

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: **AUG 08 2014**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

For Michael T. Kelly

Ron Rosenberg

Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a 3-employee biotechnology start-up¹ established in 2011. In order to employ the beneficiary part-time (10 hours per week) in what it designates as an accountant position,² the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the petitioner failed to demonstrate that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

As will now be discussed, to meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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.

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 541711, "Research and Development Biotechnology." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541711 Research and Development Biotechnology," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed July 16, 2014).

² The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 13-2011, the associated Occupational Classification of "Accountants and Auditors," and a Level I (entry-level) prevailing wage rate.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the 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 rely simply upon a proffered position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In a statement accompanying its March 31, 2013 letter of support, the petitioner claimed that the proffered position would include the following duties:

- Basic accounting procedures: (A/R, A/P, time billing, G/L, and inventory control);
- Develop, implement, modify, and document accounting systems;
- Establish tables of accounts and assign entries to proper accounts;
- Financial Statement preparation (i.e. monthly and quarterly financial reports such as weekly forecast to Management Team summarizing current and projected financial position);
- Analyze and reconcile general ledger accounts, investment transactions in conjunction with preparing quarterly reports for management;
- Analyze business operations, trends, costs, revenues, financial commitments, and obligations, project future revenues and expenses or to provide advice;
- Develop, maintain, and analyze budgets, preparing periodic reports that compare budgeted costs to actual costs;

- Producing financial data for management team upon request and assisting with other special Accounting projects from time to time;
- Communicating with customers to address any past due invoices on their accounts and providing weekly status updates to management;
- Ensure all active projects are covered by valid, binding [sic].

[Quoted verbatim from the record]

In its September 17, 2013 letter submitted in response to the director's RFE, the petitioner's counsel stated that because the petitioner is a small startup it does not have any other employees to perform accounting functions. The beneficiary would be responsible for all these functions. Counsel also expanded on the tasks the beneficiary would be responsible for, to include:

- Answer accounting procedure questions for the management team by researching and interpreting accounting policy and regulations;
- Develop, maintain, and analyze budgets, preparing periodic reports that compare budgeted costs to actual costs. Monitor the company's spending to ensure that is within budget. Inform CEO of the status and availability of funds, estimate future financial needs, and ensure adequate cash flow to meet the company's needs;
- Work with the CEO on the strategic vision including fostering and cultivating stakeholder relationships, as well as assisting in the development and negotiation of contracts;
- Analyze business operations, trends, costs, revenues, financial commitments, and obligations, project future revenues and expenses or to make best-practices recommendations to the CEO;
- Assist the CEO in managing capitalization table and stock options. Review capitalization table to make suggestions and improvements;
- Assist the CEO to develop financial models and forecasts for operations and fundraising activities;
- Examine financial statements to ensure that they are accurate and comply with laws and regulations. Ensure the annual financial statements are in accordance with U.S. GAAP and federal, state and other required supplementary schedule and information.
- Ensure adequate controls are installed and oversee the coordination and activities of independent auditors ensuring all audit issues are resolved, and all compliance issues are met;

- Compute taxes owed, prepare tax returns, and ensure that taxes are paid properly and on time; and,
- Oversee all purchasing and payroll activities;

Neither the petitioner nor counsel explained what percentage of the beneficiary's ten-hour work week would be allocated to the above tasks. Furthermore, by its submission of a Labor Condition Application (LCA) that had been certified for use with a Level I prevailing wage-rate position, the petitioner attested that the petition was filed for an entry-level accountant who needs extensive training and supervision.³

First we note that, as evident in the duty descriptions that we quoted from the record, the job duties are described in general, nondescript, and relatively abstract terms - such as, for instance, "Develop, maintain, and analyze budgets," "Analyze business operations, trends, costs, revenues, financial commitments and obligations," and "Develop, implement, and modify, and document accounting systems" - that the petitioner does not develop or explain in any substantial terms that would relate the substantive nature of the budget development, maintenance, and analysis in which the beneficiary would actually engage, the aforementioned "accounting systems work" that she would actually perform, or the "analysis" that she would actually apply to "business operations, trends, costs, revenues, financial commitments and obligations." In short, the petitioner describes the proffered and its constituent duties in terms of general and generic functions which are not described in sufficient detail to establish what their actual performance would entail in either related

