



U.S. Citizenship
and Immigration
Services

(b)(6)

[REDACTED]

DATE: FEB 21 2014 OFFICE: CALIFORNIA SERVICE CENTER FILE [REDACTED]

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

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

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a food manufacturer company established in 2010. In order to employ the beneficiary in what it designates as a cost analyst position, 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, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

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

I. FACTUAL AND PROCEDURAL BACKGROUND

In the petition signed on March 27, 2013, the petitioner indicates that it is seeking the beneficiary's services as a cost analyst on a full-time basis at the rate of pay of \$44,179 per year. In the March 12, 2013 letter of support, the petitioner states that "[t]he Cost Analyst will provide technical and strategic support in advancing our product development and business plans for a growing global brand – [REDACTED]". The petitioner further states that "[t]he offered position of Cost Analyst is primarily to work with our research team and calculate/model the cost, size, and the duration of our new projects." In addition, the petitioner claims that the beneficiary will be responsible for the following duties:

- 1) Develop and calculate costs for new products; assess actual costs and revise costing calculations during manufacturing process to reflect changed factors.
- 2) Determine profit margin for new and existing products and recommend actionable plans for the management.
- 3) Perform cost analysis to provide vital information to set reasonable price for products. Lead strategic and ad-hoc analyses of the data to develop recommendations with specific action plans on how to address issues and business challenges such as seasonality of commodities (e.g. flour, sugar).

- 4) Analyze market-pricing and time-varying volatility to determine the pricing cycle of commodities in the U.S. and overseas; employ multi-proxy linear regression analysis and various variants of [REDACTED] models to determine serial correlation between commodity pricing, market and demand level, and all other variables. Analyze the influence of seasonality factors to the commodity pricing in the U.S. market, and China/Taiwan, including the weather and the most recent GDP data.
- 5) Develop food making labor hour estimates. Compile product costs including direct labor, commodities, and overheads. Sign off on final costing summaries in support of company's quotes, product pricing and contract activities.
- 6) Gather information from multiple sources and analyze the financial and technical feasibilities of business plans.

The AAO observes that the petitioner also states that "the applicant must have at least a bachelor's degree with a major in business administration, finance, or other related field." However, further in the letter, the petitioner states that "there is a clear standard for how one prepares for Cost Analyst/Cost Estimator, which is a bachelor's degree in such a field as accounting, finance, economics, business, or business administration." Further, the petitioner claims that "[t]his minimum prerequisite for the offered position clearly marks it as a specialty occupation that requires a person of distinguished merit and ability."¹

With the Form I-129 petition, the petitioner submitted a copy of the beneficiary's Master of Business Administration degree and transcript from [REDACTED]. In addition, the petitioner submitted copies of the beneficiary's foreign academic credentials.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Cost Estimators" - SOC (ONET/OES Code) 13-1051, at a Level I (entry level) wage.

¹ The petitioner states that the proffered position requires "a person of distinguished merit and ability." However, to clarify, the AAO notes that the term "distinguished merit and ability" was defined in the regulations as "one who is a member of the professions . . . or who is prominent in his or her field." See 8 C.F.R. § 214.2(h)(4) (1991). The *Immigration Act of 1990* ("IMMACT 90") deleted the term "distinguished merit and ability" from the general H-1B description and replaced it with the requirement that the position be a "specialty occupation." Pub. L. No. 101-649, 104 Stat. 4978, 5020. The implementation of this change occurred on April 1, 1992. The *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991* ("MTINA"), which was enacted on December 2, 1991, modified the H-1B definition to include fashion models of distinguished merit and ability. Pub. L. No. 102-232, 105 Stat. 1733. While the term "distinguished merit and ability" is still used with regard to fashion models, it must be noted that the term has not been applicable to the general H-1B classification ("specialty occupations") for over 20 years.

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 22, 2013. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted. The AAO notes that the director specifically requested the petitioner to provide a detailed statement to:

- explain the beneficiary's proposed duties and responsibilities;
- indicate the percentage of time devoted to each duty;
- state the minimum educational requirements for these duties; and
- explain how the beneficiary's education related to the position.

