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



U.S. Citizenship
and Immigration
Services

DATE: JAN 31 2014 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director of the California Service Center initially denied the nonimmigrant visa petition. After the petitioner filed a complaint in Federal District Court, the director reopened the matter, on Service motion, thus affording the petitioner an additional opportunity to establish eligibility for the benefit sought. The director concluded the reopened proceeding by (1) producing a decision to again deny the petition (on the same grounds upon which the initial decision had been based) and (2) certifying that decision to the Administrative Appeals Office for review. Based upon its review of the entire record of proceeding, including the certified decision and the petitioner's brief and appended exhibits submitted in response to the certification, the AAO will affirm the director's certified decision. Accordingly, the petition will be denied.

The petitioner describes itself as a 45-employee firm that has provided homecare services since 1996. It seeks approval of this petition 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 petition for a part-time position to which it assigned the job title "Deputy Controller." In support of this petition, the petitioner submitted a Labor Condition Application (LCA) that the Department of Labor had certified for a job offer falling within the "Financial Managers" occupational category, at a Level I (entry-level) prevailing wage rate.

The director bases the denial of the petition upon her determination that the evidence of record does not establish the proffered position as a specialty occupation. For the reasons discussed in this decision, the AAO concludes that the certified decision to deny the petition for failure to establish a specialty occupation was correct. Accordingly, the certified decision will be affirmed, and the petition will be denied.

As an additional matter not addressed by the director, the AAO will also address the fact that, while the record includes a copy of a baccalaureate of arts diploma from the [REDACTED] in 2001 (which specifies no major or academic concentration) and the petitioner submitted an evaluation equating that degree to a bachelor's degree in finance awarded by a regionally accredited college or university in the United States, the record of proceeding does not contain copies of the academic transcripts upon which the evaluator relied in arriving at this conclusion. Thus, the AAO finds that approval of the petition is also precluded by the record's failure to establish that the beneficiary is qualified to serve in any specialty occupation, due to this absence of sufficient, documentary evidence that the beneficiary possesses at least a bachelor's degree, or the equivalent, in a specific specialty.

I. Procedural History

The record reflects that the petitioner filed the petition on May 10, 2012; that the director issued a request for additional evidence (RFE) on September 13, 2012; and that the petitioner filed a timely response to the RFE on August 6, 2012.

The director denied the petition on December 13, 2012, concluding that the petitioner had failed to establish that the proffered position is a specialty occupation.

On [REDACTED], 2013, the petitioner filed a complaint for a writ of mandamus and injunctive relief with United States District Court for the Northern District of California.

Thereafter, on May 14, 2013, the director reopened the matter on Service motion and issued a second RFE on that same date. After reviewing the evidence submitted in the petitioner's response, the director wrote another decision denying the petition. On September 27, 2013, the director both certified that decision to the AAO for review and issued the appropriate Notice of Certification (Form I-290C) which afforded the petitioner 30 days in which to submit a supplemental brief to the AAO.

The petitioner's counsel responded to the Notice of Certification by submitting for the AAO's consideration a brief with allied exhibits, which we have fully considered. The AAO received the response on November 21, 2013.

The record of proceeding before the AAO thus contains the following: (1) the Form I-129 and supporting documentation; (2) the director's first RFE; (3) the petitioner's response to the first RFE; (4) the director's initial decision denying the petition; (5) the director's service motion combined with the second RFE; (6) counsel's response to the combined service motion and RFE; (7) the director's Form I-290C, Notice of Certification; and (8) counsel's brief and supporting materials submitted in response to the Notice of Certification.

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 director's decision that has been certified to the AAO will be affirmed, and the petition will be 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, i.e., the failure of the evidence of record to establish that the beneficiary is qualified to perform the duties of a specialty occupation. 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. For this additional reason, the petition must also be denied.

II. Standard of Review

As a preliminary matter, it is noted that 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.

* * *

The "preponderance of the evidence" 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.

Id. at 375-376.

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 petitioner did not establish the proffered position as 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 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 certification with regard to 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 claim that the beneficiary is qualified to perform the duties of a specialty occupation is "more likely than not" or "probably" true.

III. The Petitioner and Its Operations

The record reflects that the petitioner is a Limited Liability Company (LLC) organized under the laws of the State of California.¹ As such, it has members but no shareholders, and it is not a publically traded entity.²

As noted above, the petitioner stated on the Form I-129 that it has been doing business as a "provider of homecare services" since 1996; it currently employs 45 people; and it has a gross annual income of \$1,700,000 and a net annual income of \$300,000.

