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

**U.S. Citizenship
and Immigration
Services**

DATE: JAN 09 2014

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on December 21, 2011. In the Form I-129 visa petition, the petitioner describes itself as an in home caregiving service established in 2002. In order to employ the beneficiary in what it designates as a community relations coordinator position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on June 28, 2012, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Counsel filed a motion to reconsider. The director granted the motion. However, on reconsideration, the director affirmed the prior decision, finding that the petitioner had not established that the proffered position qualifies as a specialty occupation. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision (dated June 28, 2012); (5) the Form I-290B for the motion to reconsider and supporting documents; (6) the director's decision on the motion (dated April 18, 2013); and (7) the Form I-290B and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

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

Later in the decision, the AAO will address an additional, independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition.¹ Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to submit a Labor Condition Application (LCA) that complies with the applicable statutory and regulatory provisions. Thus, the petition will also be denied on this independent and alternative basis.

In this matter, the petitioner states in the Form I-129 that it seeks the beneficiary's services as a full-time community relations coordinator. In a supplement to the Form I-129, the petitioner provided the following description of the duties of the proffered position:

[The beneficiary]'s position is that of Community Relations Coordinator. In this position, the beneficiary will study the objectives, promotional policies, or needs of

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

organizations to develop public relations strategies that will influence public opinion or promote ideas, products, or services. Monitor the [redacted] activity of the office staff, send handwritten than[k] you notes for each referral weekly, deliver/mail the coordination of care forms weekly, monitor and refill all [of the petitioner's] Brochures bi-monthly, attend networking events [redacted] etc.). Respond to requests for information from the media or designate an appropriate spokesperson or information source. Provide [the petitioner's] representation at all health fairs, hold weekly meeting on Monday mornings with Administration/Alt. Administrator to update marketing progress. He must plan 20 meetings per week with potential referral sources which can be pop-in or scheduled meetings. Develop new marketing contacts and referral sources. Establish or maintain cooperative relationships with representatives of community, consumer, employee, or public interest groups. **Arrange public appearances, lectures, contests or exhibits for clients to increase product or service awareness or to promote goodwill. Consult with advertising agencies or staff to arrange promotional campaigns in all types of media for products, organizations, or individuals.** Emphasize a positive image [of the petitioner] in the community, be available for health fairs and other marketing activities after hours and be available to perform sign up and caregiver introductions after hours. **Arrange public appearances, lectures, contests or exhibits for clients to increase product or service awareness or to promote good will. Consult with advertising agencies or staff to arrange promotional campaigns in all types of media for products, organizations, or individuals.**

(Emphasis added to highlight repetition). The AAO notes that many of the job duties are recited from the tasks for the occupation "Public Relations Specialists" as described in the Occupational Information Network (O*NET) Code Connector.² Specifically O*NET states, in pertinent part, the following regarding the occupational category "Public Relations Specialists" – SOC (ONET/OES Code) 27-3031:

- Study the objectives, promotional policies, or needs of organizations to develop public relations strategies that will influence public opinion or promote ideas, products, or services.
- Respond to requests for information from the media or designate an appropriate spokesperson or information source.
- Establish or maintain cooperative relationships with representatives of community, consumer, employee, or public interest groups.

² This type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but it fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, generally cannot be relied upon by a petitioner when discussing the duties attached to specific H-1B employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate that a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

- Arrange public appearances, lectures, contests, or exhibits for clients to increase product or service awareness or to promote goodwill.
- Consult with advertising agencies or staff to arrange promotional campaigns in all types of media for products, organizations, or individuals.

See U.S. Dep't of Labor, Emp't & Training Admin., Occupational Information Network (O*NET) Code Connector, Public Relations Specialists – SOC (ONET/OES Code) 27-3031 on the Internet at <http://www.onetonline.org/link/summary/27-3031.00> (last visited January 7, 2014).