On July 2, 2013, the petitioner responded to the RFE. In a letter dated June 22, 2013, the petitioner provided additional information regarding the proffered position, along with the percentage of time the beneficiary would spend performing the duties of the position, as follows:

- Analyze market-pricing and time-varying volatility to determine the pricing cycle of commodities in the U.S. and overseas; employ multi-proxy linear regression analysis and various variants of [REDACTED] models to determine serial correlation between commodity pricing, market and demand level, and all other variables. Analyze the influence of seasonality factors to the commodity pricing in the U.S. market, and China/Taiwan, including the weather and the most recent GDP data. (40% of the time will be spent on this task)
 1. Monitor and review the latest information from [REDACTED] and sources on commodity future market;
 2. Review and analyze trends and risks in the commodity markets;
 3. Perform database analysis; confer with management at pre-bid meetings; evaluate quotations based on the latest future commodity prices, and make recommendations in the development and negotiation of applicable terms and conditions.
 4. Consider and determine all factors from U.S.-based industry sources to enhance the competitive bidding process;
 5. Analyze procurement patterns to identify and take advantage of purchasing/contracting cost savings through quantitative models such as time series analysis and multiple-regression analysis to optimize decision making under uncertain situations.

* * *

- Develop food making labor hour estimates. Compile product costs including direct labor, commodities, and overheads. Sign off on final costing summaries in support of company's quotes, product pricing and contract activities. Determine profit margin for new and existing products and recommend actionable plans for the management. Perform cost analysis to provide vital information to set reasonable price for products. Lead strategic and ad-hoc analyses of the data to develop recommendations with specific action plans on how to address issues

and business challenges such as seasonality of commodities (e.g. flour, sugar). Gather information from multiple sources and analyze the financial and technical feasibilities of business plans. (50% percentage of time)

1. Review and analyze the price of all the ingredients, the labor cost, overhead cost, material handling cost, energy cost, operating supplies cost, supervision cost, insurance and taxes cost, building depreciation, equipment depreciation, building occupancy, and product-support services.
 2. Prepare a consolidated priced summary report of materials, performance and cost data on past and current programs and an assessment of how this information might be impacted by developments such as new methods of design or the use of new materials.
 3. Analyzing data from all the available data on applicable factors, including materials, machinery requirements, labor costs, location and other relevant cost elements. Determining the actual cost of products when factors changed, changing the products price while needed.
 4. Using Microsoft office excel/SAP to do complex mathematical calculations, preparing reports and advising management on appropriate actions in the manufacturing process in accordance with organizational goals.
 5. Preparing bid on other company's order, preparing the company quotation for potential customers according to their special needs.
- Develop and calculate costs for new products; assess actual costs and revise costing calculations during manufacturing process to reflect changed factors. (10% of the time will be spent on this task)
 1. Use the Program Evaluation Review Technique to manage and facilitate the process, and to decrease the cost of wasting time during the process of procurement of commodities.
 2. Identify weaknesses and problems from suppliers' commodity delivering quality control systems.

In response to the RFE, the petitioner also submitted: (1) advertisements for the petitioner's products; (2) an organizational chart; (3) documentation regarding former employees; (3) the petitioner's Internet job posting; (4) documentation described by the petitioner as the beneficiary's work product; (5) an excerpt entitled "Cost Estimators" from the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), 2012-13 edition; (6) job vacancy announcements; and (7) the petitioner's business plan, dated December 2012, and product catalogue.

The director reviewed the information provided by the petitioner to determine whether the petitioner had established eligibility for the benefit sought. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly

specialized knowledge in a specific specialty. The director denied the petition on July 12, 2013. Counsel submitted an appeal of the denial of the H-1B petition. With the appeal, counsel submitted a brief.

