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U.S. Citizenship  
and Immigration  
Services

DATE: FEB 27 2014 OFFICE: CALIFORNIA SERVICE CENTER

IN RE:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

for *Michael T. Kelly*  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director of the California Service (the director) denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner, which describes itself as a 130-employee tire and wheel product distributor established in 1972, seeks approval of this Petition for a Nonimmigrant Worker (Form I-129) so that it may employ the beneficiary as an H-1B temporary 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), and the related regulations at 8 C.F.R. § 214.2(h).

The petitioner filed the instant petition for a part-time petition to which it assigned the job title "Demand/Supply Planner." In support of this petition, the petitioner submitted a Labor Condition Application (LCA) certified for a job offer falling within the "Logisticians" occupational category, SOC (O\*NET/OES) Code 13-1081, at a Level I (entry-level) prevailing wage rate.

The director based her denial of the petition upon her determination that the evidence of record does not establish that the proffered position is a specialty occupation. For the reasons discussed below, the AAO concludes that her determination was correct. Accordingly, the petitioner's appeal will be dismissed, and this petition will be denied.

The AAO will also address below an additional issue which, though not addressed by the director, nonetheless also precludes approval of this petition. Specifically, the AAO finds that the Labor Condition Application (LCA) filed by the petitioner in support of this petition does not correspond to it, and fails to establish that the petitioner will pay the beneficiary an adequate salary.

## **I. Procedural History**

The petitioner filed the instant petition with the California Service Center on April 1, 2013. The director issued a request for additional evidence (RFE) on April 19, 2013, and the petitioner, through prior counsel, submitted a timely response on June 17, 2013. The director denied the petition on June 28, 2013.

Current counsel filed a timely appeal on July 26, 2013, and submitted a brief and additional evidence. As counsel marked the box on the Form I-290B to indicate that no further evidence would be submitted, the AAO deems the current record complete and ready for adjudication.

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

As will be discussed below, the AAO finds that the evidence of record fails to overcome the director's ground for denying this petition. Consequently, the petitioner's appeal will be dismissed, and the petition will remain denied.

Beyond the decision of the director, the AAO finds an additional aspect which, although not addressed in the director's decision, nevertheless also precludes approval of the petition. As noted above, the AAO finds that the LCA filed by the petitioner in support of this petition does not correspond to it, that is, the petitioner's claims in the record of proceeding with regard to the levels of independence, judgment, responsibility, and leadership to be exercised by the beneficiary do not comport with the LCA submitted by the petitioner, which had been certified for a job prospect at the lowest level (Level I) wage-rate. The AAO conducts review of service center decisions on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional ground for denial.

## II. Standard of Review

In the exercise of its administrative review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states the following:

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.

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The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

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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.

*Id.* at 375-76.



Again, the AAO conducts its review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145. In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director's determination that the evidence of record does not establish that the proffered position is a specialty occupation was correct. Upon its review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, the AAO finds that the evidence of record does not establish that the claim of a proffer of a specialty occupation position is "more likely than not" or "probably" true. In other words, as the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claim that the proffered position qualifies as a specialty occupation is "more likely than not" or "probably" true.

In similar fashion, as indicated by the AAO's supplemental finding made on appeal regarding the LCA and the evidentiary deficiencies present in the materials submitted with regard to the qualifications of the beneficiary, the evidence of record also does not lead the AAO to believe the petitioner's implicit claim that the LCA submitted by the petitioner corresponds to the petition is "more likely than not" or "probably" true.

### III. The Petitioner and its Operations

As noted above, the petitioner described itself on the Form I-129 as a 130-employee tire and wheel product distributor established in 1972. At page 17 of the Form I-129, and at page 1 of the LCA, the petitioner provided a North American Industry Classification System (NAICS) Code of 423130, "Tire and Tube Merchant Wholesalers."<sup>1</sup> The NAICS defines this industry code as follows:

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<sup>1</sup> U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "423130 Tire and Tube Merchant Wholesalers," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Feb. 6, 2014).

The U.S. Census Bureau's online glossary provides the following background information regarding the NAICS:

A system of grouping establishments into industries based on the similarity of their production processes. This system is used by the United States, Canada and Mexico.

NAICS classifies industries using 2-, 3-, 4-, 5-, and 6- digit levels of detail. Two-digit codes represent sectors, the broadest classifications. Six-digit codes represent individual industries in the U.S. The North American Industry Classification System was developed by representatives from the United States, Canada, and Mexico, and replaces each country's separate classification system with one uniform system for classifying industries. In the United States, NAICS replaces the Standard Industrial Classification, a system that federal,



**423130 Tire and Tube Merchant Wholesalers**

This industry comprises establishments primarily engaged in the merchant wholesale distribution of new and/or used tires and tubes for passenger and commercial vehicles.

In its March 15, 2013 letter, the petitioner described itself as follows:

[The petitioner] is a wholesale distributor of tires. The company's main customers are wholesalers and retailers, instead of end users. [The petitioner] was founded in 1972[.]

At the start, [the petitioner] had three employees and operated out of a two-thousand square-foot office in [REDACTED]. Today, [the petitioner] imports and distributes tires and wheels throughout North America and abroad, and is currently based in [REDACTED] CA, occupying the former [REDACTED] since March 2008. In addition, [the petitioner] owns and operates a state-side warehouse that is over two million square feet.

In 2006, [the petitioner] became the largest importer of tire and tire-related products from China to North America. [The petitioner] is also the largest importer of radial passenger, UHP, and RLT. The company ships to all 50 states, Canada, Mexico, and abroad from its facilities.

**IV. The Proffered Position and its Constituent Duties**

As indicated above, the petitioner seeks to employ the beneficiary in a position that it describes as a "Demand/Supply Planner" on a part-time basis. The petitioner stated at page 5 of the Form I-129 that the beneficiary would work 32-40 hours per week, and the petitioner stated on both the Form I-129 and the LCA that it would pay her a salary of \$25.87 per hour.

