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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: FEB 25 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 Director of the California Service Center denied the nonimmigrant visa petition and certified the decision to the Administrative Appeals Office (AAO). The AAO reviewed the record of proceeding in its entirety and finds that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will be affirmed, and the petition will be denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 1, 2013. In the Form I-129 visa petition, the petitioner describes itself as a professional sports agency established in 1983. In order to employ the beneficiary in what it designates as an entertainment support specialist, 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 on September 23, 2013, 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. In response to the director's certification, counsel submitted a brief to the AAO as permitted by 8 C.F.R. § 103.4(a)(2). Counsel 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 petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; (5) the director's Notice of Certification; and (6) counsel's submission to the AAO. 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's decision that the record of proceeding does not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Accordingly, the director's decision will not be disturbed. The decision certified to the AAO will be affirmed, and the petition will be denied.

Furthermore, later in the decision, the AAO will also address several additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Thus, the petition cannot be approved for these reasons as well.¹

I. The Factual and Procedural History

In this matter, the petitioner states in the Form I-129 that it seeks the beneficiary's services as a full-time entertainment support specialist at an annual salary of \$40,643 per year. In the support letter dated March 28, 2013, the petitioner indicates that the proffered position "is an entry-level opportunity for a candidate who is interested in the entertainment industry and wants to get exposure to the production, representation and creative side of alternative television." Further, the petitioner describes the proffered position as follows:

¹ The AAO conducts its review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The Entertainment Support Specialist will assist the Senior Management of [the petitioner's] [e]ntertainment division and focus on supporting projects such as the creation and pitching of TV production projects. The position requires the ability to prioritize assignments, multi task, and work under pressure in a friendly but fast paced environment. The Entertainment Support Specialist will conduct market research and fact finding to explore potential TV production or marketing opportunities; will compile and track project-related information; will create marketing materials for current/potential clients or projects; will assist with other projects such as recruitment of new clients, execution of PR events of current clients and general client service projects; will respond timely to internal and external inquiries; will provide coverage for other support team members while they are out of the office; and will carry out other reasonably related duties as assigned.

The Entertainment Support Specialist must be highly proficient with Microsoft Office Suite (including Word, Excel and PowerPoint); possess strong organizational skills to coordinate multiple tasks simultaneously, as well as excellent written and verbal communication skills; and capably interact with internal and external clients at all levels articulately and with courtesy and diplomacy.

In the letter of support, the petitioner claims that the proffered position "requires a minimum of a [b]achelor's degree in a [b]usiness [sic] or [m]anagement, or other related field." The petitioner continues by stating that preference was given to candidates with prior work experience with an agency or a production company.

The petitioner provided a copy of the beneficiary's foreign diploma and transcript, along with a copy of a certificate issued to the beneficiary.² In addition, the petitioner provided an academic evaluation report stating that the beneficiary possesses the U.S. equivalent of a Bachelor of Business Administration degree in marketing.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant petition. The petitioner designated the proffered position under the occupational category "Business Operations Specialists, All Other" – SOC (ONET/OES) code 13-1199, at a Level I (entry) wage.³

² The beneficiary was granted a "Certificate in the Business and Management of Entertainment," which was issued by the [REDACTED]

[REDACTED] in June 2012. The [REDACTED] website includes a section entitled "Frequently Asked Questions." To the question of how to enroll in a certificate program, the website states that "[f]or most programs, you become a candidate by simply paying the candidacy fee online." The website indicates that the "Certificate in the Business and Management of Entertainment" program has "open enrollment." The website further indicates that there are no academic pre-requisites for enrolling in this certificate program (and that there is "no special admission or application process"). Moreover, the estimated duration of the program at a full-time pace is "3 quarters." For additional information, see the [REDACTED]

³ The Standard Occupational Classification (SOC) System is used by the U.S. Department of Labor (DOL) for classifying occupations. Under the SOC system, workers are classified at four levels of aggregation: (1)

In addition, the petitioner provided printouts from its website. The petitioner did not submit any further documentation regarding its business operations or the proffered position.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 23, 2013. In the request, the director asked the petitioner to provide additional evidence to establish that the proffered position qualifies as a specialty occupation. The notice included a request to provide a more detailed description of the work to be performed by the beneficiary for the entire period requested, including the specific job duties, the percentage of time to be spent on each duty, level of responsibility, hours per week of work, etc.⁴ The director outlined

major group (of which there are 23); (2) minor group (of which there are 96); (3) broad occupation (of which there are 449); and (4) detailed occupation (of which there are 821). Occupations are classified based upon work performed, skills, education, training, and credentials.

Residual categories exist within the various levels of the system to permit the reporting of occupations not identified at the detailed level. That is, if an occupation is not included as a distinct detailed occupation in the structure, it is classified in the appropriate residual occupation. Residual occupations contain all occupations within a major, minor, or broad group that are not classified separately. Thus, for the less populous occupations, residual categories (that is, "All Other" categories) have been created within most levels of the SOC system.

Residual categories provide a complete accounting of all workers employed within an establishment and allow aggregation and analysis of occupational employment data at various levels of detail. For instance, residual categories include "Business Operations Specialists, All Other" – SOC (ONET/OES) code 13-1199 and "Managers, All Other" – SOC (ONET/OES) 11-9199. For additional information regarding the SOC system and residual categories, see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., on the Internet at <http://www.bls.gov/home.htm>.

⁴ As reflected in the above description of the proffered position, the petitioner states the proposed duties in terms that fail to convey the relative complexity, uniqueness and/or specialization of the proffered position or its duties. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will "assist the Senior Management"; "focus on supporting projects"; and "assist with other projects." These statements do not include information regarding the day-to-day tasks of the position, and the terms "assist" and "focus on" do not delineate the actual work that the beneficiary will perform. This is again illustrated by the petitioner's statement that the beneficiary will "compile and track project-related information." The petitioner's statement does not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application.

Additionally, the petitioner claims that the beneficiary "will respond timely to internal and external inquiries"; "will provide coverage for other support team members while they are out of the office"; and "will carry out other reasonably related duties as assigned." The petitioner also claims that the proffered position requires proficiency of "Microsoft Suite (including Word, Excel and PowerPoint)." These responsibilities and requirements also fail to convey sufficient details regarding the nature and scope of the beneficiary's employment and the actual work that the beneficiary will perform.

According to the petitioner, the beneficiary must "possess strong organizational skills to coordinate multiple tasks simultaneously." Moreover, the petitioner claims that the position "requires the ability to prioritize

the evidence to be submitted.

The petitioner responded to the RFE by providing a letter, dated July 2, 2013, and additional evidence in support of the H-1B petition. In the support letter, the petitioner claims that the proffered position qualifies as a specialty occupation. Further, the petitioner states that due to increased business activities, it identified a need to have a position "specifically designed to 'float' specialized support to [the] entertainment management division, supporting the different business units and working to support all the Vice Presidents and the Managing Director on a variety of critical projects such as TV production business development and marketing [the petitioner's] new clients."