II. BEYOND THE DIRECTOR'S DECISION

The AAO reviewed the record of proceeding in its entirety and, as will be discussed later in the decision, agrees with the director that the petitioner has not established eligibility for the benefit sought. Moreover, the AAO has identified several, additional issues that preclude the approval of the H-1B petition that were not identified by the director. Consequently, even if the petitioner overcame the grounds for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought.²

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

As previously discussed, the petitioner submitted an LCA in support of the petition that designated the proffered position to the corresponding occupational category of "Cost Estimators" - SOC (ONET/OES) code 13-1051. The wage level for the proffered position in the LCA corresponds to a Level I (entry) position. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.³ The LCA was certified on March 12, 2013. The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.⁴

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

³ The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Office of Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatabase.com/>.

⁴ For additional information regarding prevailing wage determinations, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) position after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁵ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and 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.

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.

The petitioner and its counsel claim that the proffered position involves complex, unique and/or specialized duties. Further, in the March 12, 2013 letter of support, the petitioner states that it will rely on the beneficiary to advance its product development and the business plan for its brand. The petitioner claims that the beneficiary will use advanced statistical techniques to analyze industry data. In addition, the petitioner reports that the cost analyst will "employ highly specialized skills and management knowledge, especially quantitative skills, in her daily responsibilities for cost and

Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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

data analysis and raw material cost determination." The petitioner emphasizes the critical importance of the proffered position in its expansion plans. According to the petitioner, it seeks the beneficiary's services to leverage its business to the next level. The petitioner continues by stating that the beneficiary will eventually lead the company's business as a significant global player in the Chinese specialty food market.

In the June 22, 2013 letter, submitted in response to the director's RFE, the petitioner states that the position involves supervisory duties. The petitioner further claims that the beneficiary will be required to perform complex mathematical calculations and advanced statistical techniques. Moreover, the beneficiary will be responsible for analyzing data and developing actionable business strategies to meet the petitioner's objectives. In addition, the petitioner references the specialized nature of the job and claims that the beneficiary will provide technical and strategic support in advancing its growth. In the appeal brief, counsel claims that the duties are highly specialized and complex and that strong quantitative skills are required for the position. Counsel mentions that sophisticated statistical skills are needed for the job duties. According to the petitioner and counsel, the daily responsibilities of the proffered position require an individual with knowledge of statistical skills on multi-proxy linear regression analysis and skills in the use of various variants of models. According to the job posting, the cost analyst will report to the president of the company and the position requires in-depth knowledge of manufacturing processes.⁶

Furthermore, within the record, the petitioner claims that the beneficiary's academic background, professional experience and achievements qualify her for the proffered position.⁷ The petitioner states that the beneficiary has a multi-disciplinary academic background in business and law, and eight years of practical business experience in data analysis and strategic developments. The petitioner describes the beneficiary's professional experience in China and the United States. Although a potential employee's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation, the AAO observes that the petitioner emphasized the beneficiary's academic credentials and years of professional experience as relevant in performing the duties of the proffered position.

In the instant case, the petitioner appears to claim that it will be relying heavily on the beneficiary's expertise to make critical decisions regarding the company's expansion and growth. Such reliance on the beneficiary's work appears to surpass the expectations of a Level I cost estimator position, as described above, where (relative to others within the occupation) the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and limited exercise of judgment. In the instant case, rather than the beneficiary's work being "monitored and reviewed for accuracy," it appears that the petitioner will depend upon the beneficiary's work with regard to the growth of its operations, as well as important business

⁶ In response to the RFE, the petitioner stated that the cost analyst will report to the procurement manager. No explanation for the variance was provided.

⁷ The petitioner references the beneficiary's academic credentials: an MBA from a university in the United States, as well as a Master of Laws in International Economic and Business Law and a Bachelor of Laws from foreign universities. The petitioner also describes the beneficiary's prior experience, including her work as an investment analyst, purchasing analyst, and M&A analyst.

decisions for the company. Furthermore, the petitioner asserts that the duties of the proffered position are highly specialized and complex and require strong quantitative skills, as well as include supervisory responsibilities.

Upon review of the assertions regarding the proffered position, the AAO must question the stated requirements for the proffered position, as well as the level of complexity, independent judgment and understanding that are actually needed for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties, responsibilities and requirements as described in the record of proceeding conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. Furthermore, a Level I designation is appropriate for a position such as a research fellow, a worker in training, or an internship.