³ The *Prevailing Wage Determination Policy Guidance* (available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last accessed Jul. 18, 2014)) issued by DOL states the following with regard to Level I wage rates:

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

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level is appropriate if the proffered position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to possess a basic understanding of the occupation; that she will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that she will be closely supervised and his work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

substantive work or in any particular educational level of specialized accounting knowledge that would be required to perform such work.

In a similar vein, we find that, because the evidence of record does not provide sufficient information about the substantive nature of actual accounting-related matters that the petitioner's business operations would actually generate for the beneficiary, the petition does not provide an adequate factual basis to establish whatever training, education, or education-equivalence level that performance of the functions of the proffered position would require, let alone that the performance would require the practical and theoretical application of at least a bachelor's degree level of knowledge in accounting or a related specialty, as would be required to establish the proffered position as a specialty occupation.

We realize that some of the evidentiary inadequacies of the record of proceeding may be a function of the fact that the petitioner is in a start-up phase. However, a petitioner's being in a start-up phase does not reduce its burden of proof. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248.

The AAO's determination that the evidence of record does not establish that the accounting duties proposed for the beneficiary would involve accounting services at a level requiring the theoretical and practical application of at least a bachelor's-degree level of a body of highly specialized knowledge in accounting is bolstered by the fact that the petitioner submitted an LCA certified for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.

We present the following portions of the records as some examples of the relatively high levels of independent judgment and responsibility as well as required occupational-knowledge that the petitioner claims as characterizing the proffered position: (1) counsel's statement in the RFE response, that, as a "start-up" with no finance department or Chief Financial Officer (CFO), the beneficiary would "have exclusive responsibility for all financial operations of the organization" and her job duties would be "advanced"; (2) the statements in the September 12, 2013 letter by the petitioner's Chief Executive Officer that the beneficiary (a) would "have exclusive responsibility for the financial operations of our organization and will be required to act autonomously with little supervision, and (b) would "provide the financial modeling and forecasting necessary for me to make critical decisions about the direction [the petitioner's] business will take"; and (3) counsel's statement (at page 3 of the brief on appeal) that the petitioner is "looking to [the beneficiary] to take on exclusive responsibility for the financial operations and future of the company."

Such claims, we find, materially conflict with the prevailing-wage level designated in the LCA that the petitioner submitted with the petition. In support of this petition the petitioner submitted an LCA that had been certified for only a Level I (entry level) wage, the lowest of the four assignable

Levels. The *Prevailing Wage Determination Policy Guidance*⁴ issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage-rates:

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

The petitioner's assertions regarding the proposed duties' level of complexity and specialization, as well as about the level of independent judgment and responsibility and occupational understanding required to perform them, are materially inconsistent with the petitioner's submission of an LCA certified for a Level I, entry-level position. The LCA's wage-level (Level I, the lowest of the four that can be designated) is only appropriate for a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels quoted above, this is the appropriate wage-rate for positions in which the beneficiary is only required to have a basic understanding of the occupation; will be expected to perform routine tasks requiring limited, if any, exercise of judgment; will be closely supervised and have his or her work closely monitored and reviewed for accuracy; and will receive specific instructions on required tasks and expected results.

This LCA aspect of the record undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the proffered position's demands, complexity, and level of responsibility. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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).

We also note that apart from the minimal (and non-probative) information in the support letter and RFE response and a screen shot of the petitioner's bank statement the record does not contain documentary evidence related to the finance and accounting matters upon which the beneficiary would work. For instance, the record does not disclose what financial reporting requirements the petitioner has. Nor does the submitted Account Summary or any other evidence of record establish what income and expenses this relatively small start-up company has, or if the petitioner actually has revenue. Also, we note as another example that the record does not establish how the petitioner is structured, who owns stock, if stock options are available, or how an accountant would be

⁴ Available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

involved in tracking this information. In short, the record lacks evidence necessary to substantiate that the beneficiary will perform the listed duties or how she will perform them.