Further, the petitioner provided a revised job description, which states, in pertinent part, the following:

With regard to the specific duties of the position, they are as follows:

1. Creation and design of client materials and sponsorship decks (35%):

The Entertainment Support Specialist researches each new client (once signed) and develops an extensive electronic file on each client including headshots, resumes, biographies and reels. The Entertainment Division retains this information in its databases for future submissions. From those materials, the Entertainment Support Specialist creates "one sheets," which is a term used in the entertainment industry for a single document that summarizes a product for

assignments, multi task, and work under pressure in a friendly but fast paced environment." The petitioner fails to sufficiently define how these tasks entail the need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty.

Thus, upon review, it is not evident that the proposed duties as described, and the position that they comprise, merit recognition of the proffered position as qualifying as a specialty occupation. That is, to the extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the performance of the proffered position for the entire period requested. The job description does not persuasively support the claim that the position's day-to-day job responsibilities and duties would require the theoretical and practical application of a particular educational level of highly specialized knowledge in a specific specialty directly related to those duties and responsibilities.

Furthermore, the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform these functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position, and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position. Without a job description that adequately conveys the essential and primary tasks of the proffered position, USCIS is unable to ascertain whether the performance of such tasks requires the attainment of at least a bachelor's degree in a specific specialty, or its equivalent. Accordingly, the director's request for additional evidence to establish the position as a specialty occupation was a proper exercise of that discretionary authority provided by 8 C.F.R. § 103.2(b)(8)(ii) and (iii).

publicity and sales. We use these to submit our clients for potential auditions and/or speaking opportunities. We have attached a "one sheet" created by [the beneficiary] for [REDACTED] as an example. The Entertainment Support Specialist also creates "sponsorship decks" for development projects which we use to approach brands to obtain financing, among other purposes. The Entertainment Support Specialist further researches ongoing projects, clients involved, and brands that could be a good fit for our clients, and then customizes the sponsorship deck to the target sponsor.

The creation of "one sheets" requires the ability of the Entertainment Support Specialist to properly place graphics and adequately redact/edit the client information in a concise way yet impactful way. From a B2B Marketing standpoint, the consumers are casting directors (for auditions), and organizations (for speaking opportunities), and in both cases, the client "one sheets" need to highlight the aspects that would make them relevant. The creation of sponsorship decks requires the ability of the Entertainment Support Specialist to analyze the marketing strategies currently in use by specific brands targeted for possible sponsorship and communicate key points on how our projects can help the potential sponsors better reach their audiences, identifying who their messages are aimed at and who their consumers are.

[The petitioner states that the following courses represent the beneficiary's "relevant education with regard to these tasks": Advertising I and II, Graphic Design, Marketing, and Consumer Behavior. All of these courses were completed as part of the beneficiary's foreign degree program.]

* * *

With regard to this segment of the Entertainment Support Specialist's work, she primarily supports [REDACTED] Vice President of Operations and Brand Relations.

2. Divisional website management (20%):

The Entertainment Support Specialist is tasked with the reconstruction of the Entertainment Division website, including compiling pictures and biographies of clients as well as redacting mission statements, core competencies, point of difference from competitors and achievements of the division. On a daily basis, the Entertainment Support Specialist is tasked with keeping the website up to date with new client materials and relevant information, which is extremely important in the fast-paced entertainment industry.

The management of the Entertainment Division website requires that the Entertainment Support Specialist identify key elements and information that communicates the best understanding of our division and our clients in order to project the right message to potential business partners and clients. In addition,

this responsibility requires the Entertainment Support Specialist to edit all images for use using the appropriate design software.

[The petitioner states that the following courses represent the beneficiary's "relevant education with regard to these tasks": Management, Services Marketing, and Graphic Design. All of these courses were completed as part of the beneficiary's foreign degree program.]

* * *

With regard to this segment of the Entertainment Support Specialist's work, she is solely responsible for this, and reports directly to [REDACTED] the Managing Director of the Entertainment Division.

3. Business affairs responsibilities (20%):

The Entertainment Support Specialist's business affairs responsibilities include handling client management agreements from start to finish (i.e. for each new client, drafting management agreements, and following up with the process until contracts are fully executed, keeping track of all client signings and reporting back to [the petitioner's] headquarters in [REDACTED]). This segment of the Entertainment Support Specialist's duties require[s] familiarity with management agreements, its content and its structure.

[The petitioner states that the following course represents the beneficiary's "relevant education with regard to these tasks": Legal Primer for the Entertainment Business ([REDACTED] Certificate Program).]

* * *

With regard to this segment of the Entertainment Support Specialist's work, she primarily supports [REDACTED] Vice President, Head of Business Affairs, and reports to both Mr. [REDACTED] and Mr. [REDACTED] (the Managing Director).

4. Liaise between senior staff and industry executives (15%):

The Entertainment Support Specialist is also responsible for setting and confirming pitch meetings (for television projects), and client meetings (for potential work opportunities). In this role, the Entertainment Support Specialist serves as the liaison between the Entertainment Division and its clients and the offices of network executives and casting directors, and coordinates with all parties involved. This task requires familiarity with the entertainment industry, as well as with knowledge of network and casting executives.

[The petitioner states that the following course represents the beneficiary's "relevant education with regard to these tasks": The Business of Entertainment

[REDACTED] Certificate Program).]

* * *

With regard to this segment of the Entertainment Support Specialist's work, she primarily supports [REDACTED] Vice President.

5. Support on development projects (10%)[:]

Finally, the Entertainment Support Specialist is responsible for support on development projects, the duties for which vary by projects. The Entertainment Division at any given time has several television projects at different stages (i.e. in negotiation, in production, pitching to networks, etc.). Currently, the Entertainment Support Specialist is assigned to a development project for a Spanish/English talk show aimed at a Latin American audience. The Entertainment Support Specialist's duties on this particular project are researching Latin American project partners, giving input and feedback on content and language used, and the creation of presentation materials.

[The petitioner states that the following course represents the beneficiary's "relevant education with regard to these tasks": Marketing Entertainment: Strategies for the Global Marketplace [REDACTED] Certificate Program). The petitioner further states that "[i]n addition to her background in Marketing and Entertainment, the [b]eneficiary completed an internship at [REDACTED] in [REDACTED] in which she assisted in strategic media planning and buying of television and printed advertisement, familiarizing herself with those markets."]

* * *

With regard to this segment of the Entertainment Support Specialist's work, she reports directly to Mr. [REDACTED] the Managing Director of the Entertainment Division.⁵

The AAO observes that the petitioner indicates that the beneficiary obtained the "relevant education" for several of the duties of the proffered position primarily through a [REDACTED] Certificate Program. According to the petitioner, these tasks make up approximately 45% of the beneficiary's duties, specifically: business affairs responsibility – 20%; liaison between senior staff and industry executives – 15%; and support of development projects – 10% (for which the petitioner claims that an internship in [REDACTED] is also relevant for the beneficiary's performance of this task).⁶

⁵ Please note that the AAO removed the exhibit numbers from the above text to avoid confusion within this decision.