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

The prevailing wage of \$44,179 per year on the LCA corresponds to a Level I for the occupational category of "Cost Estimators" for [REDACTED].⁸ Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$58,718 per hour for a Level II position, \$73,278 per year for a Level III position, and \$87,818 per year for a Level IV position.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition.⁹ To permit otherwise

⁸ For additional information regarding the prevailing wage for cost estimators in Cook County, see the All Industries Database for 7/2012 - 6/2013 for this occupation at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?code=13-1051&area=16974&year=13&source=1> (last visited February 19, 2014).

⁹ To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between DOL and the U.S. Department of Homeland Security (DHS), a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2). Upon receiving DOL's certification, the prospective employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). DOL reviews LCAs "for

would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted for a higher-level and more complex position as claimed elsewhere in the petition.

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

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

Certification by the Department of Labor [DOL] of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

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

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

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, provided the proffered position was in fact found to be a higher-level and more complex position as asserted by the petitioner and counsel

completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition. 20 C.F.R. § 655.705(b); *see generally* 8 C.F.R. § 214.2(h)(4)(i)(B).

elsewhere in the petition, the petitioner would have failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position. That is, the LCA submitted in support of the petition would then fail to correspond to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance section 212(n)(1)(A) of the Act and the pertinent LCA regulations.

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

As such, a review of the enclosed LCA indicates that the information provided therein does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements, which if accepted as accurate would result in the beneficiary being offered a salary below that required by law. As a result, even if it were determined that the proffered position were a higher-level and more complex position as described and claimed elsewhere in the petition in support of the petitioner's assertions that this position qualifies as a specialty occupation, the petition could still not be approved for these additional reasons.¹⁰

III. REVIEW OF THE DIRECTOR'S DECISION

The Petitioner Failed to Establish that the Proffered Position Qualifies as a Specialty Occupation in Accordance with the Applicable Statutory and Regulatory Provisions

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

¹⁰ Fundamentally, it appears that (1) the petitioner previously claimed to DOL that the proffered position is a Level I, entry-level position to obtain a lower prevailing wage; and (2) the petitioner is now claiming to USCIS that the position is a higher-level and more complex position in order to support its claim that the position qualifies as a specialty occupation. The petitioner cannot have it both ways. Either the position is a more senior and complex position (based on a comparison of the petitioner's job requirements to the standard occupational requirements) and thereby necessitates a higher required wage, or it is an entry-level position for which the lower wage offered to the beneficiary in this petition is acceptable. To permit otherwise would be directly contrary to the U.S. worker protection provisions contained in section 212(n)(1)(A) of the Act and its implementing regulations.

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

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory

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

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

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

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To make this determination, the AAO turns to the record of proceeding. To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition.¹¹ It is only in this manner that the

¹¹ Contrary to the petitioner's assertion in its letter of support, cost analysts are not referenced at 8 C.F.R.

agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. 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."

In the instant case, the petitioner has provided inconsistent information regarding the academic requirements of the proffered position. In the March 12, 2013 letter of support, the petitioner stated that "the applicant must have at least a bachelor's degree with a major in business administration, finance, or other related field." However, further in the letter, the petitioner stated that "there is a clear standard for how one prepares for Cost Analyst/Cost Estimator, which is a bachelor's degree in such a field as accounting, finance, economics, business, or business administration." In the June 22, 2013 letter, submitted in response to the RFE, the petitioner stated that "the prospective candidate must hold at least a bachelor's degree in a major in Finance, Accounting, Business Administration, or other related field." No explanation for the variance was provided by the petitioner.

Moreover, the petitioner states that a bachelor's degree in business or business administration is acceptable for the proffered position. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business or business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.¹² Here the petitioner claims that a degree in business or business administration is sufficient to perform the duties of the proffered position, suggesting that a general-purpose degree is acceptable for the proffered position.

Nevertheless, the AAO will address each criterion of the regulations for the purpose of providing a

§ 214.2(h)(4)(ii).