In the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement, at Part A, section 6, the petitioner specifies its North American Industry Classification System (NAICS) Code as "621610," which refers to the Home Health Care Services Industry.

In its May 2, 2012 letter of support, which was signed by the petitioner's owner/administrator, the petitioner described itself as follows:

[The petitioner] is a provider of high quality, affordable homecare services to the residents of the San Francisco Bay Area. Our services enable our clients to remain independent and in their own homes. We were founded in 1996 and currently have 45 employees. We had gross revenues of \$1.7 million and net revenues of \$300,000 last year. We provide personal in-home care services in the form of bathing and grooming assistance, assistance with dressing, medication reminders, meal preparation and clean-up, errands and shopping, light housekeeping, laundry and linen changes, transferring, skin-care and positioning for non-ambulatory clients, hospice and respite care, observation and monitoring, prescribed exercise programs, incontinence care, [and] transportation and assistance with appointments and outings.

In an excerpt printed from its website and attached to the letter of support, the petitioner further described itself as follows:

[The petitioner] was established to enable our clients to live at home with our assistance. . . .

* * *

Our goal is to provide high quality, affordable home care to enable our client's [sic] to remain independent and in their own home.

¹ A January 14, 2014 search of the California Secretary of State's Internet business-entity database, at <http://kepler.sos.ca.gov/>, indicated that the petitioner first filed as a California LLC on [REDACTED] 1998 and that it remains in active status.

² The State of California Tax Franchise Board provides a brief discussion of the California LLC at https://www.ftb.ca.gov/businesses/bus_structures/LLcompany.shtml.

Upon initial contact, we will provide a complimentary In-Home assessment to evaluate the needs of the client and the skill level of our caregiver required. A plan of care would be developed at this time, and supervisory visits on an ongoing basis would ensure continuity of care for our clients and evaluate our employees' performances.

We work side by side with many **Long Term Care Insurance Companies**, and provide all necessary documentation as required.

We can provide various referrals from the Homecare community, which enables [sic] our client's [sic] to In Home services[,] e.g.,] Medical Doctor's [sic] that provide home visits, and companies who arrange home adaptation devices and remodeling to improve home comfort and safety.

There is no information in either of these documents, or anywhere else in the record of proceeding, that indicates that the petitioner's services extend beyond those stated by the petitioner in the above-quoted support letter, that is:

[B]athing and grooming assistance, assistance with dressing, medication reminders, meal preparation and clean-up, errands and shopping, light housekeeping, laundry and linen changes, transferring, skin-care and positioning for non-ambulatory clients, hospice and respite care, observation and monitoring, prescribed exercise programs, incontinence care, [and] transportation and assistance with appointments and outings.

In this regard, the AAO notes that the petitioner does not describe the extent of the "hospice and respite care." Further, the petitioner does not establish that its assistance with "prescribed exercise programs" involves employment of physical therapists. Additionally, the petitioner does not identify the occupational range of the persons that it employs to provide services.

Next, we accord no significant weight to the petitioner's assertion in its November 30, 2012 letter responding to the September 13, 2012 RFE that it "has been experiencing increasing growth and has recently opened up a new office in [REDACTED] of the San Francisco Area." We find that the record does not include documentary evidence and corresponding explanation sufficient to establish the extent of the claimed growth or that it materially relates to a need for the services of a person with at least a bachelor's degree in a specific specialty.

The petitioner's response to the May 14, 2013 RFE includes an organizational chart that displays the petitioner's management and staff positions. According to the configuration of this line-and-box chart, the proffered position (Deputy Controller) would be subordinate to the both the Managing Member of the [REDACTED] Office and the Managing Member of the [REDACTED] Office (both of whom are identified by name). The chart also shows the proffered position, Deputy Controller, as being directly in charge of positions entitled "Scheduler" (identified by name), "Marketing" (identified as "Currently Vacant"), and Human Resources (also identified as "Currently Vacant.") The chart also indicates the Scheduler as being in charge of the petitioner's "Caregiver Service Providers," which the chart notes as "45 Active."

Single asterisks that immediately follow the "Currently Vacant" annotations within the "Marketing" and the "Human Resources" boxes alert the reader to the following explanatory statement near the bottom of the chart page:

- * The duties of the marketing and human resources divisions are currently performed by the co-owners. Petitioner is currently attempting to hire for these positions.