⁶ As previously mentioned, the website for the [REDACTED] Certificate Program indicates that it has "open enrollment"; there are no academic pre-requisites for enrolling in this certificate program; and there is "no special admission or application process." Moreover, the estimated duration of the program at a full-

In response to the RFE, the petitioner provided an organizational chart for its entertainment division. In the July 2, 2013 letter of support, the petitioner indicated that the entry "Support Specialist" on the organizational chart refers to the proffered position. The petitioner further stated that "[t]he Entertainment Support Specialist, as a floating project support position, does not have any supervisory duties with regard to other employees, although [the position] receives assistance with administrative tasks from the Entertainment Coordinator and the Administrative Assistant."⁷

Additionally, the petitioner provided: (1) three job postings; and (2) samples of the beneficiary's work product (a "one sheet" and a "sponsorship desk" created by the beneficiary). The petitioner did not submit any further information regarding the proffered position or its business operations.

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, or its equivalent. The director denied the petition on September 23, 2013. Subsequently, the director certified the decision to the AAO. In response to the director's certification, counsel submitted a brief to the AAO.⁸

II. The Standard of Proof

In response to the director's certification, counsel states that the "standard of proof applicable to I-129 petitions is the 'preponderance of the evidence' standard, where the petitioner's claim is true 'more likely than not,' defined as a greater than 50% probability of something occurring." Counsel further asserts that the petitioner failed "to apply the preponderance of the evidence in evaluating evidence from DOL resources."

With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

time pace is "3 quarters." Thus, according to the petitioner, it appears that performance of a significant portion of the duties does not require the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent), but rather can be done by someone who obtained this knowledge primarily through a short-term certificate program.

⁷ The petitioner did not provide job descriptions for the other positions in its entertainment division. Based upon the organizational chart, it appears that the administrative assistant and coordinator provide support to five senior-level positions, specifically the managing director and four vice presidents. Moreover, in the initial submission, the petitioner stated that the beneficiary "will provide coverage for other support team members while they are out of the office," which, from the organizational chart, appears to consist of the administrative assistant and the coordinator. Without further information, it is not evident how the beneficiary will be relieved from performing any non-qualifying duties.

⁸ The vast majority of the statements in counsel's brief are copied from a letter sent on April 4, 2012 to Alejandro Mayorkas, Director of U.S. Citizenship and Immigration Services (USCIS), from the American Immigration Lawyers Association (AILA).

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. See *INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Consistent with *Matter of Chawathe*, U.S. Citizenship and Immigration Services (USCIS) examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As will be discussed, in the instant case, that burden has not been met.

III. Beyond the Director's Decision – Additional Grounds for Denial of the H-1B Petition

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. Before reaching that issue, the AAO will first discuss some findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

A. The Petitioner Materially Changed the Requirements and Duties of the Proffered Position

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks 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."

For H-1B approval, the petitioner must 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. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

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. In the instant case, however, there are discrepancies in the record of proceeding that undermine the petitioner's credibility with regard to the services the beneficiary will perform, as well as the nature and requirements of the proffered position.

For instance, in the March 28, 2013 support letter, the petitioner's claims that the position "requires a minimum of a [b]achelor's degree in a [b]usiness [sic] or [m]anagement, or other related field." In response to the director's certification, the petitioner now claims that "the Entertainment Support Specialist position requires a minimum of a [b]achelor's degree in business (specifically, marketing)[,] entertainment management or another degree concentration related to the job in order to be hired by [the petitioner] into the position." Thus, the petitioner has significantly altered the requirements for the proffered position.

That is, initially, the petitioner reported that a baccalaureate or higher degree in business (without further specification) was sufficient, whereas the petitioner now claims that a degree in business must specifically be in marketing. Further, in the initial submission the petitioner stated that a degree in management was acceptable, yet now the petitioner asserts that a candidate must possess a degree in *entertainment* management. Previously, the petitioner indicated that it would accept a degree in business, management, or other related field – suggesting that it considered both business and management to be related to the proffered position. Now, the petitioner indicates that it will only accept "another degree concentration related to the job." Thus, it appears the petitioner has attempted to narrow the educational requirements for the proffered position in response to the director's certified

decision denying the petition; however, the petitioner did not address or provide an explanation why the academic requirements as stated in the initial submission have changed. The AAO notes that this inconsistency raises questions as to the petitioner's actual requirements for the proffered position.

Moreover, it must be noted that the information provided by the petitioner in its response to the director's request for evidence did not clarify or provide more specificity to the original duties of the position, but rather significantly changed the duties of the position. For instance, in the response to the request for evidence, the petitioner expanded the beneficiary's duties, claiming that 20% of the beneficiary's time would be spent managing the divisional website. The petitioner states that the beneficiary is solely responsible for this task and that "[o]n a daily basis" she is tasked with keeping the website up-to-date. The petitioner also asserts that the beneficiary is required to use the appropriate design software in implementing this task.

Importantly, the petitioner did not mention that the beneficiary would be responsible for performing this duty in its original submission. No explanation was provided for failing to specify a task for which the "beneficiary is solely responsible"; that will encompass 20% of her time; that she will perform "[o]n a daily basis"; and that the petitioner claims is "extremely important" to its business within the industry. Further, in the initial submission, the petitioner claimed that the beneficiary must be "highly proficient in Microsoft Office Suite (including Word, Excel and PowerPoint)," but did not state that the beneficiary would be required to utilize design software for the reconstruction of a major division of the petitioner's website.

Additionally, in response to the RFE, the petitioner claims that the beneficiary will be responsible for "handling client management agreements from start to finish." The petitioner claims that "[t]his segment of the Entertainment Support Specialist's duties require[s] familiarity with management agreements, its content and its structure." According to the petitioner, the beneficiary will spend 20% of her time on this task and it is one of her primary duties. However, the AAO again notes that the petitioner did not communicate this as an essential duty of the proffered position in its original submission.

Further, in the initial submission, the petitioner stated that the "[proffered] position is an entry-level position for a candidate who is interested in the entertainment industry and wants to get exposure to the production, representation and creative side of alternative television." According to the petitioner, the position requires an individual who can "capably interact with internal and external clients at all levels articulately and with courtesy and diplomacy." The AAO also observes that the petitioner indicated on the LCA that the proffered position involves a level of education, skill and experience at the Level I wage rate, which is consistent with and corresponds to an entry-level position relative to others within the occupation.