¹² 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.

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

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹³ As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Cost Estimators."

The AAO reviewed the chapter of the *Handbook* entitled "Cost Estimators," including the sections regarding the typical duties and requirements for this occupational category.¹⁴ However, the *Handbook* does not indicate that "Cost Estimators" comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "How to Become a Cost Estimator" states, in part, the following about this occupation:

Education

Increasingly, employers prefer candidates who have a bachelor's degree. A strong background in mathematics is essential.

Construction cost estimators generally need a bachelor's degree in an industry-

¹³ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2014 – 2015 edition available online. The AAO hereby incorporates into the record of proceeding the chapter of the *Handbook* regarding "Cost Estimators."

¹⁴ For additional information regarding the occupational category "Cost Estimators," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Cost Estimators, on the Internet at <http://www.bls.gov/ooh/business-and-financial/cost-estimators.htm#tab-1> (last visited February 19, 2014).

related field, such as construction management, building science, or engineering. Those interested in estimating manufacturing costs typically need a bachelor's degree in engineering, physical sciences, mathematics, or statistics. Some employers accept candidates with backgrounds in business-related disciplines, such as accounting, finance, and business.

* * *

Work Experience in a Related Occupation

Increasingly, employers prefer that cost estimators—particularly those without a bachelor's degree—have previous work experience in the construction industry. For example, experienced electricians and plumbers can become construction cost estimators if they have the necessary construction knowledge and math skills.

Candidates interested in becoming cost estimators also can gain experience through internships and cooperative education programs.

Licenses, Certifications, and Registrations

Voluntary certification can show competence and experience in the field. In some instances, employers may require professional certification before hiring. The American Society of Professional Estimators, the Association for the Advancement of Cost Estimating International (also known as AACE International), and the International Cost Estimating and Analysis Association each offer a variety of certifications.

To become certified, estimators generally must have at least 2 years of estimating experience and must pass a written exam.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Cost Estimators, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/cost-estimators.htm#tab-4> (last visited February 19, 2014).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the wage level of the proffered position as a Level I position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. Furthermore, DOL guidance indicates that a Level I designation is appropriate for a position as a research fellow, a worker in training, or an internship.

The *Handbook* does not support the assertion that a baccalaureate or higher degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry into the occupation. The *Handbook* indicates that employers increasingly prefer candidates who have a bachelor's degree.

However, obviously a *preference* is not a minimum degree *requirement*.

Further, the *Handbook* also points out that there are a variety of acceptable fields of study and backgrounds for this occupation, including construction management, building science, engineering, physical sciences, mathematics, statistics, and business-related disciplines (including accounting, finance, and business). The *Handbook* further states that employers prefer that cost estimators, particularly those without a bachelor's degree, have previous work experience, which can be gained in the industry, as well as through internships and cooperative education programs. The *Handbook* does not state that such experience must be equivalent to at least a bachelor's degree in a specific specialty.

The *Handbook* indicates that some employers may require professional certification before hiring and employee. Although the petitioner does not report that certification is required for the proffered position, the AAO observes that the narrative of the *Handbook* states that estimators generally must have at least two years of estimating experience and must pass a written exam for certification. The *Handbook* does not indicate that certification requires at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO reiterates that the *Handbook* does not denote that at least a bachelor's degree is normally the minimum requirement for entry into the occupation, rather the *Handbook* indicates that some employers prefer candidates with a degree. However, assuming *arguendo* that the *Handbook* stated a degree requirement (which it does not), the AAO notes that, in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added)."

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Here, the *Handbook* indicates that "construction cost estimators generally need a bachelor's degree in an industry-related field, such as construction management, building science, or engineering" and manufacturing cost estimators "typically need a bachelor's degree in engineering, physical sciences,

mathematics, or statistics." The *Handbook* further indicates, "Some employers accept candidates with backgrounds in business-related disciplines, such as accounting, finance, and business." Thus, a wide-range of disparate fields and backgrounds are considered relevant for entry into the occupation. The record lacks evidence establishes how each of these is directly related to the duties and responsibilities of the position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act.