Furthermore, the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform these functions and tasks.³ Thus, the petitioner failed to specify which tasks were major functions of the proffered position, and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

In the supplement to the Form I-129, the petitioner states that it requires "at least a Bachelor of Science degree in Communications or Marketing as the minimum educational requirement for entry into the position being offered" to the beneficiary. The petitioner submitted a copy of the beneficiary's diploma and academic transcript from [REDACTED] showing that the beneficiary has a Bachelor of Arts in Speech Communications.

The petitioner also submitted an LCA in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Public Relations Specialist" – SOC (ONET/OES Code) 27-3031, at a Level I (entry-level).

In addition, the petitioner provided a "Summary Agreement" with regard to the beneficiary's employment. Notably, the document states "Please Transfer to Your Company Letterhead," suggesting that the document was not created by the petitioner. The petitioner did not provide any additional documentation regarding the proffered position or its business operations in support of the petition.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 5, 2012. The director outlined the specific evidence to be submitted. The AAO notes that the director specifically requested the petitioner submit probative evidence to establish that the proffered position is a specialty occupation. In the RFE, the petitioner was asked to provide a more detailed description of the work to be performed by the beneficiary for the entire period requested, including the specific job duties, the percentage of time to be spent on each duty, level of responsibility, etc. The director outlined the evidence to be submitted.

³ Moreover, the petitioner indicated that it is "an in-home caregiving services for elderly citizens in need of support." In the job description, the petitioner repeatedly states that the beneficiary will promote "products" but fails to provide any specific information regarding such "products." Additionally, the petitioner repeatedly asserts that the beneficiary will "[a]rrange public appearances, lectures, contests or exhibits for clients," but it did not submit any documentation regarding these "clients."

In response to the RFE, counsel for the petitioner submitted a brief and additional evidence. The AAO notes that counsel provided a position evaluation from [REDACTED] Professor of Operations Management and Management Science at the [REDACTED]

Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on June 28, 2012. Thereafter, counsel filed a motion to reconsider. After reviewing the motion, the director affirmed the prior decision to deny the petition. Counsel submitted an appeal of the decision.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. The AAO will first discuss some findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

In the appeal brief, counsel references the preponderance of the evidence standard. The AAO notes that with respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states, in pertinent part, the following:

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

* * *

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

* * *

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

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

believe that the claim is probably not true, deny the application or petition.

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

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

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

As previously mentioned, the description of the duties was largely copied from the occupation "Public Relations Specialist" as described in O*NET. As previously discussed, this type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but it fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, generally cannot be relied upon by a petitioner when discussing the duties attached to specific H-1B employment.

The portion of the description of the beneficiary's duties that was not copied verbatim from O*NET lacks the specificity and detail necessary to support the petitioner's assertion that the position is a specialty occupation. The general description provided about the proffered position and its

constituent duties is exemplified by the petitioner's assertion that the beneficiary will "deliver/mail the coordination of care forms weekly," and "send handwritten than[k] you notes for each referral weekly." The petitioner fails to sufficiently define how these tasks of delivering/mailling forms and sending thank you notes entails the need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty.

Additionally, the petitioner claims that the beneficiary will "monitor and refill all [the petitioner's] brochures bi-monthly" and "monitor the [redacted] activity of the office staff." These statements do not include information regarding the day-to-day tasks of the position, and the term "monitor" does not delineate the actual work that the beneficiary will perform. The petitioner's statements – as so generally described – do not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application.

In addition, the petitioner claims the beneficiary will "attend networking events" and "plan 20 meetings per week with potential referral sources which can be pop-in or scheduled meetings." Moreover, the beneficiary will "be available for health fairs and other marketing activities after hours." The duties as stated fail to provide any particular details regarding the demands, level of responsibilities and requirements necessary for the performance of these duties. The statements do not provide any information as to the complexity of the job duties, the amount of supervision required, and the level of judgment and understanding required to perform the duties.