Next, we also find that the documents submitted as Exhibit D to the RFE response are not probative evidence towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel's RFE-reply letter describes these documents as "an indication of the nature of the specific duties." However, the evidentiary value of these documents is insignificant in that neither petitioner, counsel, or, for that matter, the beneficiary (who is said to have produced them) provides any substantive evidence (such as, for example, copies of worksheets, calculation records, or detailed notes made during the documents' production). Thus, the record does not document whatever calculations, methodologies, and applications (such as commercial-off-the-shelf-software (COTS)) were used to produce the documents at Exhibit D. In fact, the documents' appearance and formatting raises a reasonable question as to whether, in fact, the documents were produced by the use of COTS. In any event, the processes by which the Exhibit D documents were produced are not self-evident, and the record of proceeding does not establish what they involved.

The petitioner should note that, because the above preliminary findings and associated analyses are material parts of our analysis of the evidentiary record regarding the specialty occupation issue, we hereby incorporate them as part of our analyses of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), which follows.

Having made these initial findings, we will now discuss the application of each alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The RFE response asserted that the proffered position satisfies all of the supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), claiming that (1) asserted degree requirement is common to the industry in parallel positions among similar organizations; (2) the position is so complex that it can only be performed by an individual with a degree; (3) the petitioner normally requires a degree for the position; and (4) the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. As we shall now discuss, we find that the evidence of record does not satisfy any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The first criterion, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), can be satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.⁵

⁵ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2014-15 edition available online.

Two portions of the *Handbook* are directly relevant to this proceeding: (1) the *Handbook's* discussion of the "Bookkeeping, Accounting, and Auditing Clerks" occupational classification; and (2) its discussion of the "Accountants and Auditors" occupational classification.

The AAO finds that the *Handbook's* entries for the "Bookkeeping, Accounting, and Auditing Clerks" and the "Accountants and Auditors" occupational classifications both contain aspects of the proposed duties as described in the record, and that both occupations require some understanding of accounting principles. However, the question to be addressed in this proceeding is not whether the proffered position requires some knowledge of accounting principles, but whether the position is one that normally requires the level of knowledge of a body of highly specialized knowledge in accounting that is signified by attainment of at least a bachelor's degree, or its equivalent, in accounting or a closely-related specialty.

As discussed in the *Handbook*, bookkeeping, auditing, and auditing clerks do not comprise an occupational category that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. The *Handbook* states the following with regard to this occupational classification:

Bookkeeping, accounting, and auditing clerks produce financial records for organizations. They record financial transactions, update statements, and check financial records for accuracy.

Duties

Bookkeeping, accounting, and auditing clerks typically do the following:

- Use bookkeeping software as well as online spreadsheets and databases
- Enter (post) financial transactions into the appropriate computer software
- Receive and record cash, checks, and vouchers
- Put costs (debits) as well as income (credits) into the software, assigning each to an appropriate account
- Produce reports, such as balance sheets (costs compared to income), income statements, and totals by account
- Check figures, postings, and reports for accuracy
- Reconcile or note and report any differences they find in the records

The records that bookkeeping, accounting, and auditing clerks work with include expenditures (money spent), receipts (money that comes in), accounts payable (bills

to be paid), accounts receivable (invoices, or what other people owe the organization), and profit and loss (a report that shows the organization's financial health).

Workers in this occupation have a wide range of tasks. Some in this occupation are full-charge bookkeeping clerks who maintain an entire organization's books. Others are accounting clerks who handle specific tasks.

These clerks use basic mathematics (adding, subtracting) throughout the day.

As organizations continue to computerize their financial records, many bookkeeping, accounting, and auditing clerks use specialized accounting software, spreadsheets, and databases. Most clerks now enter information from receipts or bills into computers, and the information is then stored electronically. They must be comfortable using computers to record and calculate data.