Thereafter, in response to the director's certification, the petitioner claimed that "[t]he duties of the Entertainment Support Specialist are high-level duties, and are not administrative in nature." The petitioner continued by claiming that "[the beneficiary] is the person in the office handling our entertainment business in Mexico." The petitioner emphasized the beneficiary's "relationships within [redacted] the telecommunications company owned by [redacted] and indicated that within the process of "pitching and

selling," this relationship is "the most valuable asset." According to the petitioner, the beneficiary has earned "[t]he trust to speak on behalf of globally known personalities." The petitioner did not provide an explanation for the variance in the characterization of the proffered position, from "an entry-level position" for someone who wants "exposure" to the industry – to a position with "high-level duties" who is "the person" responsible for the petitioner's entertainment business in Mexico, and provides "the most valuable asset" in this process.

Moreover, the petitioner initially claimed that the proffered position falls under the occupational category "Business Operations Specialists, All Other." Thereafter, in response to the director's certified denial, counsel claims for the first time that "the position falls within the category of 'Public Relations Specialists' (although the position itself is highly specific to the field of entertainment management)." The petitioner did not address the reason that it submitted an LCA designating the proffered position under the occupational category "Business Operations Specialists, All Other" if the description for "Public Relations Specialists" more accurately corresponds to the job duties and requirements of the proffered position. Further, the petitioner did not provide a valid explanation for failing to make such a claim with the original petition or in response to the RFE.⁹ In addition, the original duties as stated by the petitioner do not appear to correspond to those associated with "Public Relations Specialists." Although the revised description of the proffered position and the duties of a public relations specialist may have a few general duties in common, the AAO finds that there are qualitative differences and is not persuaded by the assertion that the proffered position, as amended, now falls under the occupational category for "Public Relations Specialists."

In response to the RFE and the director's certification, the petitioner was offered an opportunity to clarify whether eligibility for the benefit sought had been established. The information provided by the petitioner, however, did not clarify or provide more specificity to the original duties and requirements of the position, but rather materially altered the duties and requirements of the job description, as well as the designated occupational category. When responding to a request for evidence (or a director's certification), a petitioner cannot offer a new position to the beneficiary, materially change a position's level of authority within the organizational hierarchy or its associated job responsibilities, change the occupational category, or alter the requirements for the position.

⁹ In response to the director's certification, counsel for the petitioner asserts that a baccalaureate or higher degree in a specific specialty (or its equivalent) is normally the minimum requirement for entry into the particular position and cites to 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). In support of this assertion, counsel claims that the proffered position falls under the occupational category for "Public Relations Specialists." Further, counsel provided DOL printouts regarding the educational requirements for the occupational category "Public Relations Specialists."

The AAO notes, however, that prior to the director's certification, the petitioner and its counsel did not claim that the petitioner satisfied 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) and they did not assert that the proffered position falls under the occupational category "Public Relations Specialist" (rather, the petitioner designated the proffered position on the LCA under the occupational category "Business Operations Specialists, All Other"). Thus, only after the decision was certified to the AAO, did the petitioner and its counsel attempt to designate the proffered position under a new occupational category and claim a new basis for satisfying the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. *See id*; *see also* 8 C.F.R. § 214.2(h)(2)(i)(E) (requiring the filing of "an amended or new petition, with fee, . . . to reflect any material changes in the terms and conditions of employment . . .").

In the instant case, the petitioner has not provided a valid explanation for the variance in the stated academic requirements, duties, and level of responsibility.¹⁰ While the AAO reviewed the new assertions provided in response to the certification, it must be noted that they will be considered within the context of the totality of the evidence presented.

B. The Petition Filed in the Instant Matter Would Not Correspond to a Higher-Level and More Complex Position

The AAO notes that there are discrepancies between the petitioner's claimed requirements and level of responsibility inherent in the proffered position and the contrary information conveyed by the petitioner to the U.S. Department of Labor (DOL) in the LCA submitted in support of the petition. That is, based upon a review of the record of proceeding, the AAO finds the claimed requirements and level of responsibility attributed to the proffered position questionable in light of the petitioner's prior attestations to DOL.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.¹¹

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount

¹⁰ An inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. *See* 8 C.F.R. § 214.2(h)(10)(ii); *see also* 8 C.F.R. § 103.2(b)(1).

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.

and level of supervision, and the level of understanding required to perform the job duties.¹² 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 as indicated by the job description.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL 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.

As noted above, in the support letter dated March 28, 2013, the proffered position was described as an "entry-level opportunity for a candidate who is interested in the entertainment industry and wants to get exposure to the production, representation and creative side of alternative television." Moreover, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Business Operations Specialists" – SOC (ONET/OES) code 13-1199 at a Level I (entry) position.

In response to the RFE, the petitioner submitted a revised description of the proffered position. In this description, the duties and level of responsibilities appear to exceed those of an entry-level position. For example, the petitioner states that "[the beneficiary] is tasked with the reconstruction of the Entertainment Division website." The petitioner claims that the "beneficiary is solely responsible" for this duty, and that this function is "extremely important" to the petitioner's business within the industry. According to the petitioner, the beneficiary is also responsible for "handling client management agreements from start to finish." The petitioner states that for each new client, this involves "drafting management agreements, and following up with the process until contracts

¹² 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.

are fully executed, keeping track of all client signing and reporting back to [the petitioner]'s headquarters in [REDACTED]. Further, petitioner indicates that the beneficiary's work product will be "use[d] to approach brands to obtain financing." The petitioner also claims that the beneficiary will be "working to support all the Vice Presidents and the Managing Director on a variety of critical projects." The petitioner claims that the duties of the position are specialized and complex.

After the director's certified denial was issued, the petitioner submitted a letter stating that the duties of the proffered position "are high-level duties and are not administrative in nature." The petitioner claims that the beneficiary is "a member of several important client teams, including those of [REDACTED]. The petitioner and its counsel further assert that the beneficiary is "the sole person in the Entertainment Division working on the development of a television project for a talk show to pitch to [REDACTED] the telecommunications company owned by [REDACTED] the [REDACTED]. Again, the petitioner states that "[the beneficiary] is the person in the office handling [the petitioner's] entertainment business in Mexico." According to the petitioner, without the beneficiary's service, the petitioner is "at a disadvantage moving forward, and [it] negatively impact[s] [the petitioner's] international projects."

Further, the petitioner also submitted and relies upon a letter from [REDACTED] executive vice president of the Entertainment Division at [REDACTED]. In the letter, Mr. [REDACTED] asserts that the proffered position is "a high-level support position to an Entertainment Manager," and further claims that the duties of the position are complex. In addition, the petitioner submitted a letter from [REDACTED], Co-CEO of [REDACTED]. In the letter, Mr. [REDACTED] discusses the "important role" that the beneficiary will fulfill as she meets the needs of several of the petitioner's "high-profile clients."

In a brief dated October 21, 2013, counsel references "the high-profile nature of the clients served by the [proffered] position, the high-level nature of the job duties, and the absolutely critical role filled by the Beneficiary . . . i.e., her primary responsibility for the development of a television project being pitched to an international telecommunications company." Counsel asserts that "the duties are clearly specialized and specific to the uniqueness, complexity, and business necessity of the Petitioner, its industry, and its client services."