Such generalized information does not in itself establish a necessary correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. The AAO also observes, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described by the petitioner, the AAO finds, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the demands of the proffered position.

The petitioner has failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or any substantive evidence regarding the actual work that the beneficiary would perform. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner's assertions with regard to the position's educational requirement are conclusory and unpersuasive, as they are not supported by the job description or substantive evidence.

Moreover, the record of proceeding contains discrepancies between what the petitioner claims about the level of responsibility inherent in the proffered position set against the contrary level of

responsibility conveyed by the wage level indicated by the LCA submitted in support of petition. In the instant case, the petitioner provided an LCA in support of the petition that indicates the occupational classification for the position is "Public Relations Specialists" at a Level I (entry level) wage.

Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.⁴ Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁵ 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.

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

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

⁴ 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.

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

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.

Throughout the record of proceeding, the petitioner and counsel claim that the proffered position involves complex, unique and/or specialized duties. For example, in response to the RFE dated May 8, 2012, counsel claims that "the specific duties are specialized and complex." Counsel further references "the specialized and complex duties required" for the position. However, here, the petitioner has classified the proffered position at a Level I wage, which is appropriate for a position requiring only "a basic understanding of the occupation" for an individual who will "receive specific instructions on required tasks and results expected" at a level expected of a "worker in training" or an individual performing an "internship."

Additionally, in the position evaluation submitted in response to the RFE, Mr. [REDACTED] describes the "specialized and complex" knowledge required to perform the duties of the proffered position. He asserts that the beneficiary will "perform various specialized duties" and notes the "challenging tasks of the position." According to Mr. [REDACTED] the success of "[the petitioner]" is largely dependent on the ability and expertise of the Community Relations Coordinator . . . as the specialized duties of this individual directly and indirectly affect the company's operations, revenues and profits, and ultimately the overall success of the company." Thus, it appears that the petitioner will be relying heavily on the beneficiary's work product to make critical decisions regarding the company's business operations. Such reliance on the beneficiary's work appears to surpass the expectations of a Level I position, as described above, where the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and limited exercise of judgment. In the instant case, rather than the beneficiary's work being "monitored and reviewed for accuracy," it appears that the petitioner claims that it will be relying on the accuracy of the beneficiary's work product to make major business decisions about the direction of the company.

On motion, counsel repeatedly claims that the duties of the position are "complex and unique." For instance, counsel asserts that "[m]any of the duties described in the position description are on their face complex and unique." Further, counsel notes that duties such as "developing public relations strategies, consulting with advertising agencies, representing the business, responding to the media, and developing marketing contacts and referral sources . . . are duties that must be described as specialized and complex." On appeal, counsel continues to claim that the duties of the position are complex, unique and/or specialized. However, the petitioner's designation of the proffered position at a Level I wage-rate indicates that the beneficiary will be expected to "perform routine tasks that require limited, if any, exercise of judgment" and that he will work "under close supervision."

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the LCA. See section 212(n)(1)(A) of the Act,

8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed. Appx. 722, 723 (7th Cir. 2010). The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]").

The 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, if the proffered position were found to qualify as a specialty occupation on the basis that it was a higher-level and more complex position, as claimed elsewhere in the petition, the petition could still not be approved as the petitioner has failed to establish that it would pay the wage required for that level of work as required under the Act.

The AAO must question the level of complexity, independent judgment and understanding required for the proffered position as the LCA is certified for a Level I entry-level position. The characterization of the position and the claimed duties and responsibilities as described in the record of proceeding conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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

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

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed

for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

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

The regulation at 20 C.F.R. § 655.705(b) therefore requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. In the instant case, the record does not establish that, at the time of filing, the petitioner had obtained a certified LCA for the proper prevailing wage that applied at the time the petition was filed. Therefore, the petitioner has failed to comply with the filing requirements at 8 C.F.R. §§214.2(h)(4)(i)(B) and 214.2(h)(i)(2)(B) by providing a certified LCA that corresponds to the instant petition. For this reason also, the petition may not be approved.