A double-asterisk mark after the organizational chart's final box (reading "Caregiver Service Providers[:] 45 Active") refers the reader to the following statement at the bottom of the chart page:

- ** Petitioner has 175 additional individuals who are approved caregivers who have completed background checks and all other requirements and are as employed as needed.

We note again that the record of proceeding nowhere documents the particular range of healthcare workers that the petitioner employs.

Further, we find that the "Currently vacant" status of the Marketing and the Human Resources positions is significant for several reasons. While the petitioners asserts that the beneficiary's responsibilities would include financial management work generated by the Marketing and Human Resources positions, the evidence of record does not establish how long those vacancies have existed (or even if they were ever filled). Further, the evidence of record does not establish when those vacancies would be filled or even what steps, if any, had been taken to fill them. Thus, the AAO finds that the actual organizational structure as depicted by the petitioner is speculative, as it posits positions which in fact are not occupied. Further, the evidence of record does not establish that, at the time of the petition's filing, those positions were filled or that any substantial steps had been taken to fill them.

Thus, the evidence of record does not establish that the proffered position would actually include work with and oversight of "the marketing and human resource departments," as claimed. This is significant because USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Thus, the AAO will not assume that what the petitioner terms its Marketing and Human Resource departments were operational at the time that the petition was filed or that their operation and associated generation of work for the beneficiary was likely at the time when the petition was filed. Thus, the AAO accords little to no evidentiary weight to assertions about work, coordination, and oversight that the beneficiary would perform with regard to those claimed departments.

Additionally, as will be seen in our review of the petitioner's statements about the duties that the beneficiary would have to perform if this petition were approved, the petitioner asserts that its operations would generate work that (1) would involve the beneficiary in the preparation of various, but unnamed, financial and business reports, projections, and statements; (2) would require the

beneficiary to ensure compliance with "all legal and regulatory requirements"; (3) would require her to "analyze the financial details" of the petitioner's operations; and (4) would make her responsible for coordinating and directing the petitioner's financial planning and budgeting activities. However, the AAO's review of the entire record of proceeding surfaced no substantive information, no work products, and no documentation that convey the substantive nature and complexity of any of the reports, monitoring responsibilities, coordinating and directing responsibilities, legal and regulatory compliance measures, financial and budgetary concerns, or other matters that the petitioner asserts as part of the proffered position's responsibilities. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

IV. The Proffered Position and Its Constituent Duties

As will be seen, our comments and findings here dovetail, and should be considered, with our earlier comments and findings with regard to the minimal level of information that the record of proceeding provides about the petitioner, its particular operations, and whatever financial-management requirements they would actually generate for the beneficiary.

The petitioner assigned the job title "Deputy Controller" to the proffered position. On the Form I-129, the petitioner attested that the beneficiary would be employed on a part-time basis, for "20-25" hours per week, at a wage of \$850 per week. As noted above, the petitioner submitted an LCA certified for a job offer falling within the "Financial Managers" occupational category, at a Level I (entry-level) prevailing wage rate.

The petitioner's May 2, 2012 letter of support described the duties of the proffered position as follows:

As a Deputy Controller with [the petitioner], [the beneficiary] will be involved in the preparation of financial statements, business activity reports, financial position forecasts, annual budgets, and/or reports required by regulatory agencies. She will analyze and prepare written reports and will monitor the company's financials to ensure that all legal and regulatory requirements are met. She will analyze the financial details of past, present, and expected operations in order to identify development opportunities and areas where improvement is needed. She will develop and maintain relationships with banking, insurance, and non-organizational personnel in order to facilitate financial activities. She will coordinate and direct the financial planning and budgeting activities of the company. She will receive cash and checks, and deposit funds. She will compute, withhold, and account for payroll deductions. She will prepare financial information so that outside accountants can complete tax returns.