In its March 15, 2013 letter, the petitioner described the proffered position as follows:

The Demand/Supply Planner will act as a key leader in helping manage and facilitate the company's continued high growth rate for the coming years. A Demand/Supply Planner is necessary, as the position serves as the crucial key link between the Sales & Marketing and the Supply Chain Function; our Demand/Supply Planner must

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state, and local governments, the business community, and the general public have used since the 1930s.

*Id.* at [http://www.census.gov/glossary/#term\\_NorthAmericanIndustryClassificationSystemNAICS](http://www.census.gov/glossary/#term_NorthAmericanIndustryClassificationSystemNAICS) (last visited Feb 6, 2014).

work closely with other departments such as the Development, Supply Chain, Purchasing, and the Marketing & Sales departments in order to generate accurate forecasts, both long-term and short-term, for the company's individual products, inventory levels, profit margins, product life cycles, etc.

Additionally, the Demand/Supply Planner is responsible for overseeing the forecasting and collaborative demand planning processes for certain distribution organizations within the company; that is, without the forecasting and [other] duties performed by the Demand/Supply Planner, distribution organizations within the company risk falling short of inventory or of overstocking the distribution warehouses, which costs the company unnecessary wasted funds. The consequences of the company not having a Demand/Supply Planner are the Marketing & Sales department and the Supply Chain department acting independently of each other, [and] marketing and selling more than what the supply chain function can efficiently address. Without the duties of the Demand/Supply Planner, the company will have no reference for product demand, inventory, life cycles, etc., and will fall into the risk of low inventory levels, overstock of products, and low sales, which will then affect customer service and the further growth and success of the company.

We will employ [the beneficiary] as our Demand/Supply Planner [at] the hourly rate of \$25.87 per hour for at least 32 to 40 hours per week. As a Demand/Supply Planner, [the beneficiary] will be responsible for the following activities:

1. Assist with implementing and then utilizing Logility's<sup>2</sup> demand planning; inventory planning (IP) and the Replenishment Planning (RP) modules.
2. Oversee the forecasting and collaborative demand planning processes for certain distribution organizations within the company.
3. Serve as the key link . . . between the Sales & Marketing and the Supply Chain function.
4. Improve forecast accuracy at both the item and organization level, and to provide an accurate forecast to the Supply Chain department.
5. Develop long-term forecasts, as required, to assess the ability of supply to meet the forecasted demand.
6. Establish written procedures to support the execution of the demand/supply planning requirements.
7. Develop and distribute detailed forecast KPI's (including forecast accuracy percentages).

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<sup>2</sup> As will be explained below, Logility is a supply chain management software program.

8. Facilitate the monthly Demand Validation meetings as part of the overall S & OP Process.
9. Work closely with other departments – Development, Supply Chain, Purchasing, Marketing[,] and Sales, to ensure the highest possible level of customer service.
10. Support new product development, promotions, product life cycle management and cannibalization while maintaining forecast accuracy.

The petitioner repeated these duties in a March 25, 2013 memorandum titled “Job Description.” In that June 5, 2013 document, the petitioner stated the following:

The Demand/Supply Planner of our company has the task of developing long-term and seasonal forecasting, as well as overseeing the demand forecasting of various warehouses. He or she needs to work with other company departments in order to generate timely and accurate forecasts. As a leader in the tire distribution industry, a large diversity of products are involved in our everyday business transactions. We use the Demand/Supply Planner to prepare forecasts, analyze our sales history, compare vendors and tire models, and develop detailed supply strategies so as to generate the most updated and accurate forecasts possible. In addition, the Demand/Supply Planner uses reports to analyze inventory levels and to plan inventory purchases based on seasonality and sales movement, and give recommendations on how to best control and maintain inventory, reduce costs and improve the profit margin.

In an attachment to counsel’s June 12, 2013 letter, the petitioner described the duties of the proffered position as follows:

1. Oversee the demand forecasting of 3 warehouses, out of 10, located in [REDACTED] based on sales history, advance orders from big customers like [REDACTED] corporation, factory capacity, and replacing items, including [REDACTED] for about 1400 kinds of tires. Our warehouse inventory check was done in the Oracle database, continuously under the supervision of the Warehouse Manager, for the 3 warehouses. On a daily basis, the shipment in and out of the warehouses is about 6 trucks of tires. Even during the low season, which is normally from October to January, the company ships at least 4 truckloads daily. For example, from the daily inventory and sales report, we can see that the sales for just one warehouse is about 1081 [in] one day, which is about one container.

Please refer to sample report #1; in this sample, it shows the inventory and sales for one warehouse exported from Oracle. We can see that the total OH is 27511, Purchase is 14567 and Sales is 1081. Our Demand/Supply Planner



needs to use this report to gain knowledge of the daily inventory, sales[,] and purchasing situation.