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. A review of the enclosed LCA indicates that the information provided does not correspond to the claimed level of work that the petitioner ascribed to the proffered position, and to the wage-level corresponding to such a level of work. As a result, even if it were determined that the petitioner overcame the director's basis for denial of the petition (which it has not), the petition could not be approved for this independent reason.

The AAO will now specifically address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below for dismissing the appeal.

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

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and

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

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

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

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

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

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

accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

As previously discussed, based upon a complete review of the record of proceeding, the AAO finds that the petitioner has failed to establish (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. Consequently, these material conflicts preclude a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

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

complexity of the specific duties, which is the focus of criterion 4. Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions.

In this regard, the AAO hereby incorporates its earlier analysis, comments, and findings with regard to the discrepancies in the record, and the lack of evidence substantiating the duties and responsibilities of the position. As described, the AAO finds that the duties do not provide a sufficient factual basis to convey a persuasive basis to discern the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested, such that they persuasively support any claim in the record of proceeding that the work that they would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific performance specialty directly related to the demands of the proffered position. Nevertheless, for the purpose of providing a comprehensive discussion, the AAO will now address in detail the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position.

The AAO recognizes DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁶ In the Form I-129 petition, the petitioner designated the proffered position as a "Community Relations Coordinators," and submitted an LCA in support of the petition identifying the occupational category as "Public Relations Specialist."⁷ However, as previously discussed, the petitioner failed to provide sufficient information and documentation regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations. Thus, it is not possible to conduct a legitimate comparison of the duties of the proffered position and the typical duties associated with the occupation "Public Relations Managers and Specialists." Even assuming *arguendo* that the occupational category "Public Relations Managers and Specialists" is relevant to this proceeding, the AAO notes that the *Handbook* does not support a finding that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

⁶ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁷ In response to counsel's claims that "[t]he actual position of Community Relations Coordinator is not found in the [*Handbook*]," the AAO notes that in circumstances where *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that (1) the proffered position otherwise qualifies as a specialty occupation under this criterion, notwithstanding the absence of the *Handbook*'s support on the issue; or (2) the proffered position satisfies one of the other three criteria. It is the petitioner's responsibility to provide probative evidence (e.g., documentation from other objection, authoritative sources) that supports a finding that the particular position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider and weigh all of the evidence presented to determine whether the particular position qualifies as a specialty occupation.

The subchapter of the *Handbook* entitled "What Public Relations Managers and Specialists Do" states the following about this occupation:

Public relations managers and specialists create and maintain a favorable public image for their employer or client. They write material for media releases, plan and direct public relations programs, and raise funds for their organizations.

Duties

Public relations managers and specialists typically do the following:

- Write press releases and prepare information for the media
- Identify main client groups and audiences and determine the best way to reach them
- Respond to requests for information from the media or designate an appropriate spokesperson or information source
- Help clients communicate effectively with the public
- Develop and maintain their organization's corporate image and identity, using logos and signs
- Draft speeches and arrange interviews for an organization's top executives
- Evaluate advertising and promotion programs to determine whether they are compatible with their organization's public relations efforts
- Develop and carry out fundraising strategies for an organization by identifying and contacting potential donors and applying for grants

Public relations specialists, also called *communications specialists* and *media specialists*, handle an organization's communication with the public, including consumers, investors, reporters, and other media specialists. In government, public relations specialists may be called *press secretaries*. They keep the public informed about the activities of government officials and agencies.

Public relations specialists must understand the attitudes and concerns of the groups they interact with to maintain cooperative relationships with them.

Public relations specialists draft press releases and contact people in the media who might print or broadcast their material. Many radio or television special reports, newspaper stories, and magazine articles start at the desks of public relations specialists. For example, a press release might describe a public issue, such as health, energy, or the environment, and what an organization does to advance that issue. In addition to publication through traditional media outlets, releases are increasingly being sent through the Web and social media.