The widespread use of computers also has enabled bookkeeping, accounting, and auditing clerks to take on additional responsibilities, such as payroll, billing, purchasing (buying), and keeping track of overdue bills. Many of these functions require clerks to communicate with clients.

Bookkeeping clerks, also known as **bookkeepers**, often are responsible for some or all of an organization's accounts, known as the general ledger. They record all transactions and post debits (costs) and credits (income).

They also produce financial statements and other reports for supervisors and managers. Bookkeepers prepare bank deposits by compiling data from cashiers, verifying receipts, and sending cash, checks, or other forms of payment to the bank.

In addition, they may handle payroll, make purchases, prepare invoices, and keep track of overdue accounts.

Accounting clerks typically work for larger companies and have more specialized tasks. Their titles, such as accounts payable clerk or accounts receivable clerk, often reflect the type of accounting they do.

Often, their responsibilities vary by level of experience. Entry-level accounting clerks may enter (post) details of transactions (including date, type, and amount), add up accounts, and determine interest charges. They also may monitor loans and accounts to ensure that payments are up to date.

More advanced accounting clerks may add up and balance billing vouchers, ensure that account data is complete and accurate, and code documents according to an organization's procedures.

Auditing clerks check figures, postings, and documents to ensure that they are mathematically accurate and properly coded. They also correct or note errors for accountants or other workers to fix.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 14-15 ed., "Bookkeeping, Accounting, and Auditing Clerks," <http://www.bls.gov/ooh/office-and-administrative-support/bookkeeping-accounting-and-auditing-clerks.htm#tab-2> (accessed Aug. 6, 2014).

As noted above, the petitioner stated in its July 26, 2012 letter that the beneficiary would spend thirty percent of her time – nearly one-third – performing such tasks as preparing financial reports; preparing balance sheets; preparing profits and loss statements; and sharing financial information with banking institutions. The *Handbook* indicates that these are the duties of bookkeeping and accounting clerks, not accountants, and states the following with regard to the educational requirements necessary for entrance into that occupational category:

Most bookkeeping, accounting, and auditing clerks need a high school diploma. However, some employers prefer candidates who have some postsecondary education, particularly coursework in accounting. In 2009, 25 percent of these workers had an associate's or higher degree.

Id. at <http://www.bls.gov/ooh/office-and-administrative-support/bookkeeping-accounting-and-auditing-clerks.htm#tab-4> (accessed August 6, 2014).

These statements do not support a conclusion that a bachelor's degree in a specific specialty, or its equivalent, is normally required for employment as a bookkeeping, accounting, or auditing clerk. Accordingly, the *Handbook* does not support a finding that this substantial portion of the proffered position's general duties satisfies the first criterion 8 C.F.R. § 214.2(h)(4)(iii)(A).

The remaining duties proposed for the beneficiary are generally similar to those described in the *Handbook* as being normally performed by accountants.

In pertinent part, the *Handbook* states the following with regard to this occupational classification:

Accountants and auditors prepare and examine financial records. They ensure that financial records are accurate and that taxes are paid properly and on time. Accountants and auditors assess financial operations and work to help ensure that organizations run efficiently. . . .

Accountants and auditors typically do the following:

- Examine financial statements to be sure that they are accurate and comply with laws and regulations

- Compute taxes owed, prepare tax returns, and ensure that taxes are paid properly and on time
- Inspect account books and accounting systems for efficiency and use of accepted accounting procedures
- Organize and maintain financial records
- Assess financial operations and make best-practices recommendations to management
- Suggest ways to reduce costs, enhance revenues, and improve profits

In addition to examining and preparing financial documentation, accountants and auditors must explain their findings. This includes face-to-face meetings with organization managers and individual clients, and preparing written reports.

Many accountants and auditors specialize, depending on the particular organization that they work for. Some organizations specialize in assurance services (improving the quality or context of information for decision makers) or risk management (determining the probability of a misstatement on financial documentation). Other organizations specialize in specific industries, such as healthcare.

* * *

Public accountants do a broad range of accounting, auditing, tax, and consulting tasks. Their clients include corporations, governments, and individuals.