2. Develop long-term forecast by predicting the seasonal demand change caused by tax returns, which leads to a demand spike in March. Factors such as weather, like the popularity of snow tires in Winter, and the market situation of pre-owned cars have since been replacing tires in our main market. When demand trends are detected, the company must react at least 2 months prior because the company's tires are produced in China and Vietnam, which takes about 2 months for producing and shipping. For example, we estimated that sales will increase about 30% in April, which requires the same percentage of increase inventory; however, it takes 2 months for factory to warehouse shipment. To prevent shortages in inventory, every February the Demand/Supply Planner needs to react by placing an additional 30% purchasing order, and must contact the Warehouse Manager to prepare for hiring temporary workers to unload an additional one more container every day, in April. From sample report #2 we can see the inventory from Apr 3<sup>rd</sup> to Apr 24<sup>th</sup>[.] We can see an increase of about 8000, almost one third of the monthly sales, with 15 days to cover the sales spike. If prior action is not taken, a large back order will occur.
3. Develop and customize detailed supply strategies and KPI's, like shipping frequency, safety stock[,] and satisfaction level, for each warehouse, according to demand forecast, for upcoming two months. For example, the warehouse located in [REDACTED] which can be reached within one day from the main [distribution center] in I [REDACTED] has only a 0.4 monthly demand safety stock, while the [REDACTED] warehouse is required to have a 1.5 monthly demand safety stock since it takes 10 days for shipments to arrive. The shipping frequency is calculated by dividing forecast by container capacity, usually 53 or 40 feet per container. Take [REDACTED] as an example, the monthly demand is 30000 so about 29 containers need to be shipped out every month.
4. Serve as the key link between Sales, Marketing[,] and the supply chain function, from the standpoint of data analysis, which combines actual sales orders, promotions reflected in selling price, our own forecasting and capacity limitation, like warehouse space limitation, and labor limitation, all of which are received from the Oracle database the day after the sales occur. After getting this information, the Demand/Supply Planner must use the replenish model, which was created and improved by the company, for each warehouse to do the daily replenishment. Overall, there are 78 columns and 1990 lines to review for one warehouse every day, which can be seen partially from sample report #3, where there is a Price list column (the lowest price sales currently being used), Status (the tire that will be purchased in future or not), SO (sales orders taken from the previous day), demand

forecast analyzed at the beginning of the month, and etc. Considering all these parameters, the Demand/Supply Planner ultimately decided the quantity for each tire to send to the warehouse each time, by using the formula noted in report #3.

5. Work closely with other departments. Firstly, the Development Department, from whom the Demand/Supply Planner gets the information of market reaction, which tire to continue sending, and which tire to blow out due to quality or price problems. Secondly, the Purchasing Department, who informs the Demand/Supply Planner of the manufacturing capacity of [the] factory, and the estimated arriving date – usually 20 days after invoice date and the floor inventory of [the] factory, which means the company can get the tires immediately without waiting for production. In addition, the Demand/Supply Planner needs to work with Logistics closely, to help us arrange and schedule the trucks each time, when making transfer. During the busy season, 2 trucks can be sent out per day, while in [the] off[f] season, only 3 trucks are sent out per week. Occasionally, the Warehouse Manager requires the time of arrival so that extra workers can be arrange[d] for the additional unloading. Otherwise, there will be demurrage fees incurred.
6. Facilitate the monthly Demand Validation meetings with Sales personnel to improve the forecast accuracy as part of the overall S&OP process. The actual sales will always be somewhat different from the forecast, due to several reasons, such as promotions, which leads to an unexpected moving of certain sizes of tires. Also, the shortage of one tire would lead to the sudden increase of other tires in [the] same size. Before the Demand Validation meeting, the Demand/Supply Planner will create a weekly inventory report and stock-out report so that Sales personnel can see the trend of sales and inventory situations. From the attached stock-out report sample report #4, we can see the stock out rate detailed to category and size. Based on this information and the sales strategy, a consensus forecast is set for the rest of the month. For example, on 10/26/2012, the stock-out reached 10.6%, which means that the demand forecast might be too low to fulfill the sales; as a result, the forecast was adjusted, and the stock-out rate showed a continuous decrease to 5.7%.
7. Analyze the sales history and trend so as to improve the forecast in organization levels. In the organization level model, the analysis is done for the trend of a whole size live [REDACTED], which is normally used in [REDACTED] vehicles, [and] then an analysis is done for a whole category like medium truck tire or passenger tires. Organization levels are also conducted for comparisons between vendors. For example, the sales of two tires from different vendors in [the] same size may vary for 200 pcs per month. So it is necessary for to [sic] analyze the margin and decide whether to keep a certain vendor or not. After comparing results, the Demand/Supply Planner presents



the data to the supervisor as a reference for the analysis of the upper-level distribution center. We have a main distribution center located in [REDACTED] from where we get 70% of our tires. Under the main distribution center are 10 second-level warehouses including [REDACTED] etc., and there are several third-level warehouses, which have relatively lass sales, about 1000 a month.

8. Improve the forecast accuracy through the assistance of Logility, a supply chain management software which was bought in 2011. There are 8 forecast models in Logility, some of which are seasonality, life cycle, pattern, moving average, etc. Logility includes nearly all the forecast models typically used in [a] supply chain. Based on the history imported to Logility, it selects the models best matching each tire. Then, the results are reviewed by the Demand/Supply Planner to adjust the forecast type and parameter, since the selling strategy is not computer generated. For example, Logility creates 200 pieces of forecast material every month for an item with a stable selling history and sufficient inventory. However, if the company is going to sell an item off, the Demand/Supply Planner must turn the forecast type to sell off, to make Logility create a forecast trend from 200/month to 150/month, and ultimately to 1/month.

Please see the attached report #5, is [sic] a screen-shot of Logility, in which the parameters are adjusted. From this, the Demand/Supply Planner can see the area for selecting the forecast type, the area to adjust the parameters, and the area showing the results. Logility also has other strong functions, such as comparing the standard deviation and giving alerts for items which have large differences between forecasting and actual demand.

9. Support new product development, which involves the importing of master data like item number and category, estimated sales based on history of similar tires, etc. The Demand/Supply Planner must pay close attention to the actual sales numbers so as to get a more accurate forecast.
10. Establish written procedures to present the procedure of [the] supply chain management department, so that information and cross checks are easily accessed by other personnel.

The AAO observes that the petitioner has provided many details about the proposed duties. However, while that information clearly indicates that the beneficiary would be employed in a position within the Logisticians occupational category, we find that the information does not establish that the duties as described, or the logistician position that those duties are said to comprise, would be more specialized, complex, and/or unique than positions within the Logisticians occupational category that can be performed without the theoretical and practical application of at least a bachelor's degree level of knowledge in logistics or other closely related specialty.