Public relations managers review and sometimes write press releases. They also sponsor corporate events to help maintain and improve the image and identity of their organization or client.

In addition, they help to clarify their organization's point of view to its main audience through media releases and interviews. Public relations managers observe social, economic, and political trends that might ultimately affect the organization, and they recommend ways to enhance the firm's image based on those trends. For example, in response to a growing concern about the environment, an oil company may create a public relations campaign to publicize its efforts to develop cleaner fuels.

In large organizations, public relations managers may supervise a staff of public relations specialists. They also work with advertising and marketing staffs to make sure that advertising campaigns are compatible with the image the company or client is trying to portray. For example, if the firm has decided to emphasize its appeal to a certain group, such as younger people, the public relations manager ensures that current advertisements will be well received by that group.

In addition, public relations managers may handle internal communications, such as company newsletters, and may help financial managers produce an organization's reports. They may help the organization's top executives by drafting speeches, arranging interviews, and maintaining other forms of public contact. Public relations managers must be able to work well with many types of specialists to accurately report the facts. In some cases, the information they write has legal consequences. They must work with the company's or client's lawyers to be sure that the information they release is both legally accurate and clear to the public.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Public Relations Managers and Specialists, on the Internet at <http://www.bls.gov/ooh/Management/Public-relations-managers-and-specialists.htm#tab-2> (last visited January 7, 2014).

The subchapter of the *Handbook* entitled "How to Become a Public Relations Managers and Specialists" states, in pertinent part, the following about this occupation:

Education

Public relations specialists typically need a bachelor's degree. Employers usually want candidates who have studied public relations, journalism, communications, English, or business.

For public relations management positions, a bachelor's degree in public relations, communication, or journalism is generally required. Courses in advertising, business administration, public affairs, public speaking, political science, and creative and technical writing are helpful. In addition, some employers prefer a master's degree in public relations or journalism. In 2010, one-fourth of public relations managers held a master's degree.

Training

Public relations specialists typically are trained on the job, either in a formal program or by working closely under more experienced staff members. Entry-level workers often maintain files of material about an organization's activities, skim newspapers and magazines for appropriate articles to clip, and assemble information for speeches and pamphlets. Training typically lasts between 1 month and 1 year. After gaining experience, public relations specialists write news releases, speeches, and articles for publication or plan and carry out public relations programs.

Certification

The Public Relations Society of America offers a certification program for public relations managers that is based on years of experience and on passing an exam. The Accredited Business Communicator credential is also available from the International Association of Business Communicators.

Work Experience

Public relations managers must have several years of experience in a related public relations position. Lower level management positions may require only a few years of experience, whereas directors are more likely to need 5 to 10 years of related work experience.

Handbook, Public Relations Managers and Specialists, on the Internet at <http://www.bls.gov/ooh/Management/Public-relations-managers-and-specialists.htm#tab-4> (last visited January 7, 2014).

When reviewing the *Handbook*, the AAO must again note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate is assigned to job offers for beginning level employees who have only a basic understanding of the occupation. That is, based upon this wage rate, there is an expectation that the beneficiary will perform routine tasks that require limited, if any, exercise of judgment; he will work under close supervision and receive specific instructions on required tasks and expected results; and his work will be closely monitored and reviewed for accuracy. DOL guidance states that a job offer for a research fellow, a worker in training, or an internship is an indication that a Level I wage should be considered.

The *Handbook* reports that certification/credential programs are available for this occupation. However, the AAO notes that there is no indication that the petitioner requires the beneficiary to have obtained any professional certification/credential to serve in the proffered position.

