



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 08 2014** OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center. In the Form I-129 visa petition, the petitioner describes itself as an online retailer of computers, accessories, and parts established in 2011. In order to employ the beneficiary in what it designates as an online commerce director position, the petitioner seeks to classify the beneficiary 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).¹

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 asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. Counsel submitted a brief and additional documents in support of this assertion.

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

For the reasons that will be discussed below, we agree 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, and the petition will be denied.

We will also discuss several additional, independent grounds, not identified by the director's decision, that also preclude approval of this petition. Specifically, beyond the decision of the director, the petitioner failed to (1) establish that it would pay an adequate salary for the beneficiary's work, as required under the applicable statutory and regulatory provisions; (2) submit a Labor Condition Application (LCA) that corresponds to the petition; (3) establish that the beneficiary is qualified to perform duties in a specialty occupation position; and (4) establish that a valid employer-employee relationship exists.

I. FACTUAL AND PROCEDURAL BACKGROUND

In this matter, the petitioner states in the Form I-129 petition that it seeks the beneficiary's services as an online commerce director to work on a full-time basis at an annual salary of \$53,000. In a support letter dated March 25, 2013, the petitioner provided the following description for the proffered position:

¹ Throughout the record the petitioner uses various titles for the proffered position including "Online Commerce Director," "Online Sales Supporter," and "Online Sales Support."

² We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

I. Starting and enhancing the online sale web system- 10% of weekly hours

- 1) Devises, selects, or purchases domain name and web address.
- 2) Determines location for product listings to maximize exposure to online traffic.
- 3) Designs customer interface of online [REDACTED] using web programming or e-commerce software.
- 4) Uploads digital media, such as photos, video, or scanned images to online StoreFront, auction sites, or other shopping Websites.
- 5) Selects and purchases technical web services, such as web hosting services, online merchant accounts, shopping cart software, payment gateway software, or spyware.
- 6) Optimizes search engine to ensure that [the petitioner's] website link appears at or near the top of the results when online customers search for a product.
- 7) Measures and analyzes Web site usage data to maximize search engine returns or refine customer interfaces.

II. Promoting and organizing products for online sale – 30% of weekly hours.

- 8) Designs promotion schemes [to] make [the petitioner's] online products stand out among the millions of other products online.
- 9) Orders or purchases merchandise to maintain optimal inventory levels.
- 10) Maintains inventory of shipping supplies, such as boxes, labels, tape, bubble wrap, loose packing materials, or tape guns.
- 11) Controls and decreases the cost of operation of company.
- 12) Integrates online retailing strategy with physical or catalogue retailing operations.
- 13) Participates in online forums or conferences to stay abreast of online retailing trends, techniques, or security threats.
- 14) Creates or distributes offline promotional material, such as brochures, pamphlets, business cards, stationary, or signage.
- 15) Promotes products in online communities through weblog or discussion-forum postings, e-mail marketing programs, or online advertising.
- 16) Composes descriptions of merchandise for posting to online [REDACTED] auction sites, or other shopping Web sites.
- 17) Prepares or organizes online [REDACTED] marketing material, including product descriptions or subject lines, optimizing content to search engine criteria.
- 18) Creates or maintains database of customer accounts.
- 19) Collaborates with search engine shopping specialists to place marketing content in desired online location.

III. Setting prices for products online and organizing orders- 30% of weekly hours.

- 20) Determines and sets product prices.
- 21) Adjusts prices of products according to the market fluctuation.
- 22) Creates, manages, or automates orders or invoices, using order management or invoicing software.
- 23) Cancels orders based on customer requests or inventory or delivery problems.
- 24) Discloses merchant information and terms and policies of transactions in online or offline materials.
- 25) Fills customer orders by packaging sold items and documentation for direct shipping or by transferring orders to manufacturers or third party distributors.
- 26) Investigates sources, such as auctions, estate sales, liquidators, wholesalers, or trade shows for new items, used items, or collectibles.
- 27) Purchases new or used items from online or physical sources for resale via retail or auction Web site.
- 28) Investigates products or markets to determine areas for opportunity or viability for merchandising specific products, using online or offline sources.