The director's September 13, 2012 RFE requested, among other items, a more detailed job description, along with the percentages of time to be devoted to each of the duties. The petitioner's November 30, 2012 letter responding to the RFE replied that "[t]he duties for the deputy controller position include the following":

- 1.) Prepare financial reports and statements, including income statements, business activity reports, financial position forecasts, balance sheets, and annual budgets. Analyze future earnings or expenses and summarize [the] company's financial position and ensure that all matters are properly addressed. *Percentage of time: 10%*
- 2.) Oversee accounts receivables and accounts payables. Ensure that all invoices are paid in a timely manner. Receive cash and checks and deposit funds. Bill clients appropriately and ensure that all amounts due to the company are received and credited appropriately. Provide follow up for past due amounts due from clients. *Percentage of time: 10%*
- 3.) Monitor [the] company's financials to ensure that all legal and regulatory requirements are met. Provide accurate summaries of information. Ensure necessary paperwork is completed accurately. Correspond with outside individuals. *Percentage of time: 10%*
- 4.) Analyze and prepare written reports. Make progress reports and measure actual against estimated costs, maintain appropriate records, and related data. Monitor financial activities and details such as reserve account levels to ensure that all have sufficient amounts. Review company's assets to ensure accurate recordkeeping. *Percentage of time: 10%*
- 5.) Analyze financial details of past, present, and expected operations in order to identify patterns and opportunities for areas where improvement may be needed. *Percentage of time: 10%*
- 6.) Coordinate and direct financial planning and budgeting activities of the company. Analyze company figures to ensure proper measures are undertaken. *Percentage of time: 10%*
- 7.) Develop and maintain relationships with banking, insurance, government and non-organizational personnel in order to facilitate financial activities. Ensure that all insurance coverage premiums are properly paid and adequate liability levels are maintained at all times. Ensure all paperwork is properly completed and timely submitted to relevant parties. *Percentage of time: 10%*
- 8.) Oversee computation, withholdings and accounts for payroll deductions. Assist with payroll duties such as employee pay, quarterly employee tax payments to the government, and related matters. *Percentage of time: 10%*
- 9.) Prepare financial information for outside accountants completing company tax returns. Maintain proper records of all information provided to outside agencies, accountants, and any other third parties. Ensure accuracy of all filings. Assist in [the] preparation of [the] company's response to requests,

including IRS, California Franchise Tax Board, Workman's Compensation and other agencies. Oversee matters pertaining to workman's compensation and State Fund. *Percentage of time: 20%*

The RFE-response letter continued:

Please note that the proffered position oversees all activities of the petitioner's finance department and provides overall financial management services for the petitioner. The petitioner has been experiencing increasing growth and has recently opened up a new office in [REDACTED] of the San Francisco Bay Area. The proffered position will oversee the work conducted by the marketing and human resource departments in that the deputy controller needs to establish an annual budget for the marketing department to engage in successful advertising, promotions, website development and maintenance, and organization and participation in relevant trade shows, to successfully increase future profitability and growth. The deputy controller must make accurate predictions for the amounts to be spent on such activities in order to get maximum results from the funds allocated, through an accurate analysis of the company's finances, past successes, and future development and growth plans. The proffered position oversees the work of the human resources department as any changes in legal and regulatory requirements or benefits must be monitored and incorporated into the weekly payroll. Further, any changes in employees' personal records such as banking information, change[s] of address, marital status, and other information is accurately reported to and maintained by the deputy controller and passed onto the relevant agencies for government filings. Further, the position requires that sensitive information be securely maintained and recorded at all times to protect confidential information about the company, its employees, clients and outside agencies.

The petitioner's August 5, 2013 letter for consideration during the reopened proceeding repeated many of the earlier assertions regarding the proffered position and added the following:

The proffered position will oversee the work conducted by the marketing and human resource departments in that the deputy controller needs to establish an annual budget for the marketing department to engage in successful advertising, promotions, website development and maintenance, and organization and participation in relevant trade shows, to successfully increase future profitability and growth. Please note that the beneficiary's work will include oversight of human resources and marketing functions only so far as it pertains to budgeting and financial management, which will total less than 5% of her time. She will not actually perform marketing or human resources functions herself. The deputy controller must make accurate predictions for the amounts to be spent on such activities in order to get maximum results from the funds allocated, through an accurate analysis of the company's finances, past successes, and future development and growth plan. The proffered position works closely with human resources because any changes in legal and regulatory requirements or benefits must be monitored and incorporated into the weekly payroll. . . .

* * *

The Deputy Controller position is highly specialized and is a very important position for [the] petitioner's company, in fact, it is essential for its continued successful business operations.

* * *

[The petitioner has] complex financial records that require monitoring, preparing, analyzing, and reporting by an individual possessing the knowledge acquired with a degree in finance. A person without a bachelor's degree in finance or a closely related field would have no idea how to accurately complete the necessary paperwork that is required for government filings or to prepare financial statements, reports, or forecasts or how to properly monitor and successfully steer the financial activities of the organization. . . .