The *Handbook* does not support the assertion that a baccalaureate or higher degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry into the occupation. While the *Handbook* states that public relations specialists typically need a bachelor's degree, the *Handbook* does not indicate that such a degree must be in a specific specialty directly related to the

duties and responsibilities of the position. The *Handbook* continues by indicating that employers usually want candidates who have studied public relations, journalism, communications, English, or business.⁸ Thus, there is a wide-range of disparate fields that employers find to be acceptable. Moreover, the *Handbook* indicates that these employers "want candidates" with such backgrounds, accordingly, it appears that this is a preference for some employers. However, the *Handbook* does not indicate that employers require a degree in these disciplines. Obviously, a preference is not an indication of a requirement by employers.

The *Handbook* also discusses public relations management positions. According to the *Handbook*, a bachelor's degree in public relations, communication, or journalism is generally required for public relations manager positions. In addition, the *Handbook* states that courses in advertising, business administration, public affairs, public speaking, political science, and creative and technical writing are helpful for these positions. The courses that the *Handbook* indicates are generally required and helpful are in a variety of fields. Furthermore, it must be noted that the petitioner does not claim that the proffered position falls under the occupational category "Public Relations Managers."

The *Handbook* does not conclude that normally the minimum requirement for entry into public relations manager and specialist positions is at least a bachelor's degree *in a specific specialty*, or its equivalent. The *Handbook* indicates that employers accept candidates with backgrounds in a wide-range of disciplines. Thus, the *Handbook* does not support the assertion that the proffered position falls under an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

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

⁸ Briefly, the AAO notes that 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 a position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). 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 147.

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

Here, the *Handbook* indicates that "employers usually want candidates who have studied public relations, journalism, communications, English, or business" for public relations specialists positions, and "a bachelor's degree in public relations, communication, or journalism is generally required" for public relations manager positions. Thus, courses of study in a wide-range of disparate fields are considered relevant for entry into the occupation. These dissimilar courses of study fail to delineate a specific specialty. Thus, the *Handbook's* narrative does not support the assertion that positions in this occupation normally require at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation.

In response to the RFE, counsel provided a letter from [REDACTED] Professor of Operations Management and Management Science at the [REDACTED] of Business of the [REDACTED]. In an undated letter, counsel indicates that the letter is provided to establish "that it is the industry standard to hire someone with a baccalaureate degree for someone in the position of Community Relations Coordinator." Thereafter, in the motion brief, counsel states that "[the letter from Mr. [REDACTED] is proof that the position is specialized and requires the application of a body of highly specialized knowledge." Counsel continues by asserting that "[the] letter more closely should be considered in tandem with 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)."

The AAO reviewed the opinion letter in its entirety. However, as discussed below, the letter from Mr. [REDACTED] is not persuasive in establishing the proffered position as a specialty occupation position.⁹

Mr. [REDACTED] provides a summary of his qualifications, including his educational credentials, professional experience, and information regarding his research interests. In addition, he attached a copy of his curriculum vitae. Based upon a complete review of Mr. [REDACTED] letter and curriculum vitae, the AAO notes that Mr. [REDACTED] may, in fact, be a recognized authority on various topics; however, he has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. The documentation does not establish his expertise pertinent to the hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. For example, Mr. [REDACTED] states that he has "published over 40 journal articles in different areas of business and technology," and he claims to have "worked closely with industry experts on various projects in the areas of supply chain optimization and pricing." However, the opinion letter

⁹ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. 8 C.F.R. § 214.2(h)(4)(ii). A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. *Id.*

contains no evidence that it was based on scholarly research conducted by Mr. [REDACTED] in the specific area upon which he is opining. Without further clarification, it is not apparent how his education, training, skills or experience would translate to expertise or specialized knowledge regarding the current recruiting and hiring practices of companies engaged "in-home caregiving services" or similar organizations in the "Home Healthcare Services" industry (as designated by the petitioner with the NAICS code) for community relations coordinator positions (or parallel positions).