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

Thus, 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 same occupation. In accordance with the relevant DOL explanatory information on wage levels, *supra*, this wage rate indicates that 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. 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. Further, DOL guidance indicates that a Level I designation is appropriate for a position as a research fellow, a worker in training, or an internship. *Id.*

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 LCA. 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 \$40,643 per year on the LCA corresponds to a Level I position for the occupational category of "Business Operations Specialists, All Other" for Los Angeles County (Los Angeles, California).¹³ Notably, if the proffered position had been designated at a higher level, the prevailing wage at that time would have been \$55,390 per year for a Level II position, \$70,158 per year for a Level III position, and \$84,906 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.¹⁴ To permit

¹³ For additional information regarding the prevailing wage for "Business Operations Specialists, All Other" in Los Angeles, California, 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.flcdatabase.com/OesQuickResults.aspx?area=31084&code=13-1199&year=13&source=1> (last visited February 24, 2014).

¹⁴ 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

otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, if the proffered position were found to qualify as a specialty occupation on the basis that it was a higher-level and more complex position, as claimed elsewhere in the petition, the petition could still not be approved as the petitioner has failed to establish that it would pay the wage required for that level of work as required under the Act.

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 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. A review of the enclosed LCA indicates that

behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). DOL reviews LCAs "for completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition. 20 C.F.R. § 655.705(b); see generally 8 C.F.R. § 214.2(h)(4)(i)(B).

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 paid 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, the petition could nevertheless not be approved because the petitioner failed to submit a certified LCA that corresponds to the petition.¹⁵

For the reasons discussed above, the petitioner has failed (1) to establish that it will pay the beneficiary an adequate salary for her work in accordance with the applicable statutory and regulatory provisions; and (2) to submit an LCA that supports the instant petition.¹⁶ These grounds for denial of the petition render the remaining issues in this proceeding moot. The AAO, therefore, need not address the director's finding that the proffered position does not qualify as a specialty occupation. As it is the basis of the director's certified decision, however, the AAO will nevertheless discuss this additional ground of ineligibility identified by the director.

IV. The Director's Basis for Denial of the H-1B Petition

The director determined 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 more likely than not constitutes a specialty occupation. It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below for affirming the director's decision.

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

¹⁵ 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 would be 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.

¹⁶ The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Moreover, as previously noted, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 176. Again, the regulations at 8 C.F.R. § 214.2(h)(2)(i)(E) instead require that the petitioner "file an amended or new petition, with fee, with the service center where the original petition was filed to reflect any material changes in the terms and conditions of employment"

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 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.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS therefore 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 particular 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 or its equivalent as the minimum for entry into the occupation, as required by the Act.

Further, it is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of a body of highly specialized knowledge for the requested validity dates. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

With the initial submission, the petitioner submitted a letter of support (dated March 28, 2013) stating that the proffered position "requires a minimum of a [b]achelor's degree in a [b]usiness [sic] or [m]anagement, or other related field."¹⁷ Such a claim, however, is inadequate to establish that

¹⁷ The AAO notes that the word "business" is defined as "1. The occupation, work, or trade in which one is engaged. . . . 2. Commercial, industrial, or professional dealings. 3. A commercial enterprise or establishment."

the proposed position qualifies as a specialty occupation, as a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question.¹⁸ Since there must be a close correlation between the required specialized studies and the position, the requirement of a general-purpose degree (such as a degree in business), 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).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, 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 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 147.¹⁹

WEBSTER'S II NEW COLLEGE DICTIONARY 153 (2008). A degree in "a business field" may include a range of disciplines, some of which may not directly relate to the duties of the proffered position. For instance, U.S. News and World Report publishes a guide for colleges. The entry for Harvard University indicates that its business school offers concentrations in a range of disciplines, including e-commerce, health care administration, human resources management, manufacturing and technology management, not-for-profit management, public administration, public policy, real estate, as well as many others. See U.S. News and World Report on the Internet at http://www.usnewsuniversitydirectory.com/graduate-schools/business/harvard-university_01110.aspx (last visited February 24, 2014).

¹⁸ 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.

¹⁹ 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

Again, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

In response to the director's certification, counsel cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012) as relevant to this matter. The employer in that case sought to hire an individual for a position it designated as a market research analyst. Counsel references the case for the proposition that "[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge."

The AAO agrees with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." However, in this matter, the petitioner failed to demonstrate that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. See 214(i) of the Act. The petitioner has not demonstrated that it requires a degree in a specific specialty that is directly related to the duties of the proposed position. Again, the petitioner indicated that a general-purpose bachelor's degree, i.e., a bachelor's degree in business, is sufficient for the proffered position. Moreover, upon review, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*. Accordingly, counsel's reliance on this United States district court's decision is misplaced.²⁰

Further, it must be noted that in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. See *Matter of K-S-*, 20 I&N

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.

²⁰ It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. The AAO further notes that the service center director's decision was not appealed to the AAO. Based on the district court's findings and the description of the record, if that matter had first been appealed through the available administrative process, the AAO may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by the AAO in its *de novo* review of the matter.

Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

The fact that a person may be employed in a position designated by an employer as that of an entertainment support specialist and may apply some related principles in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. Thus, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring both the theoretical and practical application of a body of highly specialized knowledge and the attainment of at least a bachelor's degree in a specific specialty, or its equivalent. When "any person makes an application for a visa or any other document required for entry, or makes an application for admission, [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such benefit. Section 291 of the Act; *see also Matter of Treasure Craft of California*, 14 I&N Dec. 190.

The AAO will now review the record of proceeding 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. It must be noted that in the initial H-1B submission and in response to the RFE, the petitioner did not assert that it satisfied this criterion of the regulations. Nevertheless, for the purpose of providing a comprehensive discussion as to whether the petitioner's entertainment support specialist position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The AAO recognizes DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.²¹ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Business Operations Specialists, All Other."

The AAO reviewed the *Handbook* regarding the occupational category "Business Operations Specialists, All Other." However, the *Handbook* does not provide a detailed narrative account nor does it provide summary data for the occupational category "Business Operations Specialists, All Other." More specifically, the *Handbook* does not state the typical duties and responsibilities for this category. Further, the *Handbook* does not include any information regarding the academic and/or professional requirements for this occupation.

The *Handbook* states the following with regard to occupations not covered in detail:

Data for Occupations Not Covered in Detail

Employment for the hundreds of occupations covered in detail in the *Handbook* accounts for more than 121 million, or 85 percent of all, jobs in the economy. [The *Handbook*] presents summary data on 162 additional occupations for which employment projections are prepared but detailed occupational information is not

²¹ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

developed. These occupations account for about 11 percent of all jobs. For each occupation, the Occupational Information Network (O*NET) code, the occupational definition, 2010 employment, the May 2010 median annual wage, the projected employment change and growth rate from 2010 to 2020, and education and training categories are presented. For guidelines on interpreting the descriptions of projected employment change, refer to the section titled "Occupational Information Included in the OOH."