It is precisely because of the sensitive nature of the services we provide to individuals who are unable to care for themselves and the numerous governmental regulatory and compliance requirements that we are subject to that we require a person with a bachelor's degree in finance or a related field to work with our organization.

The AAO finds that, as reflected in the documents quoted immediately above – and consonant with this decision's earlier comments and findings with regard to the generalized nature of the record's information about the petitioner's actual operations – the petitioner has not provided any substantial descriptions or documentary evidence regarding either the substantive nature of the work that the beneficiary would perform or whatever practical and theoretical applications of highly specialized knowledge that the beneficiary would have to employ from any specific specialty.

Rather, the petitioner's submissions present the proffered position and its constituent duties exclusively in terms of general functions – such as, for instance, "[p]repar[ing] financial reports and statements, including income statements, business activity reports, financial position forecasts, balance sheets, and annual budgets"; "provid[ing] overall financial management services" for the petitioner; performing "accurate analysis of the company's finances, past successes, and future development and growth plans"; and [c]oordinat[ing] and direct[ing] financial planning and budgeting activities of the company" – and the petitioner does not supplement those broad descriptions with any specific statements or documentary evidence that would substantiate what in fact the actual performance of such broadly described functions would involve in terms of the actual day-to-day work that the beneficiary would perform under an approved petition.

In the above regard, we particularly note the absence of any information in the record about the particular types, nature, and corresponding levels of complexity of any the "financial reports and statements . . . income statements, business activity reports, financial position forecasts, balance sheets, and annual budgets" which the petitioner would have the beneficiary prepare. Further, the AAO lacks any basis for administrative notice that the complexity and preparation requirements are standard for such broadly defined products regardless of a business entity's particular type, organizational structure,

range of operations, and associated financial matters.³ In short, the evidence of record fails to convey the substantive nature – and, thus also, the educational requirements – of the actual work that the proffered position and its constituent duties would actually require.

Additionally, and as further discussed *infra*, the AAO finds that the evidence of record does not describe either the proffered position or its constituent duties with sufficient detail to establish whatever relative level of specialization, complexity, and/or uniqueness may reside in them. Given its lack of substantive evidence regarding the nature of the specific matters that would engage the beneficiary and the substantive nature of the specific work that such matters would generate for the beneficiary, the record of proceeding does not develop either the proposed duties or the proffered position in terms of relative complexity, specialization, and/or uniqueness, as would be required to satisfy either the second alternative prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Put another way, to the extent that they are developed in the record of proceeding, neither the proffered position nor its constituent duties indicate that they are more complex, specialized, and/or unique than other financial manager or controller positions that do not require at least a bachelor's degree in a specific specialty or its equivalent.

That said, it is acknowledged that While the petitioner stated in its August 5, 2013 letter that it has "complex financial records that require monitoring, preparing, analyzing, and reporting by an individual possessing the knowledge acquired with a degree in finance," and claimed further that "[a] person without a bachelor's degree in finance or a closely related field would have no idea how to accurately complete the necessary paperwork that is required for government filings or to prepare financial statements, reports, or forecasts." The record of proceeding as currently constituted, however, lacks evidence to substantiate those claims.

As already noted, the record lacks substantial evidence regarding the types of financial records and reports and other matters that would engage the beneficiary, and the evidence that the petitioner does submit in this regard does not support its assertions with regard to the minimum level of education required to perform the duties of the position. The evidence submitted by the petitioner in this regard, which consists of two documents entitled "Employee Roster" that appear to have been submitted to the city of San Francisco, is acknowledged. However, the evidence of record does not explain how producing these documents, which appear to be lists of the petitioner's employees, their addresses, and their telephone numbers requires a bachelor's degree in a specific specialty, or the equivalent.

Furthermore, the petitioner claimed in that same August 5, 2013 letter that "[a]t the current time, the job duties of the position are performed by the owners of the organization." If the petitioner's claim that "[a] person without a bachelor's degree in finance or a closely related field would have no idea how to accurately complete the necessary paperwork that is required for government filings or to

³ For instance, as will be related in this decision's later discussion of bookkeeping, auditing, and auditing clerks with less than a bachelor's degree, the duties of such positions typically include the production of reports such as balance sheets, income statements, profit and loss reports, and financial statements and other reports for supervisors and managers.

prepare financial statements, reports, or forecasts," then it follows that the owners of the organization who are currently performing these duties should each possess a bachelor's degree in finance or a closely related field. If they do not, then the petitioner's claim is not accurate. The record, however, contains no evidence regarding the educational credentials of the petitioner's owners.