## V. The LCA Submitted by the Petitioner in Support of the Petition

Before addressing the director's determination that the proffered position is not a specialty occupation, the AAO will first address the supplemental finding it has made on appeal, which independently precludes approval of this petition, namely, our finding that the LCA submitted by the petitioner in support of this petition does not correspond to the petition, and does not establish that the petitioner will pay the beneficiary an adequate salary.

The LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Logisticians" occupational classification, SOC (O\*NET/OES) Code 13-1081, and at a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. Wage levels should be determined only after selecting the most relevant O\*NET code classification. A prevailing wage determination is then made by selecting one of four wage levels for an occupation based upon 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.<sup>3</sup>

Prevailing wage determinations start at Level I (entry) and progress to a wage that is commensurate with that of Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.<sup>4</sup> The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

The *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

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<sup>3</sup> 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited Feb. 6, 2014).

<sup>4</sup> 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.

**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.

The petitioner has classified the proffered position at a Level I wage, which is only appropriate for a position requiring only "a basic understanding of the occupation" expected of a "worker in training" or an individual performing an "internship." That wage-level designation indicates further that the beneficiary will only be expected to "perform routine tasks that require limited, if any, exercise of judgment." However, the AAO finds that many of the duties described by counsel and the petitioner exceed this threshold.

For example, in its March 26, 2013 letter the petitioner stated the beneficiary "will act as a key leader in helping manage and facilitate the company's continued high growth rate," and that she would "oversee the forecasting and collaborative demand planning processes." In its June 5, 2013 letter, the petitioner stated that the job duties require "advanced skills" in production planning and information technology. In her June 12, 2013 letter, prior counsel addressed the "complexity of the proffered positions," claimed that the beneficiary would "act[ ] as a bridge and as a key leader in helping the management and facilitation of the company's high growth and sales rate," stated that she would "develop and customize detailed supply strategies for each warehouse," and asserted that the work proposed for the beneficiary "is absolutely central to the entire company's operations and success."

These stated duties indicate that the beneficiary will be required to exercise extensive independent judgment in the proffered position, which conflicts with the Level I wage-rate designation.

The AAO, therefore, questions the level of complexity, independent judgment and understanding actually required for the proffered position, as the LCA was certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described by the petitioner conflict with the wage-rate element of the LCA submitted by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, the selected 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. Thus, the petitioner's characterizations of the proffered position and the claimed duties and responsibilities conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a



comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, the selected 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.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7<sup>th</sup> 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]").

It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ her at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. Again, the petitioner has offered the beneficiary a wage of \$25.87 per hour, which satisfied the Level I (entry level) prevailing wage for a logistician in the [REDACTED] was certified.<sup>5</sup> However, in order to offer employment to the beneficiary at a Level II (qualified) wage-level, which would involve only "moderately complex tasks that require limited judgment," the petitioner would have been required to raise her salary to at least \$32.39 per hour. The Level III (experienced) prevailing wage was \$38.91 per hour, and the Level IV (fully competent) prevailing wage was \$45.53 per hour.<sup>6</sup>

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. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work as characterized by the petitioner on the Form I-129 and allied submissions and as required under the Act, if the petition were granted for a higher-level and more complex position than addressed in the LCA as claimed elsewhere in the petition.

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<sup>5</sup> U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Logistician," <http://www.flcdatcenter.com/OesQuickResults.aspx?code=13-1081&area=31084&year=13&source=1> (last visited Feb. 6, 2014).

<sup>6</sup> *Id.*



Additionally, 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. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

DOL and USCIS regulations reveal several features of the LCA-certification process that have material implications in USCIS review of a H-1B specialty occupation petitions, including the one before us now.

DOL has stated clearly that its LCA certification process is cursory, that it does not involve substantive review, and that it makes the petitioner responsible for the accuracy of the information entered in the LCA. With regard to LCA certification, the regulation at 20 C.F.R. § 655.715 states the following:

*Certification* means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Likewise, the regulation at 20 C.F.R. § 655.735(b) states, in pertinent part, that "[i]t is the employer's responsibility to ensure that ETA [(the DOL's Employment and Training Administration)] receives a complete and accurate LCA."

That the LCA-certification process does not involve a substantive review, but instead relies upon the petitioner to provide complete and accurate information, is highlighted by the following italicized-for-emphasis statement that appears at Part M, the certification section, of the standard LCA (ETA Form 9035/9035E):

*The Department of Labor is not the guarantor of the accuracy, truthfulness, or adequacy of a certified LCA.*

By the signature at part K (Declaration of Employer) of the ETA Form 9035/9035E, the petitioner attested, in part, "that the information and labor condition statements provided [in the LCA] are true and accurate."

As the signature at Part 7 of the Form I-129 certifies under penalty of perjury that the "this petition and the evidence submitted with it are true and correct" to the best of the petitioner's knowledge, that signature also certified that the content of the LCA filed with it and identified by the LCA or ETA case number at item 2 of Part 5 (Basic Information about the Proposed Employment and Employer) truly and correctly matched the related aspects of the petition. However, as just discussed above, this appears to not be the case.

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.<sup>7</sup>

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 or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

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

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

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<sup>7</sup> *See also* 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) ("An approved labor condition application is not a factor in determining whether a position is a specialty occupation").



As such, a review of the LCA submitted by the petitioner indicates that the information provided therein does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such higher-level work and responsibilities, which if accepted as accurate would result in the beneficiary being offered a salary below that required by law. Thus, even if it were determined that the petitioner had overcome the director's ground for denying this petition (which it has not), the petition could still not be approved.