Approximately 5 percent of all employment is not covered either in the detailed occupational profiles or in the summary data given here. The 5 percent includes categories such as "all other managers," for which little meaningful information could be developed.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Data for Occupations Not Covered in Detail, on the Internet at <http://www.bls.gov/ooH/About/Data-for-Occupations-Not-Covered-in-Detail.htm>.

Thus, the narrative of the *Handbook* indicates that there are over 160 occupations for which only brief summaries are presented. That is, detailed occupational profiles for these 160+ occupations are not developed.²² The *Handbook* continues by stating that approximately five percent of all employment is not covered either in the detailed occupational profiles or in the summary data. The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed.

Accordingly, in certain instances, the *Handbook* is not probative. When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise qualifies as a specialty occupation under this criterion, notwithstanding the absence of the *Handbook*'s support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other objective, authoritative sources) that indicates whether the particular position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider all of the evidence presented to determine whether the petitioner has established eligibility for the benefit sought. Upon review of the record, the petitioner has failed to meet its burden in this regard.²³ More specifically, the petitioner did not submit probative evidence that normally the

²² The occupational categories for which the *Handbook* only provides summary data includes a range of occupations, such as, for example, farm labor contractors; clergy; merchandise displayers and window trimmers; radio operators; first-line supervisors of police and detectives; crossing guards; travel guides; agricultural inspectors; postmasters and mail superintendents; as well as others.

²³ As discussed *supra*, the *Handbook* does not contain a detailed narrative account or summary data for the occupational category "Business Operations Specialists, All Other" – the occupational category selected in the instant case by the petitioner on the LCA. The petitioner submitted a letter from [REDACTED] from the Department of Agricultural and Industrial Sciences at [REDACTED] stating that "for purposes of determining specialty occupation in any position in the industry of talent management in entertainment and sports on this basis, the Occupational Outlook Handbook is irrelevant as it contains no

minimum requirement for positions falling under the occupational category "Business Operations Specialists, All Other" is at least a bachelor's degree in a specific specialty, or its equivalent.

Again, in the initial H-1B submission and in response to the RFE, the petitioner did not assert that it satisfied this criterion of the regulations. Moreover, based upon a complete review of the record of proceeding, the AAO finds that in the instant case, the record does not establish that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) indicates that normally the minimum requirement for entry into the particular position proffered here is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding by the petitioner also do not indicate that this particular 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 has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source) reports a standard, entry 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. Further, the petitioner did not provide documentation from the industry's professional association as to whether it has made a degree a minimum entry requirement.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, counsel submitted opinion letters from individuals in the industry. The AAO reviewed the opinion letters in their entirety. However, as discussed below, the letters are not persuasive in establishing that a requirement of a baccalaureate or higher degree is common to the industry in parallel positions among similar organizations.

More specifically, the record of proceeding contains a letter from Mr. [REDACTED] executive vice president for [REDACTED]. The letter is dated October 10, 2013. In the letter, Mr.

information."

describes his qualifications, including his professional experience and academic credentials. Based upon a complete review of Mr. letter, the AAO notes that Mr. may, in fact, be a recognized name in the public relations industry; however, he has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. For instance, there is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for entertainment support specialist positions (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. Furthermore, he does not convey that he has any personal experience in hiring entertainment support specialists (or parallel positions) for organizations similar to the petitioner in the same industry. Without further clarification, it is unclear how his education, training, skills or experience would translate to expertise or specialized knowledge on the issue.

In any event, Mr. states that he "reviewed the job description for the position," but fails to specify which job description he reviewed. That is, from his statement, it cannot be determined whether he reviewed (1) the job description provided to USCIS with the petitioner's initial submission, (2) the revised job description submitted by the petitioner in response to the RFE, or (3) another description that has not been provided to USCIS.

In the letter, Mr. references a report entitled "Public Relations Education for the 21st Century: A Port of Entry" by the Public Relations Society of America Commission that was published in 1999.²⁴ Notably, the report was issued approximately 14 years prior to the filing of the instant H-1B petition, and Mr. does not address how the occupation has or may have evolved or changed since that time.

Further, based on Mr. description, the report does not indicate that a particular level of education (in any particular specialty) is normally required for entry into these positions. Rather, it appears that the report provides general recommendations on the knowledge and skills required to gain educational credentials that lead to an understanding of the principles and practices of the public relations field. Mr. does not claim that the recommendations were implemented. He states that the "Commission sought to suggest methods appropriate for evaluating both student learning and the quality of the academic programs." Mr. does not establish the probative value of the report to the issue here, that is, the current degree requirements in the industry for entertainment support specialist positions (or parallel positions) among organizations similar to the petitioner.

Moreover, Mr. claims that the proffered position is "really a high-level support position to an Entertainment Manager." As discussed, however, the petitioner classified the proffered position under the occupational category "Business Operations Specialist, All Other" at a Level I position on the LCA. There is no indication that the petitioner or its counsel advised Mr. that the petitioner characterized the proffered position to DOL as an entry-level position, for a beginning level employee who has only a basic understanding of the occupation (as indicated by the wage-level selected by the petitioner on the LCA). Again, the wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment (relative

²⁴ Mr. did not provide a copy of the referenced report to USCIS.

to other positions in the same occupation); 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. It appears that Mr. [REDACTED] would have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that Mr. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately analyze similar or parallel positions.

Mr. [REDACTED] does not provide a substantive, analytical basis for his opinion and ultimate conclusion. Accordingly, the very fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. He does not establish that he has any particular knowledge of the duties and requirements of the proffered position. For all of the foregoing reasons, he has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty, or its equivalent.

Counsel also submitted a letter from [REDACTED]. The letter is dated October 10, 2013. Mr. [REDACTED] states that he has "more than 40 years of entertainment industry experience." He describes his academic credentials and professional experience, including the television shows that he has directed, and he provides the names of clients that are prominent TV personalities. Mr. [REDACTED] did not submit a resume or other document that details his qualifications.

Mr. [REDACTED] states that his opinion is based upon his experience, the job description/job duties and his discussions with the petitioner's managing director. Mr. [REDACTED] does not, however, provide a copy of the job description/job duties that he reviewed or relate any specific aspects of his conversations with the managing director. Upon review of the letter, the AAO notes that his self-endorsement does not establish his expertise pertinent to academic requirements for entertainment support specialist positions (or parallel positions) in accordance with this criterion of the regulations. The letter also does not provide any information regarding his experience giving opinions on such matters, nor does it cite specific instances in which his past opinions have been accepted or recognized as authoritative on this issue. Additionally, Mr. [REDACTED] does not report that he has any specific experience in the hiring process or any other aspect of determining the educational requirements of support specialists (or parallel positions) for organizations similar to the petitioner.