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. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

V. Additional Preliminary Findings

Before analyzing the evidence of record under the pertinent statutory and regulatory framework related to the specialty occupation basis for denial identified by the director, we will first enter some additional findings that will have a material bearing upon that analysis.

Implications of the submission of an LCA certified for Level I wage-level position

As noted earlier, the petitioner submitted an LCA in support of the petition that had been certified for use with a job prospect within the "Financial Managers" occupational classification, SOC (O*NET/OES) Code 11-3031, and at a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.⁴ The *Prevailing Wage Determination Policy Guidance*⁵ issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

⁴ 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."

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) also makes clear that certification of an LCA does not constitute a determination that a position qualifies for classification as 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.

⁵ Available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last visited January 7, 2014).

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

This aspect of the LCA further undermines the credibility of the petition, and, in particular, the credibility of the assertions regarding the proffered position's level of responsibility within the petitioner's hierarchy. 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).

Failure to substantiate that the petitioner actually has a finance department

In her May 14, 2013 RFE, the director stated that the evidence of record did not indicate that the petitioner has "a specific component such as a finance department within [its] organization." In its August 5, 2013 letter, the petitioner attempted to refute that finding by asserting that "[o]ur organization does indeed have a finance department." However, the evidence of record does not support the petitioner's claims (1) that it has a finance department, and (2) that the beneficiary's duties would involve work generated by that department.

The organization chart attached to the petitioner's August 5, 2013 letter identifies one "Managing Member" of its [redacted] office, and one "Managing Member" of its [redacted] office. The

beneficiary would be subordinate to both individuals. The organization chart then names [REDACTED] as a "Scheduler" and two vacant positions entitled "Marketing" and "Human Resources." The chart makes no reference to a finance department. Therefore, not only does the organization chart not support the petitioner's claim regarding the existence of a finance department, but it affirmatively undermines that claim; and the record contains no other evidence supporting the petitioner's claim of a finance department. 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.

Claims regarding the petitioner's growth

The petitioner described the growth it is experiencing in its business operations in its November 30, 2012 and August 5, 2013 letters. In its November 30, 2012 letter, which was submitted in response to the director's September 13, 2012 RFE, the petitioner stated the following:

The petitioner has been experiencing increasing growth and has recently opened up a new office in [REDACTED] of the San Francisco Bay Area.

The petitioner referenced this growth again in its August 5, 2013 letter and linked its need for the services of the beneficiary, as well as the purported complexity of the position she would occupy, to such growth:

We have recently experienced rapid growth[,] and we recently opened a new location in [REDACTED] of the San Francisco Bay Area. Due to our expansion and growth, we require a knowledgeable individual with a background in finance to perform the duties of the position.

Counsel reiterates these assertions by the petitioner in his November 20, 2013 brief.

Thus, the petitioner presents itself as a successful and growing 45-employee homecare services provider and it contends, in part, that this growth elevates the position such that its duties can only be performed by a degreed individual. However, the evidence of record is not sufficient to establish either assertion.

First, the record lacks substantial evidence to support the petitioner's claims with regard to its "increasing growth," its "rapid growth," or its assertion that it has recently expanded to previously unserved locations. 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.

Nor does the record contain evidence explaining with any degree of specificity how this claimed growth would affect the duties proposed for the beneficiary. For example, the "Employee Roster" documents discussed above, which were submitted as representative examples of the types of documents that the beneficiary would prepare, are not sufficient in this regard because the evidence of record does not explain: (1) how the petitioner's claimed growth necessitated the production of

these documents; or (2) how producing these documents which, again, appear to be lists of the petitioner's employees, their addresses, and their telephone numbers, requires a bachelor's degree in a specific specialty, or the equivalent. Thus, even if the evidence of record did demonstrate the growth claimed by the petitioner, the AAO would still find that this evidence does not establish how, if at all, such growth would impact upon the performance requirements of the proffered position.

Accordingly, the AAO see no probative value in the assertions regarding the petitioner's growth, in light of the lack of substantive evidence of the extent of the asserted growth and, more fundamentally, how exactly the asserted growth bears upon the substantive work and associated knowledge requirements of the proffered position.