They work with financial documents that clients are required by law to disclose. These include tax forms and balance sheet statements that corporations must provide potential investors. For example, some public accountants concentrate on tax matters, advising corporations about the tax advantages of certain business decisions or preparing individual income tax returns.

External auditors review clients' financial statements and inform investors and authorities that the statements have been correctly prepared and reported.

Public accountants, many of whom are Certified Public Accountants (CPAs), generally have their own businesses or work for public accounting firms.

Some public accountants specialize in forensic accounting, investigating financial crimes, such as securities fraud and embezzlement, bankruptcies and contract disputes, and other complex and possibly criminal financial transactions. Forensic accountants combine their knowledge of accounting and finance with law and

investigative techniques to determine if an activity is illegal. Many forensic accountants work closely with law enforcement personnel and lawyers during investigations and often appear as expert witnesses during trials.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Accountants and Auditors," <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-2> (accessed August 6, 2014).

With regard to the educational requirements necessary for entry into this occupational classification, the *Handbook* states that "[m]ost accountants and auditors need at least a bachelor's degree in accounting or a related field." *Handbook* at <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-4>. However, "most" does not indicate that an accountant position normally requires at least a bachelor's degree, or its equivalent, in a specific specialty. The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of accountant positions require at least a bachelor's degree in a specific specialty, it could be said that "most" accountant positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act.

Furthermore, the *Handbook* includes the following statement:

In some cases, graduates of community colleges, as well as bookkeepers and accounting clerks who meet the education and experience requirements set by their employers, get junior accounting positions and advance to accountant positions by showing their accounting skills on the job.

Id. Thus, the *Handbook* does not indicate that a minimum of a bachelor's degree in a specific specialty, or its equivalent, is normally required for this occupational category. Instead, this category accommodates a wide spectrum of educational credentials, and that spectrum includes credentials that fall short of a bachelor's degree.

As clear from the statements from the *Handbook* excerpted above, the fact that a person may be employed in a position designated as that of an accountant and may apply accounting principles in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. Thus, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position being proffered would involve accounting services at a level requiring the theoretical and practical application of at least a bachelor's-degree level of a body of highly specialized knowledge in accounting or a closely related specialty. To make this

determination, the AAO turns to the record for information regarding the duties and nature of the petitioner's business operations.

In the instant matter, we find that those job duties listed by the petitioner which do generally fall within those described in the *Handbook* as normally performed by accountants (as opposed to the duties which align with those of bookkeeping and accounting clerks) are generalized descriptions of functions generic to accountant positions in general. As such, they do not establish that their performance requires the theoretical and practical application of at least a bachelor's-degree level of a body of highly specialized knowledge in a specific specialty.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category would be sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we find that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent.

As evidence of eligibility under this criterion, the petitioner submits copies of five job-advertisements. We reiterate that the petitioner is a start-up biotech research company consisting of three employees, and that the petitioner states that it wants to hire a part-time accountant who will be the sole member of the financial team.

At the outset, we hereby adopt and incorporate the director's findings and comments about the record not establishing that the job-advertisements were issued for positions parallel to the proffered position

as described in this petition. This aspect of the record, of course, places the submitted advertisements outside this criterion's zone of consideration, thus eliminating any probative weight. That being said, we will still briefly address those submissions.

The first job-advertisement provided in the record is for a Director of Revenue Accounting with [REDACTED]. Among other things not conforming with the proffered position, this advertisement specifies a preference for an MBA, requires CPA status, specifies a preference for audit experience in a "Big 4 CPA firm," and requires "8+ years of combined experience in Big 4 CPA firms and private industry (including 4+ years of revenue accounting experience)." The job descriptions and duties for this opening and the instant position do not match. Furthermore, nothing in the record establishes if the petitioner is in the same industry as [REDACTED].