## VI. Specialty Occupation

The AAO will now address the director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director that the evidence fails to establish that the position as described constitutes a specialty occupation.

### A. Law

To meet the petitioner's burden of proof with regard to the proffered position's classification as an H-1B specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;



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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position's title. The specific duties of the position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must

examine the ultimate employment of the beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree *in the specific specialty* as the minimum for entry into the occupation, as required by the Act.

### **B. The Letter Submitted for Consideration as an Expert Opinion**

Before reviewing the director's decision, the AAO will first discuss why it accords no probative value to the letter from [REDACTED] of Operations and Supply Chain Management and Department Chair, Operations/Supply Chain and Information Management, at the [REDACTED]

In his July 28, 2013 letter, [REDACTED] (1) describes the credentials that he asserts qualify him to opine upon the nature of the proffered position, (2) briefly lists some of the duties proposed for the beneficiary, and (3) states his belief that the performance of the duties he lists requires "extensive baccalaureate and post-baccalaureate education."

As will now be discussed, the AAO finds that [REDACTED] letter does not constitute probative evidence of the proffered position satisfying any criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

At the outset we note a fundamental defect that we find in itself fatal to the evidentiary value of the opinions stated in the letter with regard to the educational requirements of the proffered position. That defect is the letter's failure to establish both the specific information upon which the professor bases his statements about the proffered position's education requirements as well as the letter's failure to identify the professor's information about the proffered position with sufficient particularity to establish that it substantially conforms to the relevant information presented in the record of proceeding.

The letter's fifth paragraph states (1) that "[b]ased on the petitioner's description of the position offered to [the beneficiary]" the proffered position requires "knowledge gained through relevant post-graduate training" and (2) that "knowledge of appropriate advanced level theory would be essential" for "performing the tasks spelled out in [the petitioner's] Demand/Supply Planner job description." However, the letter does not include copies of the referenced material or quote them to any extent, let alone sufficiently for the AAO to discern to which, if any, of the many job and position descriptions in the record of proceeding the professor is referring.

The AAO does not question the accuracy of the five-page "CV – Abbreviated" that [REDACTED] submitted with his letter, and accordingly we have considered all of the information provided therein. Likewise, we have considered the Professor's academic standing, background, and degrees, and his CPIM certification.



However, even the combined content of the aforementioned letter and the abbreviated CV does not provide a sufficiently detailed factual foundation to convey and substantiate whatever level of expertise it is that the professor's letter's fourth paragraph claims with regard to the assessing the educational needs of the particular position in question. Without identifying or specifically discussing any experience with, study, or consultation on the particular type of position upon which the professor's letter opines, that fourth paragraph claims (1) that (a) the professor's positions identified in the letter and (b) his consulting history (related only by a list of clients in the abbreviated CV) endow him with "an awareness of the various positions in this field" and (2) that his teaching of "graduate level and executive level courses in these fields" made him "aware of the current requirements for such positions."

The professor does not provide any information with regard to studies, treatises, statistical surveys, authoritative industry sources, U.S. Department of Labor resources, or any other relevant and authoritative sources of which he may have specialized knowledge that would merit deference or special weight to the particular opinion that he offers in this case. Thus, we accord little to no weight to his position, degrees, academic history, or teaching duties as endowing the professor with specialized knowledge relevant to the particular matters upon which he here opines, namely, the educational requirements for the particular position proffered in this petition.

First, because [REDACTED] submission does not discuss the duties of the proffered position in substantive detail, the degree to which [REDACTED] analyzed these duties prior to formulating his letter is not evident.

Next, the letter is not accompanied by, and does not expressly state the full content of, whatever documentation and/or oral transmissions upon which it may have been based. For instance, [REDACTED] does not indicate whether he visited the petitioner's business premises or communicated with anyone affiliated with the petitioner as to what the performance of the general list of duties cited by the professor would actually require. Nor does [REDACTED] articulate whatever familiarity he may have obtained regarding the particular content of the work products that the petitioner would require of the beneficiary. In short, while there is no standard formula or "bright line" rule for producing a persuasive opinion regarding the educational requirements of a particular position, a person purporting to provide an expert evaluation of a particular position should establish greater knowledge of the particular position in question than [REDACTED] has done here.

Nor does [REDACTED] reference and discuss any studies, surveys, industry publications, other authoritative publications, or other sources of empirical information which he may have consulted in the course of whatever evaluative process he may have followed.

Furthermore, [REDACTED] description of the position upon which he opines does not indicate that he considered, or was even aware of, the fact that the petitioner submitted an LCA that was certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation which, as discussed above, signifies that the beneficiary is only expected to possess a basic understanding of the occupation. In any event, the professor nowhere discusses this aspect of the proffered position. The AAO considers this a significant omission, in that it suggests an incomplete review of the position in question and a faulty factual

basis for the professor's ultimate conclusion as to the educational requirements of the position upon which he opines.

As noted earlier, the LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Logisticians" occupational category, SOC (O\*NET/OES) Code 13-1081, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. Again, the above-discussed *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.<sup>8</sup>

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

[REDACTED] omission of such an important factor as the LCA wage-level significantly diminishes the evidentiary value of his assertions.

Finally, although [REDACTED] states that "extensive baccalaureate and post-baccalaureate education" is necessary, he does not indicate that such education need come from any particular specialty. However, 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. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further

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<sup>8</sup> 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited Feb. 6, 2014).



specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

In addition to proving that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

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).

For all of these reasons, the AAO finds that [REDACTED] letter is not probative evidence towards satisfying any criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). For the sake of economy, the AAO hereby incorporates the above discussion and findings into its analysis of each of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

### C. The Caselaw Cited By Counsel on Appeal

Although counsel cited several unpublished AAO decisions in his July 25, 2013 memorandum submitted on appeal, he does not provide copies of those decisions.