Mr. [REDACTED] states that his "professional opinions have been widely accepted in all areas of business administration, information technology, and systems engineering." However, Mr. [REDACTED] letter does not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for such positions (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. He claims to possess expertise in the field of operations management and related fields, but he did not identify the specific elements of his knowledge and experience that he may have applied in reaching his conclusions here.

In the evaluation, Mr. [REDACTED] claims that "a minimum of a Bachelor's Degree in Marketing, Communications, or a related area, or the equivalent provides the student with the core competencies and skills needed" for the proffered position. Further, Mr. [REDACTED] stated that it is "the industry standard for a position such as Community Relations Coordinator for [the petitioner] is to be filled through recruiting a college graduate with the minimum of a Bachelor's Degree in Marketing, Communications, or a related area, or the equivalent."

Mr. [REDACTED] provided a brief description of the petitioner's business and a job description of the proffered position. Upon review of Mr. [REDACTED] opinion letter, there is no indication that he possesses any knowledge of the petitioner's proffered position beyond this information. He does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. There is no evidence that Mr. [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue.

In the letter, Mr. [REDACTED] states his opinion on the educational requirements for the proffered position. However, it must be noted that there is no indication that the petitioner and counsel advised Mr. [REDACTED] that the petitioner characterized the proffered position as a low, entry-level community relations coordinator position (under the occupational classification of "Public Relations Specialist"), for a beginning employee who has only a basic understanding of the occupation (as indicated by the wage-level on the LCA). The wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. It appears that Mr. [REDACTED] would

have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that Mr. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

Mr. [REDACTED] asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement. Likewise, he does not provide a substantive, analytical basis for his opinion and ultimate conclusion. Accordingly, the very fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. Importantly, his statements are not supported by copies or citations of research material that may have been used. He has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty. 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).

In summary, for the reasons discussed above, the AAO concludes that the opinion letter rendered by Mr. [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by Mr. [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. Therefore, the AAO declines to defer to Mr. [REDACTED] findings and ultimate conclusions, and further finds that his opinion letter is not probative evidence towards satisfying any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

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. at 1102).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations or similar firms in the petitioner's industry attesting 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. In the motion brief, counsel states that "[t]he petitioner concedes it did not submit evidence that the degree requirement is common to the industry among similar organizations." Therefore, the petitioner does not claim that the proffered position qualifies as a specialty occupation under this prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

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

In the instant case, the petitioner and its counsel claim that the proffered position qualifies as a specialty occupation under this criterion of the regulations. In support of this assertion, counsel states the following in the appeal brief:

Many of the duties included in the position description are unique on their face. Developing public relations strategies, consulting with advertising agencies, representing the business and responding to the media are all the sorts of complex and unique activities that require application of the knowledge acquired during the course of the Beneficiary's studies.

Notably, the duties referenced by counsel are taken directly from the tasks for the occupation "Public Relations Specialists" as described in the Occupational Information Network (O*NET) Code Connector. Counsel claims that the duties are "unique on their face," but fails to explain the beneficiary's specific role in performing these functions within the petitioner's particular business operations. Further, counsel does not include information regarding the day-to-day tasks in the actual performance of these responsibilities. Without more, simply reciting duties (that represent typical tasks for an occupation) is insufficient to demonstrate that the petitioner's particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. As so generally described, the stated duties do not provide a sufficient factual basis to support counsel's assertion.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹⁰

It is further noted the record of proceeding does not establish that the petitioner's requisite knowledge for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or its equivalent. In the appeal, counsel lists several courses completed by the beneficiary and claims that they "provide him with the skills to complete the unique and complex job duties required for the Community Relations Coordinator position." However, the petitioner and counsel did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties that counsel claims are so complex or unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position.

In summary, the description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. The petitioner has not credibly demonstrated that this position, which the petitioner characterized in the LCA as an entry-level position relative to other positions in the occupation, is so complex or unique that it can be performed only by an individual with at least a baccalaureate degree in a specific specialty, or its equivalent.