IV. Managing online activities – law compliance 15% of weekly hours

- 29) Implements security practices to preserve assets, minimize liabilities, or ensure customer privacy, using parallel servers, hardware redundancy, fail-safe technology, information encryption, or firewalls.
- 30) Develops or revises business plans for online sales, emphasizing factors such as product line, pricing, inventory, or marketing strategies fully in compliance of Federal and state law.
- 31) Corresponds with online customers via electronic mail, telephone, or other electronic messaging to address questions or complaints about products, policies, or shipping methods.
- 32) Composes images of products, using video or still cameras, lighting equipment, props, or photo or video editing software, avoiding violation of customer privacy.

V. Estimating income and revenue for online sales – 15% of weekly hours.

- 33) Calculates revenue, sales, and expenses using financial accounting or spreadsheet software.
- 34) Calculates purchase subtotals, taxes, and shipping costs for submission to customers.
- 35) Receives and process payments from customers, using electronic transaction service.
- 36) Contacts CPA for corporation taxation, timely filing quarterly and annual tax returns.
- 37) Analyzes profitable products and the main trend of market.

[A]n educational background with a Bachelor's degree majoring in the field of information management is a minimum requirement for entry into this particular position.

The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of her education. The petitioner provided a diploma and transcript from the [REDACTED] which state that the beneficiary was granted a Master of Science in Accounting in January 2011.³

The petitioner provided an LCA in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification "Wholesale and Retail Buyers, Except Farm Products" - SOC (ONET/OES) code 13-1022, at a Level II (qualified) wage.

In addition to the above described evidence, the petitioner submitted documents related to the beneficiary's maintenance of status, an employment agreement between the petitioner and the beneficiary, tax documents, bank statements, and photos of the petitioner's locale.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE. The director requested that the petitioner submit probative evidence to establish eligibility for the benefit sought, and outlined the evidence to be submitted.

The petitioner responded to the director's RFE by submitting a letter and the following additional documents:

- Documents regarding the beneficiary's foreign education;
- A printout from the Delaware Division of Corporations regarding the petitioner's incorporation;
- Stock certificates;
- A stock shares agreement;
- Board minutes;
- An offer of employment to the petitioner's executive officer/office manager;
- Printouts of the petitioner's products from Amazon.com; and
- Copies of previously submitted documents.

The director reviewed the information provided in the initial H-1B petition and in response to the RFE. Although the petitioner and counsel claimed that the beneficiary would serve in a specialty

³ The petitioner made various claims regarding the beneficiary's education. For example, the petitioner claimed that the beneficiary has attained bachelor's degrees in economics and trade, and also in advertising from China, but did not submit an academic evaluation to substantiate its claims. The petitioner further claimed that the beneficiary "completed two year accounting and information management program in [REDACTED] however, the beneficiary's diploma and transcript indicate that she received a Master of Science in Accounting.

occupation, the director determined that the petitioner failed to establish eligibility for the benefit sought and denied the petition. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition. In support of the appeal, counsel submitted a brief and additional evidence.⁴

II. SPECIALTY OCCUPATION

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

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the

⁴ With the appeal brief, counsel provided new evidence. With regard to the new documentation submitted on appeal that was encompassed by the director's RFE, we note 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, we will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, we need not consider the sufficiency of such evidence submitted for the first time on appeal. Nevertheless, we reviewed the documentation. However, as will be discussed in this decision, the petitioner has not established eligibility for the benefit sought.

attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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 at 147 (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 ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through attainment of at least a baccalaureate degree in a specific discipline. Here, the petitioner has not done so.

In the instant case, the duties of the proffered position, as described by the petitioner in support of the Form I-129 petition and in response to the director's RFE, have been stated in generic terms that fail to convey the actual tasks the beneficiary will perform on a day-to-day basis. The duties as described by the petitioner consist substantially of duties taken directly from the Occupational Information Network (O*NET) OnLine Details Report for the occupation "Online Merchants." The O*NET OnLine Summary Report for "Online Merchants" contains the following "tasks":

- **Calculate revenue, sales, and expenses, using financial accounting or spreadsheet software.**
- **Compose descriptions of merchandise for posting to online storefront, auction sites, or other shopping Web sites.**
- **Prepare or organize online storefront marketing material, including product descriptions or subject lines, optimizing content to search engine criteria.**