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 relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, the AAO will not request and/or obtain copies of the unpublished decisions cited by counsel.

If a petitioner wishes to have unpublished decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself through its own legal research and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i). In the instant case, the petitioner failed to submit a copy of the unpublished decisions. As the record of

proceeding does not contain any evidence of the unpublished decisions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding.

Nevertheless, even if this evidence had been submitted and even if it had been determined that the facts in those cases were analogous to those in this proceeding, those decisions are not binding on USCIS. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Finally, the AAO notes that counsel cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), in part, 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." 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 two 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). However, as will be discussed below, the petitioner has failed to meet its burden and establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties. *See also Health Carousel, LLC v. U.S. Citizenship & Immigration Services*, \_\_\_\_ F. Supp. 2d \_\_\_\_ (S.D. Ohio 2014) (agreeing with AAO's analysis of *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*).



In any event, 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*.<sup>9</sup> The AAO also notes 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 Dec. at 715. 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.

#### **D. Review of the Director's June 28, 2013 Decision Denying the Petition**

The AAO will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

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

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 it addresses.<sup>10</sup>

As noted, the LCA submitted in support of this petition was certified for a job offer falling within the "Logistician" occupational category. The AAO agrees that this occupational category encompasses the duties proposed for the beneficiary.

In relevant part, the *Handbook* summarizes the duties typically performed by logisticians as follows:

Logisticians analyze and coordinate an organization's supply chain—the system that moves a product from supplier to consumer. They manage the entire life cycle of a product, which includes how a product is acquired, distributed, allocated, and delivered.

#### **Duties**

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<sup>9</sup> 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 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.

<sup>10</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2014-15 edition available online.

Logisticians typically do the following:

- Direct the allocation of materials, supplies, and finished products
- Develop business relationships with suppliers and customers
- Work to understand customers' needs and how to meet them
- Design strategies to minimize the cost or time required to move goods
- Review the success of logistical functions and identify areas for improvement
- Propose improvements to management and customers

Logisticians oversee activities that include purchasing, transportation, inventory, and warehousing. They may direct the movement of a range of goods, people, or supplies, from common consumer goods to military supplies and personnel.

Logisticians use sophisticated software systems to plan and track the movement of goods. They operate software programs tailored specifically to manage logistical functions, such as procurement, inventory management, and other supply chain planning and management systems.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Logisticians," <http://www.bls.gov/ooh/business-and-financial/logisticians.htm#tab-2> (last visited Feb. 6, 2014).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

Although an associate's degree may be sufficient for some logistician jobs, a bachelor's degree is typically required for most positions. Work experience in a related field is helpful for jobseekers.

### **Education**

Logisticians may qualify for positions with an associate's degree. However, as logistics becomes increasingly complex, more companies prefer to hire workers who have at least a bachelor's degree. Many logisticians have a bachelor's degree in business, industrial engineering, process engineering, or supply chain management.

Bachelor's degree programs often include coursework in operations and database management, decisionmaking, and system dynamics. In addition, most programs



offer courses that train students on software and technologies commonly used by logisticians, such as radio-frequency identification (RFID).

*Id.* at <http://www.bls.gov/ooh/Business-and-Financial/logisticians.htm#tab-4> (last visited Feb. 6, 2014).

The statements made by DOL in the *Handbook* regarding entrance into this occupational category do not support a finding that a bachelor's degree, or the equivalent, in a specific specialty is normally required. First, the *Handbook* specifically states that "[l]ogisticians may qualify for positions with an associate's degree."

Furthermore, although a bachelor's degree may be preferred<sup>11</sup> by "more" companies (though not even necessarily a majority), the *Handbook* makes clear that a bachelor's degree from the fields of business, industrial engineering, process engineering, or supply chain management would also suffice. However, these fields do not constitute a specific specialty; such a wide range of acceptable majors or academic concentrations is not indicative of a position requiring the theoretical and practical application of a distinct body of highly specialized knowledge in a specific specialty, as required by section 214(i)(1) of the Act and its implementing regulation at 8 C.F.R. § 214.2(h).

The statement by DOL in the *Handbook* that a bachelor's degree in business, without any further specification, would provide adequate preparation constitutes additional evidence that the proffered position is not a specialty occupation. 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. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To prove 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 administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.<sup>12</sup>

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<sup>11</sup> It should be noted that preferences are not synonymous with requirements.

<sup>12</sup> 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

Accordingly, as the *Handbook* indicates that working as a management analyst does not normally require at least a bachelor's degree or the equivalent in a specific specialty or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation.

The AAO will turn next to DOL's Occupational Information Network (O\*NET OnLine), an alternative authoritative source cited by the petitioner. The AAO finds that O\*NET OnLine does not establish that the proffered position qualifies as a specialty occupation under the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. In general, O\*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a standard entry requirement for a given position, as O\*NET OnLine's Job Zone designations make no mention of the specific field of study from which a degree must come. As was noted previously, the AAO 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 proposed position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Furthermore, the Specialized Vocational Preparation (SVP) ratings, which are cited within O\*Net OnLine's Job Zone designations, are meant to indicate only the total number of years of vocational preparation required for a particular position. The SVP ratings do not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Finally, the particular occupation for which the petitioner submits O\*Net OnLine information – Supply Chain Managers – was not the occupation for which the LCA was certified. For all of these reasons, the O\*NET OnLine excerpt cited by counsel is of little evidentiary value to the issue presented on appeal.

Nor do the materials submitted by prior counsel from the [REDACTED] satisfy the first criterion, as neither resource establishes that a bachelor's degree in a specific specialty, or the equivalent, is normally required for entry. The AAO does not dispute these materials' claims that a given degree program "provides a broad background which can enhance a student's career opportunities"; "incorporates Supply Chain Management"; qualifies a student to perform certain duties; or that the automotive industry is a "common career path." The language of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) is clear, and none of these resources even address it, let alone satisfies it.