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of the *Handbook's* support on the issue. As previously mentioned, 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." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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

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

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source), reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. The petitioner did not submit any documentation from the industry's professional association stating that it has made a degree a minimum entry requirement. The petitioner also did not submit any letters or affidavits from firms

or individuals in the industry in support of this criterion of the regulations.

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

In the Form I-129 petition, the petitioner stated that it is a food manufacturer business established in 2010. The petitioner further stated that it has 11 employees and a gross annual income of \$834,827. The petitioner indicated, without further explanation, that its net annual income is "N/A." The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 311412.¹⁵ This NAICS code is designated for "Frozen Specialty Food Manufacturing." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This U.S. industry comprises establishments primarily engaged in manufacturing frozen specialty foods (except seafood), such as frozen dinners, entrees, and side dishes; frozen pizza; frozen whipped topping; and frozen waffles, pancakes, and french toast.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 311412 – Frozen Specialty Food Manufacturing, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 19, 2014).

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). Notably, it is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

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

For instance, the petitioner submitted job postings placed by staffing firms (Accountemps, Beacon

¹⁵ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited February 19, 2014).

Staffing Group, Parker and Lynch, Inc., and two job postings that indicate "Confidential Posting" for which little or no information regarding the employers is provided. In addition, the petitioner provided a job posting for Accumold ("a high-tech plastics manufacturer that specializes in micro and small injection molded components for medical, micro electronics, micro optics, automotive electronics and military/aerospace"). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. Consequently, the record is devoid of sufficient information regarding these advertising employers to conduct a legitimate comparison of the organizations to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations. Again, the petitioner must demonstrate the degree requirement is *common to the industry* in parallel position among similar organizations.

Moreover, some of the advertisements do not appear to be for parallel positions. More specifically, the petitioner submitted a "Confidential Posting," which requires a degree in accounting and "7+ to 10 Years" of experience. The record also contains a posting for a position that requires a degree and 7 to 15 years of experience. The petitioner also provided a posting for an accounting/cost analyst position, which requires a degree in accounting or finance and "5-7 years of Accounting AND Cost Analyst experience." Moreover, the petitioner submitted a posting by [REDACTED] which requires a degree in accounting, "plus [a] minimum of 2-4 years [of] manufacturing/business accounting." Additionally, the petitioner submitted a job posting by [REDACTED] which requires candidates to possess a degree and a "minimum [of] 3-5 years of cost estimating and cost accounting in a manufacturing environment." As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) position. The advertised positions appear to be for more senior positions than the proffered position.

More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position. For instance, some of the advertising employers provided brief and/or vague job descriptions for the advertised positions. Thus, these advertisements do not contain sufficient information regarding the day-to-day duties, complexity of the job duties, supervisory duties (if any), independent judgment required, the amount of supervision received, or other relevant factors within the context of the advertising employers' business operations to make a legitimate comparison of the advertised positions to the proffered position.

Furthermore, the petitioner provided an advertisement that simply states "Acct or Fin Degree" is required, but it does not specify the level of education required (e.g., associate's degree, baccalaureate). The qualifications listed in the posting do not support a finding that the advertised position requires a baccalaureate (or higher degree) in a specific specialty, or its equivalent. Contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the

positions.¹⁶

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. The evidence does not establish that the proffered position qualifies as a specialty occupation under this criterion of the regulations.¹⁷

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

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

USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence. The evidence submitted, however, fails to establish that the petitioner's proffered position qualifies for the requested classification under the applicable statutory and regulatory provisions. It is not the volume of documentation that establishes eligibility for the benefit sought, but rather the relevance, probative

¹⁶ As previously discussed, although a general-purpose bachelor's degree, such as a degree in business, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

¹⁷ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

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

value, and credibility of the documentation – both individually and within the context of the totality of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

The petitioner submitted documents that it refers to as work samples. However, the referenced documents are not on company letterhead and are not endorsed by the petitioner. The reports do not indicate the specific purpose for which they were prepared, nor do they identify the intended audience. The record of proceeding lacks evidence supporting a conclusion that the data, evaluation and analysis of the reports were prepared by or for the petitioning organization. Further, they are undated and the author(s) of the documents are not identified. There is no indication that the beneficiary was involved in the preparation of the reports. The documents do not contain the beneficiary's name or any other information connecting her to the documents. Accordingly, without further information, the evidence regarding the reports is of limited probative value.