- Purchase new or used items from online or physical sources for resale via retail or auction Web site.
- Receive and process payments from customers, using electronic transaction services.
- Calculate purchase subtotals, taxes, and shipping costs for submission to customers.
- Compose images of products, using video or still cameras, lighting equipment, props, or photo or video editing software.
- Correspond with online customers via electronic mail, telephone, or other electronic messaging to address questions or complaints about products, policies, or shipping methods.
- Design customer interface of online storefront, using web programming or e-commerce software.
- Determine location for product listings to maximize exposure to online traffic.
- Develop or revise business plans for online business, emphasizing factors such as product line, pricing, inventory, or marketing strategy.
- Devise, select, or purchase domain name and web address.
- Implement security practices to preserve assets, minimize liabilities, or ensure customer privacy, using parallel servers, hardware redundancy, fail-safe technology, information encryption, or firewalls.
- Initiate online auctions through auction hosting sites or auction management software.
- Investigate products or markets to determine areas for opportunity or viability for merchandising specific products, using online or offline sources.
- Investigate sources, such as auctions, estate sales, liquidators, wholesalers, or trade shows for new items, used items, or collectibles.
- Measure and analyze Web site usage data to maximize search engine returns or refine customer interfaces.
- Fill customer orders by packaging sold items and documentation for direct shipping or by transferring orders to manufacturers or third-party distributors.
- Promote products in online communities through weblog or discussion-forum postings, e-mail marketing programs, or online advertising.
- Select and purchase technical web services, such as web hosting services, online merchant accounts, shopping cart software, payment gateway software, or spyware.
- Transfer digital media, such as music, video, or software, to customers via the Internet.
- Cancel orders based on customer requests or inventory or delivery problems.
- Collaborate with search engine shopping specialists to place marketing content in desired online locations.

- **Create or distribute offline promotional material, such as brochures, pamphlets, business cards, stationary, or signage.**
- **Create or maintain database of customer accounts.**
- **Create, manage, or automate orders or invoices, using order management or invoicing software.**
- Deliver e-mail confirmation of completed transactions and shipment.
- Determine and set product prices.
- **Disclose merchant information and terms and policies of transactions in online or offline materials.**
- **Integrate online retailing strategy with physical or catalogue retailing operations.**
- **Maintain inventory of shipping supplies, such as boxes, labels, tape, bubble wrap, loose packing materials, or tape guns.**
- Order or purchase merchandise to maintain optimal inventory levels.
- **Participate in online forums or conferences to stay abreast of online retailing trends, techniques, or security threats.**
- **Upload digital media, such as photos, video, or scanned images to online storefront, auction sites, or other shopping Web sites.**

(Emphasis added to reflect duties listed in the petitioner's job description)

U.S. Department of Labor, Employment & Training Administration, O*NET OnLine, 13-1199.06 – Online Merchants, on the Internet at <http://www.onetonline.org/link/details/13-1199.06> (last visited August 6, 2014).

Providing job duties for a proffered position from O*NET is generally not sufficient for establishing H-1B eligibility. That is, while this type of description may be appropriate when defining the range of duties that may be performed within an occupational category, it cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval as this type of generic description fails to adequately convey the substantive work that the beneficiary will perform. In establishing a position as qualifying as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary *in the context of the petitioner's business operations*, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

The generically described duties do not make sufficient reference the petitioner's specific business operations such that we may ascertain the daily tasks that the beneficiary is expected to perform. Further, several of the duties listed do not appear to apply to the petitioner. For example, the petitioner has stated that it is an online retailer of computers and accessories. Throughout the record, the petitioner emphasizes that the bulk of its sales are transacted via [REDACTED]. It is therefore not apparent why the beneficiary would "[i]nvestigate sources, such as auctions, estate sales, liquidators, wholesalers, or trade shows for new items, used items, or collectibles." There is

no indication in the record as to the relevancy of estate sales or collectibles to the petitioner's business operations.

As a restatement of generic duties, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the performance of the proffered position for the entire period requested. Moreover, the job descriptions in the record of proceeding fail to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nevertheless, assuming *arguendo*, that the petitioner had adequately and accurately described the duties of the proffered position, we will now discuss the proffered position in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

USCIS recognizes the 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 that it addresses.⁵ As previously discussed, the petitioner provided an LCA that indicates that the proffered position falls under the occupational category "Wholesale and Retail Buyers, Except Farm Products."⁶ We reviewed the section of the *Handbook* regarding the occupational category

⁵ All of the references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational categories are hereby incorporated into the record of proceeding.