Nor do the materials submitted by prior counsel from CareerOneStop satisfy the first criterion. Prior counsel highlighted the fact that CareerOneStop listed the "[t]ypical education needed for entry" as a "bachelor's degree." However, this resource fails to satisfy 8 C.F.R.

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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.*



§ 214.2(h)(4)(iii)(A)(I) for two reasons. First, although a bachelor's degree is specified as being "typical," CareerOneStop does not specify that the bachelor's degree be in a specific specialty. Second, and more damaging to prior counsel's argument, a close examination of the document submitted by prior counsel reveals that it actually undermines her argument. CareerOneStop reports that, of logisticians between the ages of 25 to 44, 1.7% have less than a high school diploma, 15.6% have a high school diploma or the equivalent, 26.8% attended college, but did not earn a degree, and 12.5% possess an associate's degree. According to CareerOneStop, only 43.4% of logisticians between the ages of 25 and 44 possess at least a bachelor's degree. That statistic is not sufficient to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Where, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies this criterion by a preponderance of the evidence standard, 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 authoritative sources) that supports a favorable finding with regard to this criterion. 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." Again, 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. at 165. In this case, the *Handbook* does not support the proposition that the proffered position satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), and the record of proceeding does not contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category would be sufficient in and of itself to establish that a bachelor's or higher degree in a specific specialty or its equivalent "is normally the minimum requirement for entry into [this] particular position."

Finally, the AAO notes again that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation. In conclusion, as the evidence in the record of proceeding does not establish that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether

letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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

Nor are there any submissions from a professional association in the petitioner's industry stating that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

While the job-vacancy announcements submitted by the petitioner are acknowledged, they do not constitute probative evidence toward satisfying the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

First, the AAO discounts the overwhelming majority of these advertisements because they do not relate to the petitioner's industry, as would be required if those submissions were to be within this prong's zone of consideration. Again, the language of this prong limits the range of relevant evidence to the petition-pertinent industry's practices (stating "[t]he degree requirement" as one that would be "common to the industry" as well as "in parallel positions among similar organizations."

As discussed above, the petitioner provided a NAICS Code of 423130, "Tire and Tube Merchant Wholesalers."<sup>13</sup> The NAICS defines this industry code as follows:

#### **423130 Tire and Tube Merchant Wholesalers**

This industry comprises establishments primarily engaged in the merchant wholesale distribution of new and/or used tires and tubes for passenger and commercial vehicles.

The AAO is able derive the following information about the advertising employers from the content of the related job-vacancy announcements: (1) [REDACTED] develops techniques and devices to aid physicians in the performance of their work; (2) [REDACTED] provides undefined engineering services; (3) [REDACTED] is a technology company; (4) [REDACTED] is a solid oxide fuel cell company; (5) [REDACTED] is a defense and aerospace systems supplier; (6) the State of Oregon is a government entity; (7) [REDACTED] is a supply chain services and solutions company; (8) [REDACTED] is a medical company; (9) [REDACTED] is an engineering firm; (10) [REDACTED] is a tire manufacturer and supplier; (11) [REDACTED] is a home improvement retailer; (12) [REDACTED] is a tire supplier; (13) the [REDACTED] group manufactures and markets automotive "OE" and aftermarket products, industrial

<sup>13</sup> U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "423130 Tire and Tube Merchant Wholesalers," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Feb. 6, 2014).



automation and mobile products, power tools and accessories, security technology, and packaging equipment; (14) the [REDACTED] manufactures and markets heavy-duty, portable power tools and accessories; and (15) [REDACTED] is an information technology company. The industries in which [REDACTED] and the unnamed company located in [REDACTED], New York are not clear from the materials submitted by the petitioner.

Again, because this prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) limits itself only to positions within organizations within the petitioner's industry, advertisements beyond that scope are simply not relevant to its application.

Second, the evidence of record does not demonstrate that any of these 21 advertisements are from companies "similar" to the petitioner. As noted, the petitioner described itself on the Form I-129 as a 130-employee tire and wheel product distributor established in 1972. While the advertisements indicate that [REDACTED] may operate in the same general business arena as the petitioner, the petitioner has not submitted any documentary evidence to establish that any of these companies is "similar" to the petitioner in size, scope, and scale of operations, business efforts, expenditures, or in any other relevant extent. With regard to the remaining advertisements, the evidence of record does not establish similarities between the petitioner and any of the companies which placed these announcements. Again, simply 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. at 165.

Additionally, the evidence of record does not demonstrate that the positions described in these announcements are "parallel" to the one being proffered here. The petitioner has submitted no information about any of these positions, other than the vacancy announcements themselves.<sup>14</sup> Furthermore, it is noted that work experience is required for several of these positions. However, as noted above, the petitioner indicated by the wage-level in the LCA that its proffered position is a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation. Absent evidence to the contrary, it is therefore difficult to envision how these attributes assigned to the proffered position by the petitioner by virtue of its wage-level designation on the LCA would be parallel to the positions described in these job vacancy announcements. Again, simply 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. at 165.

Furthermore, the aggregate of the job-vacancy advertisements do not reflect a common requirement of at least a bachelor's degree in a specific specialty. Many of them do not list the degree requirements of the advertised position, and of the nine that do, only three (the unnamed company located in [REDACTED] and the two advertisements from [REDACTED], none of which can be considered parallel positions located in similar organizations) list a requirement of a bachelor's degree in a specific specialty, or the equivalent. With regard to the other seven, it is noted that

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<sup>14</sup> The AAO notes that most of these announcements are only 2-3 sentences long and contain very little substantive information regarding the advertised positions, which limits their evidentiary value.