The petitioner indicates that the beneficiary's academic credentials qualify him to serve in the proffered position. However, the test to establish a position as a specialty occupation is not the experience or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. Upon review of the record of proceeding, the

¹⁰ For additional information regarding wage levels as defined by DOL, see Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

AAO finds that the petitioner has failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).¹¹

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

To satisfy this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

The petitioner stated in the Form I-129 petition that it has approximately 250 employees and that it was established in 2002 (approximately 9 years prior to the H-1B submission). On motion, counsel indicated that it has not previously employed an individual in the proffered position. The petitioner and its counsel do not claim that the proffered position qualifies as a specialty occupation under this criterion of the regulations.

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

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is

¹¹ The AAO acknowledges that the petitioner submitted an opinion letter from Mr. [REDACTED]. However, the AAO here incorporates its earlier discussion and analysis regarding the opinion letter, and again notes that the letter does not establish that the proffered position qualifies as a specialty occupation under any of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

The AAO reviewed all of the evidence in the record of proceeding, including the job description, and finds that the petitioner's statements and the submitted documentation fail to support the assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. As reflected in this decision's earlier comments and findings with regard the proffered position, the petitioner has not presented the proposed duties with sufficient specificity and substantive content to establish relative specialization and complexity as distinguishing characteristics of those duties, nor that they are at a level that would require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent. The documentation submitted is insufficient to satisfy this criterion of the regulations.¹²

On appeal, counsel asserts that "the specialized nature of the [proffered] position is reflected in the duties that overlap with numerous positions in the *Handbook*." In support of this assertion, counsel states the following (emphasis added):

While many of the duties [of the proffered position] are identical to those of public relations managers or specialists[,] they also include activities typically associated with other occupations such as Product Managers and Market Research Analysts. For example, as the Community Relations Coordinator [the beneficiary] will *establish and maintain cooperative relationships with community members and consult with advertising agencies and staff on promotional campaigns.*" Market Research Analysts collect data and information from consumers and then use this knowledge to develop promotions. Similarly, [the beneficiary] will attend and [sic] networking events and *arrange public appearances, lectures, contests and exhibits for clients.*" These duties are akin to those of demonstrators and product promoters who 'design an exhibit and target nit [sic] for a particular audience.' The wide-ranging responsibilities of the position clearly distinguish it from a generalist.

Although counsel claims that the proffered position includes "activities typically associated with other occupations," the AAO reviewed the duties noted by counsel and observes that they are duties that have been copied verbatim from the tasks for the occupation "Public Relations Specialists" as described in the Occupational Information Network (O*NET) Code Connector.¹³ The unsupported

¹² The AAO acknowledges that the petitioner submitted an opinion letter from Mr. [REDACTED]. However, the AAO here incorporates its earlier discussion and analysis regarding the opinion letter, and again notes that the letter does not establish that the proffered position qualifies as a specialty occupation under any of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

¹³ More specifically, O*NET includes the following tasks for the occupational category "Public Relations Specialists" – SOC (ONET/OES Code) 27-3031 (emphasis added):

statements of counsel on appeal are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Further, while counsel may claim that the duties of the position are "wide-ranging," this (unsupported) assertion does not established that 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 bachelor or higher degree in a specific specialty (or its equivalent).

The AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupation. The petitioner designated the position as a Level I position (the lowest of four assignable wage levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV position, requiring a significantly higher prevailing wage. A Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

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

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

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

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- *Establish or maintain cooperative relationships with representatives of community, consumer, employee, or public interest groups.*
 - *Arrange public appearances, lectures, contests, or exhibits for clients to increase product or service awareness or to promote goodwill.*

See U.S. Dep't of Labor, Emp't & Training Admin., Occupational Information Network (O*NET) Code Connector, Public Relations Specialists – SOC (ONET/OES Code) 27-3031 on the Internet at <http://www.onetonline.org/link/summary/27-3031.00> (last visited January 7, 2014).

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

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *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.