⁶ As noted in the director's decision, the petitioner referred to the *Handbook's* education requirement for the occupational category "Sales Engineers" in its support letter to state that a bachelor's degree is typically required for the proffered position. However, as discussed, the petitioner indicated in the LCA filed in support of this petition that the proffered position corresponds to the occupational category "Wholesale and Retail Buyers, Except Farm Products." Assuming *arguendo*, that the LCA was filed for "Sales Engineers," we agree with the director that the *Handbook's* section on "Sales Engineer" does not indicate that a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. The *Handbook* specifically states that while sales engineers typically need a bachelor's degree in engineering or a

"Purchasing Managers, Buyers, and Purchasing Agents." The section regarding the duties of these occupations states the following regarding wholesale and retail buyers:

Wholesale and retail buyers purchase goods for resale to consumers. Examples of these goods are clothing and electronics. Purchasing specialists who buy finished goods for resale are commonly known as *buyers* or *merchandise managers*. Buyers who work for large organizations usually specialize in one or two lines of merchandise (for example, men's clothing or women's shoes or children's toys). Buyers who work for small stores may be responsible for buying everything the store sells.

The section entitled "How to Become a Purchasing Manager, Buyer, or Purchasing Agent," describes the following preparation for the occupation:

Although educational requirements for buyers and purchasing agents may vary by the size of the organization and the type of product, extensive on-the-job training is typically provided. Purchasing managers need a bachelor's degree and work experience as a buyer or purchasing agent.

Education

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

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

Training

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

related field, a worker without a degree, but with previous sales experience as well as technical experience or training, sometimes holds the title of sales engineer. The *Handbook* does not report that previous sales experience as well as technical experience or training must be the equivalent of a bachelor's degree in a specific specialty. For more information on "Sales Engineers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Sales Engineers, on the Internet at <http://www.bls.gov/ooh/sales/sales-engineers.htm#tab-4> (last visited August 6, 2014).

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Purchasing Managers, Buyers, and Purchasing Agents on the Internet at <http://www.bls.gov/ooh/business-and-financial/purchasing-managers-buyers-and-purchasing-agents.htm#tab-4> (last visited August 6, 2014).

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 occupation. Rather, the *Handbook* states that educational requirements usually vary with the size of the organization and extensive on-the-job training is typically provided. It further states that purchasing agents may be employed with a high school diploma but large stores and distributors *prefer* applicants with a bachelor's degree who have taken some business or accounting classes. We note that a preference for a particular type of preparation is not a requirement for the same. Further, the *Handbook* does not indicate that a degree in a *specific specialty* is required.

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is a baccalaureate or higher degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that 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.⁷ Thus, the petitioner failed to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

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

⁷ As noted above, the job duties that the petitioner provided were taken from the O*NET OnLine Details report for the occupational classification "Online Merchants" SOC (ONET/OES code) 13-1199.06. This occupation falls under the category of "Business Operations Specialists, All Other." We reviewed the *Handbook* regarding the occupational category "Business Operations Specialists, All Others." However, the *Handbook* simply describes this category as "[a]ll business operations specialists not listed separately." In other words, the *Handbook* does not provide a detailed narrative account nor does it provide summary data for the occupational category "Business Operations Specialists, All Others." Accordingly, the *Handbook* lacks sufficient information regarding the occupational category (e.g., duties, academic requirements) to be deemed probative evidence in this matter.

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

In the Form I-129, the petitioner stated that it is an online retailer of computers, accessories, and parts established in 2011, with one employee. The petitioner stated its gross annual income as \$4.78 million and its net annual income as approximately \$144,000.

The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 45411. According to the U.S. Census Bureau, 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 August 6, 2014). The NAICS code specified by the petitioner is designated for "Electronic Shopping and Mail-Order Houses," and is defined by the U.S. Department of Commerce, Census Bureau as follows:

This industry comprises establishments primarily engaged in retailing all types of merchandise using nonstore means, such as catalogs, toll free telephone numbers, or electronic media, such as interactive television or computer. Included in this industry are establishments primarily engaged in retailing from catalog showrooms of mail-order houses.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 45411 – Electronic Shopping and Mail-Order Houses, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited August 6, 2014).