According to Mr. [REDACTED] the petitioner's managing partner has "signed, developed and expanded the careers" for several individuals. Mr. [REDACTED] spends a considerable amount of time in his letter listing the names of these individuals. He does not, however, expand upon his statement to establish the beneficiary's specific role (if any) in "sign[ing], develop[ing] and expand[ing]" these individuals' careers.

In the letter, Mr. [REDACTED] concludes that "a minimum of an undergraduate degree in a major which provides [the beneficiary] with the skills and knowledge necessary to function in the position is required." However, Mr. [REDACTED] does not identify which majors would provide an individual with the skills and knowledge allegedly required and, therefore, stops short of asserting that at least a bachelor's degree in a specific specialty (or its equivalent) is required. As explained above, USCIS

interprets the statutory degree requirement to be a U.S. bachelor's or higher degree in a specific specialty that is directly related to the proposed position. Moreover, his opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. For instance, there is no evidence that Mr. [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. He has not provided sufficient facts that would support the contention that the proffered position requires at least a U.S. bachelor's degree in a specific specialty, or its equivalent.

Furthermore, while Mr. [REDACTED] asserts an industry standard by claiming that the "requirement would be the same for a similar position at any agency in the entertainment industry," it must be noted that Mr. [REDACTED] does so without referencing any supporting authority or any empirical basis for the pronouncement. The letter lacks the requisite specificity and detail and his claims are not supported by independent, objective evidence demonstrating the manner in which he reached the conclusions stated in the letter.

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

In support of the petitioner's assertion that the proffered position qualifies as a specialty occupation position, the record of proceeding also contains several job announcements. Upon review of this evidence, however, the AAO finds that the petitioner's reliance on the job announcements is misplaced.

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner and counsel to claim that the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. See *Matter of Soffici*, 22 I&N Dec. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

In the Form I-129 petition, the petitioner describes itself as a professional sports agency, established in 1983, with 342 employees. Although the Form I-129 specifically requests that the petitioner provide its gross annual income and its net annual income, the petitioner failed to provide this information. The petitioner designated its business operations under the North American Industry

Classification System (NAICS) code 711410.²⁵ According to the U.S. Department of Commerce, Census Bureau website, the NAICS code 711410 is for "Agents and Managers for Artists, Athletes, Entertainers, and Other Public Figures." The NAICS website describes this industry as follows:

This industry comprises establishments of agents and managers primarily engaged in representing and/or managing creative and performing artists, sports figures, entertainers, and other public figures. The representation and management includes activities, such as representing clients in contract negotiations; managing or organizing clients['] financial affairs; and generally promoting the careers of their clients.

See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 711410 – Agents and Managers for Artists, Athletes, Entertainers, and Other Public Figures, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed February 24, 2014).

The AAO reviewed the job advertisements submitted by the petitioner. The AAO observes that the petitioner and its counsel did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of job advertised. Further, as they are only solicitations for hire, they are not evidence of what qualifications were ultimately required for the positions. Upon review of the job postings, 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.

Specifically, the advertisements include positions with the [REDACTED] (presumably, [REDACTED] (a regional public park system, which is funded by a park levy and grants); an unnamed financial information services and software consulting company; the [REDACTED] described as one of the top television stations in the country); [REDACTED] (provides payroll software over the Internet); [REDACTED] (visual communication market – digital display technology); [REDACTED] (provides support for a [REDACTED] client on an energy efficiency communications program); [REDACTED] (a "leader in insurance technology" with more than 1,000 employees); and [REDACTED]. 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.

Further, the petitioner provided an advertisement for a "confidential" production support company and an unnamed company in [REDACTED]. The advertisements do not contain information regarding the employers' industry or business operations. Consequently, the record lacks sufficient information regarding the advertising employer to conduct a legitimate comparison of the organization to the petitioner. Thus, in the instant case, the petitioner failed to supplement the

²⁵ 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 viewed February 24, 2014).

record of proceeding to establish that the employers are similar to it. That is, the petitioner has not provided information regarding which aspects or traits (if any) it shares with the advertising organizations.

Moreover, some of the advertisements do not appear to be for parallel positions. For instance, the advertisements for (1) an unnamed information services and software consulting company, (2) [REDACTED], and (3) [REDACTED] all require a degree and a minimum of five years of relevant work experience. Furthermore, the position with [REDACTED] requires a degree and four years of experience. As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I low, entry-level position relative to others within the occupation. It appears that the advertised positions may be more senior-level jobs than the proffered position based on the claimed academic and work experience requirements.

In addition, 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, or the amount of supervision received within the context of the advertising employers' business operations to make a legitimate comparison of the advertised positions to the proffered position.

Additionally, several of the positions do not appear to have similar duties to the proffered position. For instance, the job posting for [REDACTED] states that the employee "prepares and disseminates press releases," "serves as the primary spokesman," and "manages and participates in speakers' bureau." For the position with [REDACTED] the duties include "creating, planning and managing [REDACTED] community events" and "leading meetings with community partners and sponsors." Further, the advertisement for [REDACTED] states that the employee "will develop internal and external communications strategies and goals including alumni newsletters, press releases, collegiate website and other publications" and "will assist and/or represent the Director of Alumni Relations and Continuing Education at various events both on and off campus." For these postings, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Contrary to the purpose for which the advertisements were submitted, some of the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent is required for the positions. For example, the job posting for [REDACTED] indicates that a bachelor's degree in one of several fields is preferred. Furthermore, the "confidential" employer provides a list of "qualifications and abilities" and states that the ideal candidate should possess some or all of these attributes.

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, as the evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions, not every deficit of every job posting has been addressed.²⁶

²⁶ USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven

Thus, based upon a complete review of the record of proceeding, 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 the proffered 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.

As a preliminary matter, it must be noted that in the initial H-1B submission and in response to the RFE, the petitioner did not assert that the proffered position qualifies as a specialty occupation under this prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nevertheless, the AAO will address this prong of the regulations for the purpose of providing a comprehensive discussion as to whether the petitioner's entertainment support specialist position qualifies as a specialty occupation based on the record of proceeding as currently constituted.

The record of proceeding contains several documents regarding the proffered position and the petitioner's business operations, including: (1) the petitioner's descriptions of the proffered position; (2) printouts from the petitioner's website; (3) an organizational chart of the petitioner's entertainment division; and (4) samples of the beneficiary's work product (a "one sheet" and a "sponsorship deck" created by the beneficiary). Further, as previously discussed, the petitioner submitted opinion letters from Mr. [REDACTED] and Mr. [REDACTED].²⁷

The AAO reviewed the record in its entirety and notes that while the documentation provides some insights into the proffered position and the petitioner's business activities, the evidence does not establish that the proffered 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.