Next, the petitioner provides a copy of [REDACTED] advertisement for a Director of Finance. [REDACTED] manufactures and markets "energy solutions for off grid communities." [REDACTED] first product is efficient reduced-smoke camp stoves. It is not a biotech research company. While the advertisement specifies a minimum of a bachelor's degree "in Accounting, Finance, Economics, or a related major," given the advertisements array of duties and array of background-requirements – which do not match the record's information about the proffered position – the petitioner has not established the relevance of this advertisement to this criterion.

The third job advertisement offered by the petitioner is for an Accounting Manager with [REDACTED]. On its very face, the advertisement obviously is not for a position that is parallel to the proffered position. For instance, the job advertisement specifies not only a "BA/BS in Accounting," but it also requires a "CPA." Further, here, too, the array of duties does not match those specified in the petition before us.

The final job-posting provided by the petitioner is for a Manager of Corporate Accounting with [REDACTED]. The petitioner here, too, does not establish why the advertised position – whose stated duties are more extensive than those stated for the proffered position and which include unexplained acronyms and terms not referenced in the petition (such as "global OPEX forecast and spending control" and "B/S GL reconciliation") and which have specific-experience requirements that the petitioner has not stated for the proffered position – should be regarded as parallel to the proffered position. Also, the advertising entity is also not in the petitioner's industry.

For all of the reasons expressed above, these five advertisements are not probative evidence towards satisfying this first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) which, again, requires the 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.

Nor does the petitioner submit any other evidence 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.

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform that position. Rather, the AAO finds that the petitioner has not distinguished either the proposed duties, or the position that they comprise, from generic bookkeeping or accounting work, neither of which, the *Handbook* indicates, necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor's degree, or the equivalent, in a specific specialty.

(Although not a decisive issue, we note that while, in the RFE response, counsel stated that the position would be the sole employee who would handle all financial management of the petitioner. This appears to be inconsistent with the fact that the petition was signed by the petitioner's Treasurer.)

Additionally, the AAO incorporates here by reference and reiterates its earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation. This factor is inconsistent with the relative complexity or uniqueness required to satisfy this criterion. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that she will receive specific instructions on required tasks and expected results; and that her work will be reviewed for accuracy.

Consequently, as it has not been shown that the particular position for which this petition was filed is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree-equivalency, in a specific specialty, in its prior recruiting and hiring for the position. Further, 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 the performance requirements of the proffered position.⁶

While the petitioner has not satisfied this criterion - as the evidence of record does not establish a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty - we will still comment on the requirements of this criterion.

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position 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 at 387. 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 a 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

⁶ Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within its occupation.

a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proposed position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The record indicates that the petitioner has never hired an accountant. Although the fact that a proffered position is a newly-created one is not in itself generally a basis for precluding a position from recognition as a specialty occupation, certainly an employer that has never recruited and hired for the position cannot satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

Furthermore, even if the record contained such evidence, the AAO would still find that the petitioner failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) because, as reflected in our comments and findings so far in this decision, the evidence of record does not establish that the petitioner's degree-requirement is more than a matter of preference for high-caliber, rather than something necessitated by the performance requirements of the proffered position.

As the evidence in the record of proceeding does not demonstrate a history of recruiting and hiring only individuals with a bachelor's degree, or the equivalent, in a specific specialty for the proffered position, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, we also find that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). To satisfy this criterion, the petitioner would have to establish that the nature of the proffered position's 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 the specialty.

We also find that, separate and apart from the petitioner's submission of an LCA with a prevailing-wage Level I designation, the petitioner has also failed to provide sufficiently detailed evidence to establish that the nature of the specific duties that would be performed if this petition were approved 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.

In this regard, we refer the petitioner back to this decision's earlier analyses and findings regarding the generalized and relatively abstract descriptions of the proposed duties.

Separate and aside from the evidentiary deficiency of the duty descriptions, we also see that, on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner's submission of an LCA for a Level I prevailing-wage rate is indicative of duties of relatively low complexity.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

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

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, Level II wage-rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Here we again incorporate our earlier analyses and findings regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable prevailing-wage level. By virtue of that submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

For all of these reasons, the evidence in the record of proceeding fails to establish that the nature of the proposed duties meets the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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