On appeal, the petitioner and counsel submitted several job announcements. However, the documentation does not establish that the proffered position qualifies as specialty occupation. For instance, the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Further, the petitioner has not established that the advertising organizations are similar to it. The record of proceeding contains job postings for the following organizations:

- [REDACTED] (an international staffing solutions provider);
- [REDACTED] an international provider of cloud applications and internet-scale architecture for advertising and marketing agencies);
- [REDACTED] (an international information technology company with annual revenues of EUR 8.6 billion and 74,000 employees in 42 countries);

- [REDACTED] providing investment and risk management solutions for pension plans and other institutional clients); and
- [REDACTED] a retailer with over 1,550 stores worldwide).

We reviewed all of the postings; however, none appear to be for organizations similar to the petitioner. When determining whether the petitioner and an organization share the same general characteristics, such factors may include information regarding the nature or type of organization, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). 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 information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. 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. Neither counsel nor the petitioner have specified what characteristics they believe the petitioner shares with these organizations, apart from the job posting submitted on appeal, which counsel indicates are from the same industry as the petitioner. As previously noted, without further information, the petitioner has not established that the advertisements are for similar organizations.

Additionally, some of the advertisements appear to be for dissimilar positions and/or for more senior positions. For example, the posting from [REDACTED] seeks an individual to "[d]evelop training documentation and train groups in the organization on utilizing the web analytics interface." The petitioner does not claim that the proffered position involves training groups of employees. [REDACTED] seeks a financial business analyst to assist with sales of its services. The posting indicates that the individual should have a "[c]omplete and thorough understanding of each sales opportunity," which "includes scope of services, business terms and financial deliverables." The petitioner represents that it is an online retailer of computer products. The petitioner does not claim to sell consulting services. [REDACTED] seeks an individual with "[i]n-depth knowledge gained through 8-10 years of progressive experience in business analysis in a financial industry environment, preferably supporting a trading floor," and "knowledge of capital markets and investment instruments." The petitioner does not claim that such knowledge or experience is required to perform the duties of the proffered position. Turn, Inc. seeks an individual who will support sales teams by "authoring responses to functional and technical elements of RFIs/RFPs." The proffered position does not appear to contain similar duties.

Further, contrary to the purpose for which they were submitted, the advertisements do not demonstrate that a bachelor's degree in a *specific specialty* (or its equivalent) is common in the petitioner's industry in parallel positions among similar organizations. The posting from [REDACTED] states that a bachelor's degree "or related experience is required." Thus, [REDACTED] will accept an undisclosed amount of "related experience" in lieu of a degree. Turn, Inc. will accept a bachelor's degree in business administration as sufficient academic preparation for its advertised position. Similarly, the posting from [REDACTED] requires a "[f]our year degree in business or a technical discipline and five or more years of experience in the telecommunications industry." To qualify as a specialty occupation, a position must require a precise and specific course of study that relates directly to the

duties and responsibilities of the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a general-purpose degree (or a degree with a generalized title such as business or business administration, without further specification) does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose degree (including a degree in business administration) may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).⁸

Furthermore, the petitioner fails to establish the relevancy of the provided examples to the issue here.⁹ That is, the petitioner has not demonstrated what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹⁰

⁸ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

⁹ 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.

¹⁰ The petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these few job postings with regard to 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").

As such, even if the job announcements supported the finding that the position (for organizations similar to the petitioner) required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not

In support of the assertion that the proffered position qualifies as a specialty occupation, the petitioner and counsel submitted letters from [REDACTED], on appeal. Both letters indicate that the companies are engaged in online sales through [REDACTED]. Based upon a complete review of both letters, we note that they failed to provide sufficient information regarding the basis of their claimed expertise on this particular issue. While they make various claims, they did not indicate that they relied on any authoritative sources to support their assertions. They did not include the results of outside formal surveys, research, statistics, or any other objective quantifying information to substantiate their opinions. Notably, their opinions are not supported by independent, objective evidence demonstrating the manner in which they reached such conclusions. They assert a general industry educational standard without referencing any supporting authority or any empirical basis for the pronouncement.

For example, the letter from [REDACTED] states that [REDACTED] has been engaged in online sales since 2009, and states that the "technical supporter" that it "hired before" has a "level of education with bachelor degree as minimum." The letter refers to the position of "Online Sales Support," which is the title of the proffered position as stated by the petitioner and counsel on appeal, and concludes that "Online Sales Support is a job title requiring higher education and training with a bachelor degree as a minimum with on-hand experience as a plus."