The record of proceeding also contains information regarding the proffered position and the petitioner's business operations, including advertisements/promotional materials for the petitioner's products, an organizational chart, as well as the petitioner's business plan and product catalogue. While the petitioner submitted various documents relating to its operations, the AAO notes that the petitioner failed to establish how the documents relate to the beneficiary's day-to-day responsibilities and how such documents demonstrate that its particular position is so complex or unique that it can only be performed only be an individual with a baccalaureate (or higher degree) in a specific specialty, or its equivalent.

The petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. That is, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position (through the job duties, the petitioner's business operations or by any other means) that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even essential, in performing certain duties of a cost analyst position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the petitioner's proffered position.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Cost Estimators" at a Level I (entry level) wage, which is the lowest of four assignable wage levels. The wage level of the proffered position indicates that (relative to other positions falling under this occupational category) the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex

or unique in comparison to others within the occupation, as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, 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."¹⁸

Therefore, the evidence of record does not establish that this position is significantly different from other cost estimator positions such that it refutes the *Handbook's* information to the effect that a bachelor's degree in a specific specialty, or its equivalent, is not required for entry into the occupation. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than cost estimator positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The petitioner claims that the beneficiary's academic background and professional experience will assist her in carrying out the duties of the proffered position. However, as previously mentioned, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area (or its equivalent). The petitioner does not sufficiently explain or clarify which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the AAO finds that the petitioner has failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

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

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed

¹⁸ 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.

requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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

The petitioner claims that it previously employed two workers in the proffered position: [REDACTED]. Notably, the petitioner did not provide the job duties and day-to-day responsibilities of the positions that it claims are the same as the proffered position. The petitioner did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, it is unclear whether the duties and responsibilities of these individuals were the same or related to the proffered position.

Furthermore, the documentation provided by the petitioner does not support its claim with regard to these employees. While the petitioner submitted copies of the former employees' diplomas and Forms W-2s, the AAO observes that the Forms W-2 indicate that one of the employees was compensated \$19,098 in 2012 and the other employee was compensated \$19,685 in 2011. The documentation indicates that these individuals were paid significantly less than the salary offered to the beneficiary, strongly suggesting that they were employed in different positions. The petitioner did not provide an explanation for the substantial variance in the wages. Without more, the documentation does not establish that the petitioner satisfied this criterion of the regulations.

The petitioner also submitted a job posting, dated December 3, 2012, that appeared on [REDACTED]. The petitioner did not provide further documentation establishing the duration of period that it was posted on [REDACTED]. The petitioner stated in the Form I-129 petition that it was established in 2010 (approximately three years prior to the submission of the H-1B petition). The petitioner did not provide any further information or evidence regarding its recruiting history for the position advertised. Consequently, it cannot be determined how representative this one job posting is of the petitioner's normal recruiting and hiring practices for the proffered position. As it is only a solicitation for hire, it is not evidence of the petitioner's actual hiring practices. Without further information, the submission is not persuasive in establishing that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

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

The AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as an entry-level position relative to others within the occupational category of "Cost Estimators." The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties compared to others within the occupation as such a position would likely be classified at a higher-level, such as a Level III (experienced) or IV (fully competent) position, requiring a substantially higher prevailing wage.¹⁹ As previously

¹⁹ If the proffered position were designated as a higher level position, the prevailing wage for the occupational category in Chicago, Illinois at that time would have been \$58,718 per hour for a Level II position, \$73,278 per year for a Level III position, and \$87,818 per year for a Level IV position.

discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

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

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

IV. CONCLUSION AND ORDER

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

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

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

ORDER: The appeal is dismissed.