[REDACTED] advertisement specifically states the following: "Bachelor's Degree preferred but not required." However, a "preference" for a bachelor's degree (and not even a preference for such a degree in a specific specialty) does not establish a position as a specialty occupation under any of the specialty occupation criteria.<sup>15</sup> [REDACTED] would find acceptable general-purpose bachelor's degrees in business or business administration.<sup>16</sup> The State of Oregon requires a bachelor's degree, but only suggests that the degree be in business, industrial management, engineering, or logistics."

Nor does the record contain any evidence regarding how representative these advertisements are of the usual recruiting and hiring practices of the particular industries in which these advertisers operate. Again, simply 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. at 165.

For all of the reasons discussed above, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty that is common (1) to the petitioner's industry and (2) for positions in that industry that are both (a) parallel to the proffered position and (b) located in organizations that are similar to the petitioner.

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

<sup>15</sup> The record contains information regarding C-C-L- (name withheld), who prior counsel claims worked for [REDACTED] including a Form W-2 for 2009 and a copy of a master's degree in engineering issued by [REDACTED] in 2008. However, this evidence does not establish (1) that C-C-L- ever worked for [REDACTED] (the W-2 was issued by a company called the [REDACTED], and the record contains no evidence that [REDACTED] are the same company and (2) that the company required this degree as a condition of C-C-L-'s employment, rather than merely preferring such a degree.

<sup>16</sup> Again, 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. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). In addition to proving that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).



In this particular case, the evidence of record does not credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent.

The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform the duties of that position. Rather, the AAO finds, that, as reflected in this decision's earlier quotation of duty descriptions from the record of proceeding, the evidence of record does not distinguish the proffered position from other positions falling within the "Logisticians" occupational category, which, the *Handbook* indicates, do not necessarily require a person with at least a bachelor's degree in a specific specialty or its equivalent to enter those positions.

The statements of counsel and the petitioner with regard to the claimed complex and unique nature of the proffered position are acknowledged. However, those assertions are further undermined by the fact that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation. The AAO incorporates here by reference and reiterates its earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the analysis of the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate selected by the petitioner, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that she will receive specific instructions on required tasks and expected results; and that her work will be reviewed for accuracy.

Accordingly, given the *Handbook's* indication that typical positions located within the "Logistician" occupational category do not require at least a bachelor's degree in a specific specialty, or the equivalent, for entry, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* contain such a requirement. As discussed above, the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ her at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level.

The evidence of record therefore fails to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent.

Consequently, as it has not been shown that the particular position for which this petition was filed is so complex or unique that it can only be performed by a person with at least a bachelor's degree

in a specific specialty or its equivalent, the evidence of record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

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

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

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. Additionally, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.<sup>17</sup>

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

The director's April 19, 2013 RFE specifically requested the petitioner to document its past recruiting and hiring history with regard to the proffered position. The third section of the RFE includes the following specific requests for such documentation:

- **Position Announcement:** To support the petitioner's contention that the position is a "specialty occupation," provide copies of the petitioner's present and past job vacancy announcements. The petitioner may also provide classified advertisements soliciting for the current position, showing that the petitioner requires its applicants to have a minimum of a baccalaureate or higher degree or its equivalent for the position.

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<sup>17</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within the same occupation.



- Past Employment Practices: Provide evidence to establish that the petitioner has a past practice of hiring persons with a baccalaureate degree, or higher[,] in a specific specialty, to perform the duties of the proffered position. Indicate the number of persons employed in similar positions. Further, submit documentation to establish how many of those persons have a baccalaureate degree or higher and the particular field of study in which the degree was attained. Documentation should include copies of transcripts and pay records or Quarterly Wage Reports for the employees claimed to hold a baccalaureate degree in the specific field of study.

Although the director provided the petitioner with the opportunity to establish a history of recruiting and hiring only individuals for this position with a bachelor's degree in a specific specialty, the petitioner submitted no such evidence. While a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, it is unclear how an employer that has never recruited and hired for the position would be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires at least a bachelor's degree in a specific specialty or its equivalent for the position.

As the record of proceeding does not demonstrate that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the AAO finds that the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specific specialty or its equivalent.

In reviewing the record of proceeding under this criterion, the AAO reiterates its earlier discussion regarding the *Handbook's* entries for positions falling within the "Logistician" occupational category. Again, the *Handbook* does not indicate that a bachelor's degree in a specific specialty, or the equivalent, is a standard, minimum requirement to perform the duties of such positions (to the contrary, it indicates precisely the opposite), and the record indicates no factors, such as supervisory responsibilities, that would elevate the duties proposed for the beneficiary above those discussed in the *Handbook*. With regard to the specific duties of the position proffered here, the AAO finds that the record of proceeding lacks sufficient, credible evidence establishing that they are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's degree in a specific specialty, or the equivalent.

Finally, the AAO finds that both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, by the submission of an LCA certified for a wage-level I, the petitioner effectively attests that the proposed duties are of relatively low complexity as compared to others within the same occupational category. This fact is materially inconsistent with the level of complexity required by this criterion.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

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

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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited Feb. 6, 2014).

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

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

*Id.*

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

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

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



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

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

*Id.*

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

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

*Id.*

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

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

As the evidence of record does not satisfy at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the director's decision denying the petition will be affirmed.

**VII. Conclusion and Order**

The evidence of record does not demonstrate that the proffered position is a specialty occupation and therefore does not overcome the director's recommended basis for denying this petition. Consequently, the director's decision recommending denial of the petition will be affirmed, and the petition will be denied.

Beyond the decision of the director, the petition will also be denied because the LCA filed by the petitioner in support of this petition does not correspond to it, and it fails to establish that the petitioner will pay the beneficiary an adequate salary.

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 at 1043, *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d at 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 director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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