Upon review of the letter, it is not apparent that Shuxin Wang has personal knowledge of the duties of the proffered position as stated by the petitioner. Further, the letter does not demonstrate that the "technical supporter" hired by [REDACTED] is a parallel position to the proffered position. The author's assertion that the title of the proffered position is indicative of a position requiring a minimum of a bachelor's degree is insufficient to establish that the position qualifies as a specialty occupation. As previously noted, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a *specific specialty* that is *directly related* to the proposed position. Thus, a position that requires skills that can be obtained through any bachelor's degree program will not qualify as a specialty occupation.

Similarly, the letter from [REDACTED] states that the proffered position "requires theoretical and practical application of highly specialized knowledge obtained only through study of bachelor degrees at a credible college or university." [REDACTED] claims to have reviewed the job description provided by the petitioner and states that [REDACTED] has a similar position. [REDACTED] states: "I would not consider hiring anyone without a bachelor's degree for this position." Further, [REDACTED] concludes that "the minimum education requirement for Online Sales Support is generally at least a bachelor's degree or its equivalent in similar online sales industry."

We observe that the employers 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

require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

they provide any documentation to substantiate their claimed academic requirements (e.g., copies of diplomas/transcripts, employment records, job vacancy announcements).

Further, while the employers provide general statements that they have employed individuals in similar positions, they fail to provide the actual job duties and day-to-day responsibilities of the positions that they claim are the same or parallel to the proffered position. In addition, the petitioner has not supplemented the record with information regarding [REDACTED] and [REDACTED] to establish that they are similar to the petitioner.

Finally, as previously noted, both letters describe an industry standard that is insufficient to qualify a position as a specialty occupation. Specifically, both letters state that the proffered position can be performed with any bachelor's degree. Neither letter indicates that a bachelor's degree in a specific specialty, or its equivalent, is the minimum education required for entry into the occupation. Thus, the letters do not support the petitioner's assertion that the proffered position qualifies as a specialty occupation.

We may, in our discretion, use advisory opinions or statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of our discretion, we decline to regard the advisory opinion letters as probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, we hereby incorporate the above discussion and analysis regarding the opinion letters into our analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Thus, based upon a complete review of the record of proceeding, the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry that are (1) in parallel positions; and (2) located in organizations similar to the petitioner. Thus, 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).

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

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted employment agreements, tax documents, bank statements, printouts of its online storefront, and photos of the petitioner's premises. The petitioner also submitted documents relating to its corporate ownership, including stock certificates, a stock shares agreement, and board meeting minutes. We reviewed the record in its entirety and find that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.

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 "Wholesale and Retail Buyers, Except Farm Products" at a Level II wage. In accordance with the relevant DOL explanatory information on wage levels, a Level II position is indicative that, relative to other positions falling under the occupational category, the beneficiary is expected to have a good understanding of the occupation but that she will only perform moderately complex tasks that require limited judgment. Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹¹ The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions in the same occupation that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The petitioner failed to demonstrate how the duties of the proffered position as described in the record require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The petitioner has indicated that the beneficiary's educational background will assist her 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 qualifies as a specialty occupation. In the instant case, the petitioner does not establish 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 fails to demonstrate that its particular position is so complex or unique that it can be performed only by an

¹¹ For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

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

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

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

The petitioner provided information regarding the proffered position and its business operations. While the evidence provides some insights into the petitioner's business activities, the documents do not establish that the nature of the specific duties of the proffered position 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.

Moreover, we incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level II position (out of four assignable wage-levels) relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. Without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage.

The petitioner has not established that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We, therefore, conclude 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 not established 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.

III. ISSUES BEYOND THE DECISION OF THE DIRECTOR

A. Adequacy of the LCA and Proposed Wage

Upon review of the record of proceeding, we find that there are additional issues not identified in the director's decision that preclude approval of this petition. Specifically, beyond the decision of the director, we find that the petitioner (1) failed to submit an LCA that corresponds to the petition; and (2) failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the applicable statutory and regulatory provisions. Thus, the petition cannot be approved for these reasons as well. They are considered independent and alternative bases for denial of the petition.

