position.

classified at a higher-level requiring a substantially higher prevailing wage.³³ For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.

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

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

IV. Beneficiary's Qualifications

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

V. Conclusion and Order

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also* 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

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

³³ If the proffered position were designated as a higher level position, the prevailing wage for the occupational category in Omaha, Nebraska at that time would have been \$86.362 per hour for a Level II position, \$115,752 per year for a Level III position, and \$145,122 per year for a Level IV position.

[REDACTED]

(b)(6)

NON-PRECEDENT DECISION

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ORDER: The appeal is dismissed.