More specifically, the petitioner has not demonstrated exactly what the beneficiary will do on a day-to-day basis. As such, the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. Although the petitioner asserts that a bachelor's degree is required to perform the duties of the proffered position, the petitioner failed to sufficiently demonstrate how the duties require the theoretical and practical application of a body of highly

is probably true." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

²⁷ For the reasons previously discussed, the AAO finds that the opinion letters are not probative of any of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. That is, the record of proceeding does not establish that the petitioner's requisite knowledge for the proffered position can only be obtained through a U.S. baccalaureate or higher degree program in a specific specialty, or its equivalent.

In response to the RFE, the petitioner listed several courses completed by the beneficiary through her foreign degree program as relevant to the tasks of the position. These courses are Advertising I and II, Graphic Design, Marketing, Consumer Behavior, Management, and Services Marketing. In addition, the petitioner provided a list of three courses completed by the beneficiary for the [REDACTED] Certificate Program, which it claims are relevant to the duties of the proffered position. These courses are Legal Primer for the Entertainment Business, The Business of Entertainment, and Marketing Entertainment: Strategies for the Global Marketplace.²⁸

The AAO finds no basis to question the relevancy of these courses. However, while such courses as those listed above may be beneficial in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses (1) leads to a baccalaureate or higher degree in a specific specialty, or its equivalent, and (2) is required to perform the duties of the proffered position. The petitioner has not established why a few courses, a short-term certificate program or industry experience (such as an internship), is insufficient preparation for the proffered position.

Further, the petitioner's 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 petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's 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 petitioner's claimed occupational classification "Business Operations Specialists, All Other" at a Level I (entry level) wage. 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." Further, DOL guidance states that a job offer for a research fellow, a worker in training, or an internship would be an indication that a Level I wage should be considered. Without further evidence, it is not credible that the duties of the petitioner's proffered position are complex or unique relative to others within the asserted occupation, as such a position would likely be classified at a higher-level, such as a Level III or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."²⁹ Thus, based upon the record of proceeding, including the LCA,

²⁸ The AAO hereby incorporates its prior discussion and findings with regard to the petitioner identifying the courses completed for the Certificate Program as "[t]he beneficiary's relevant education with regard to [certain] tasks." According to the petitioner, these tasks will encompass approximately 45% of the beneficiary's time in the proffered position.

²⁹ For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing*

it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed at least a U.S. baccalaureate program in a specific discipline (or its equivalent) that directly relates to the proffered position.

In the support letter dated March 28, 2013, the petitioner asserts that the beneficiary is "ideally qualified to fill the position of Entertainment Support Specialist." The petitioner references the beneficiary's academic credentials and experience in an internship position. Moreover, the petitioner claims that the beneficiary "has demonstrated her ability to perform in the offered position by excelling on several trial assignments during her internship with [the petitioner] over the past year." However, the test to establish a position as a specialty occupation is not the credentials or skills of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge and attainment of at least a U.S. baccalaureate degree in a specific specialty, or its equivalent, for entry into the position.

Again, in the instant case, the petitioner did not claim in its initial submission or in response to the RFE that the proffered position is so complex or unique that it can be performed only by an individual with a baccalaureate (or higher degree) in a specific specialty, or its equivalent. Moreover, upon review of the record of proceeding, the AAO finds that the evidence does not demonstrate 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 at least a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, USCIS typically reviews such evidence as the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To satisfy 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. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence will not establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in a 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 created only to 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").

The petitioner states in the Form I-129 petition that it has over 340 employees and that it was established in 1983 (approximately 30 years prior to the H-1B submission). In response to the RFE and certification, the petitioner indicates that the proffered position is a new position that was created specifically for the beneficiary. The petitioner reports that it did not advertise the position or post a vacancy announcement for the proffered position.

The petitioner claimed in response to the RFE, however, that both the entertainment coordinator and the administrative assistant possess bachelor's degrees. The petitioner did not submit any documentation in support of its claim with regard to these individuals' academic credentials and employment with the petitioner. The petitioner also did not provide the job duties and day-to-day responsibilities for the entertainment coordinator and the administrative assistant. Accordingly, the record of proceeding does not establish that these positions are the same or similar to the proffered position and, therefore, the academic requirements for these positions are not relevant to the instant issue of whether the proffered position qualifies as a specialty occupation.

In response to the director's certification, counsel states that "[t]he petitioner did not (and does not now) submit documentation [regarding the credentials of the entertainment coordinator and the administrative assistant] because as correctly noted in the denial . . . the record must establish that the employer requires a degree in a specific specialty for the proffered position." Further, according to counsel, the petitioner acknowledges that the academic credentials of the entertainment coordinator and the administrative assistant are not probative in satisfying this criterion of the regulations.

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

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

In response to the RFE, the petitioner provided several documents to establish the "specialized and complex job duties" of the proffered position, including: (1) a revised job description; (2); an organizational chart of the petitioner's entertainment division; and (3) samples of the beneficiary's work product (a "one sheet" and a "sponsorship deck" created by the beneficiary).

Upon review of the record of proceeding, the AAO notes that the petitioner has not provided sufficient probative evidence to satisfy this criterion of the regulations. As previously discussed, the petitioner itself does not require at least a baccalaureate degree in a specific specialty, or its equivalent. Moreover, in the instant case, the petitioner has not sufficiently developed relative specialization and complexity as an aspect of the proffered position.

As reflected in the above comments and findings with regard to the proposed duties as described, the petitioner has not presented the proposed duties with sufficient specificity and substantive content to establish relative specialization and complexity as distinguishing characteristics of those duties, nor has it established that they are at a level that would require knowledge usually associated with attainment of at least a U.S. bachelor's degree in a specific specialty, or its equivalent. Although the petitioner submitted samples of the beneficiary's work product (a "one sheet" and a "sponsorship deck"), the petitioner did not provide any documentation to establish that the nature of this duty is so specialized and complex that the knowledge required to create a "one sheet" and a "sponsorship deck" is usually associated with the attainment of a U.S. baccalaureate or higher degree, in a specific specialty, or its equivalent.

Further, the AAO reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the designation of the entertainment support specialist position at a Level I is indicative of a low, entry-level position relative to others within the same claimed occupational category and, hence, one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Moreover, DOL guidance states that a job offer for a research fellow, a worker in training, or an internship would be an indication that a Level I wage should be considered.

Without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or a Level IV (fully competent) position, requiring a significantly higher prevailing wage of \$70,158 per year (for a Level III) or \$84,906 per year (for a Level IV), a difference of over \$30,000 to \$40,000 per year (for the occupational category "Business Operations Specialists, All Other" as designated by the petitioner on the LCA). For instance, as previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

Upon review of the record of proceeding, the AAO finds that the petitioner has submitted insufficient probative evidence to establish 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. The AAO, therefore, concludes that the petitioner has failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has submitted insufficient evidence to satisfy 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. Accordingly, the director's decision must be affirmed and the petition denied on this basis.

V. Conclusion

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the

initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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

The petition must be denied 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; *see e.g., Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The director's decision is affirmed. The petition is denied.