Based on the petitioner's representations, the petitioner did not submit a certified LCA that properly corresponds to the petition. As previously stated, the petitioner submitted an LCA in support of the instant petition designating the proffered position under the occupational classification "Wholesale and Retail Buyers, Except Farm Products" SOC (ONET/OES Code) 13-1022. However, the petitioner has characterized the duties of the proffered position as pertaining to multiple occupational categories. For example, in its letter dated March 25, 2013, the petitioner indicated that the proffered position shares characteristics with the occupational categories of "Sales Engineers" and "Business Operations Specialists." On appeal, counsels represent that the occupational categories of "Sales Engineers," "Survey Researchers," "Sales Managers," "Financial Managers," "Business Analysts" and "Senior Web Analysts" are relevant to the proffered position, indicating that the proffered position "actually contains several different job titles as far as the nature and detailed job duties are concerned."

When the duties of a proffered position involve more than one occupational category, DOL provides clear guidance for selecting the most relevant O*NET code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

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

See 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.

Thus, if the petitioner believed its position was described as a combination of occupations, then according to DOL guidance the petitioner should have chosen the relevant occupational code for the highest paying occupation. The petitioner provided an LCA with a prevailing wage of \$25.46 per hour for a Level II position in the relevant geographic area. Notably, this prevailing wage is significantly lower than the prevailing wage for "Sales Engineers," "Sales Managers," and "Financial Managers."¹²

Specifically, a search of the Foreign Labor Certification Data Center Online Wage Library lists the prevailing wage for a Level II "Sales Engineers" SOC (ONET/OES Code) 41-9031 as \$44.06 per hour (\$91,645 per year). The prevailing wage for a Level II "Financial Managers" SOC (ONET/OES Code) 11-3031 position is listed as \$54.81 per hour (\$114,005 per year). The prevailing wage for a Level II "Sales Manager" SOC (ONET/OES) code 11-2022 position is \$58.12 per hour (\$120,890 per year). Thus, according to DOL guidance, if the petitioner believed its position was a combination of the occupations, it should have chosen the relevant occupational code for the highest paying occupation. However, the petitioner selected the occupational category for the lowest paying occupational category for the proffered position on the LCA. Notably, the petitioner indicated on the Form I-129 that it would pay the beneficiary a full-time annual salary of \$53,000, which is lower than the above-mentioned occupational categories with prevailing wages ranging from \$91,645 to \$120,890 per year.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual

¹² For additional information regarding the prevailing wage for these occupations in New Castle County (Newark, DE), see the All Industries Database for 7/2012 - 6/2013 at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesWizardStep2.aspx?stateName=Delaware> (last visited August 6, 2014).

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).

Moreover, the petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational category in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act. 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.

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

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation 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, the petitioner has failed to submit an LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the occupational category that the petitioner ascribed to the proffered position and to the wage corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

Therefore, for these reasons, even if it were determined that the petitioner overcame the director's basis for denial of the petition (which it has not), the petition could not be approved.

B. Beneficiary's Qualifications

We do not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

C. Employer-Employee Relationship

Finally, we will briefly address the issue of whether or not the petitioner qualifies as an H-1B

employer. The United States Supreme Court determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

The evidence in the record indicates that the petitioner was established and incorporated by the beneficiary in August 2011. It further indicates that 49% of the stock is owned by the beneficiary's spouse, Mr. [REDACTED] and the other 51% is owned by Mr. [REDACTED] who appears to reside in China. Based on the documents provided, it appears that the beneficiary makes all business decisions for the company. Moreover, the bank statements and tax documents in the record utilize the beneficiary's home address, as stated on the Form I-129, as the petitioner's address.¹³ In addition, the petitioner has only one other employee in an executive officer/office manager position, who reports to the beneficiary in her capacity as a secretary/treasurer.

The petitioner has not established that it controls the manner and means by which the beneficiary undertakes her work. Thus, the petitioner has not established that the requisite employer-employee relationship will exist between the petitioner and the beneficiary. The petition must therefore be denied for this additional reason.

IV. CONCLUSION AND ORDER

¹³ The public records indicate that both the beneficiary's address (which appears on the petitioner's tax documents, bank statements, and corporate record) and the petitioner's address (which appears on its letterhead) correspond to residential single-family homes. The petitioner has not established that it is authorized to conduct business at these locations per local zoning laws and regulations.

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

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

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.