VI. Specialty Occupation: The Statutory and Regulatory Framework

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.

VII. Specialty Occupation: Analysis

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. As we proceed, the petitioner should regard this decision's earlier comments and findings as incorporated into the following analysis of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.⁶ We find that two sections of the *Handbook* are directly relevant to this proceeding, namely, (1) the chapter on the Financial Managers occupational category, and (2) the chapter on "Bookkeeping, Accounting, and Auditing Clerks."

As already noted, the LCA submitted in support of this petition had been certified for a job offer falling within the "Financial Managers" occupational category, and counsel cites to the *Handbook's* entry for that occupational category throughout the petition.

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

Financial managers are responsible for the financial health of an organization. They produce financial reports, direct investment activities, and develop strategies and plans for the long-term financial goals of their organization.

Duties

Financial managers typically do the following:

- Prepare financial statements, business activity reports, and forecasts
- Monitor financial details to ensure that legal requirements are met

⁶ 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 2012-13 edition available online.

- Supervise employees who do financial reporting and budgeting
- Review company financial reports and seek ways to reduce costs
- Analyze market trends to find opportunities for expansion or for acquiring other companies
- Help management make financial decisions

The role of the financial manager, particularly in business, is changing in response to technological advances that have significantly reduced the amount of time it takes to produce financial reports. Financial managers' main responsibility used to be monitoring a company's finances, but they now do more data analysis and advise senior managers on ideas to maximize profits. They often work on teams, acting as business advisors to top executives.

Financial managers also do tasks that are specific to their organization or industry. For example, government financial managers must be experts on government appropriations and budgeting processes, and healthcare financial managers must know about issues in healthcare finance. Moreover, financial managers must be aware of special tax laws and regulations that affect their industry. For more information on chief financial officers, see the profile on top executives.

The following are examples of types of financial managers:

Controllers direct the preparation of financial reports that summarize and forecast the organization's financial position, such as income statements, balance sheets, and analyses of future earnings or expenses.⁷ Controllers also are in charge of preparing special reports required by governmental agencies that regulate businesses. Often, controllers oversee the accounting, audit, and budget departments.

Treasurers and **finance officers** direct their organization's budgets to meet its financial goals. They oversee the investment of funds. They carry out strategies to raise capital (such as issuing stocks or bonds) to support the firm's expansion. They also develop financial plans for mergers (two companies joining together) and acquisitions (one company buying another).

Credit managers oversee the firm's credit business. They set credit-rating criteria, determine credit ceilings, and monitor the collections of past-due accounts.

⁷ The AAO notes here that, according to the *Handbook*, controllers *direct* the preparation of income statements, balance sheets, and related materials. They do not prepare such materials themselves. As will be discussed below, those are the duties of bookkeeping, accounting, and auditing clerks.

Cash managers monitor and control the flow of cash that comes in and goes out of the company to meet the company's business and investment needs. For example, they must project cash flow (amounts coming in and going out) to determine whether the company will not have enough cash and will need a loan or will have more cash than needed and so can invest some of its money.

Risk managers control financial risk by using hedging and other strategies to limit or offset the probability of a financial loss or a company's exposure to financial uncertainty. Among the risks they try to limit are those due to currency or commodity price changes.

Insurance managers decide how best to limit a company's losses by obtaining insurance against risks such as the need to make disability payments for an employee who gets hurt on the job and costs imposed by a lawsuit against the company.⁸

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Financial Managers," <http://www.bls.gov/ooh/Management/Financial-managers.htm#tab-2> (last visited January 7, 2014).

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

Financial managers must usually have a bachelor's degree and more than 5 years of experience in another business or financial occupation, such as loan officer, accountant, auditor, securities sales agent, or financial analyst.

Education

A bachelor's degree in finance, accounting, economics, or business administration is often the minimum education needed for financial managers. However, many employers now seek candidates with a master's degree, preferably in business administration, finance, or economics. These academic programs help students develop analytical skills and learn financial analysis methods and software.

Id. at <http://www.bls.gov/ooh/Management/Financial-managers.htm#tab-2> (last visited January 7, 2014).

Despite counsel's assertions otherwise, this *Handbook* information is not sufficient to establish the proffered position as a specialty occupation.

According to the *Handbook*, a bachelor's degree in business administration is often a sufficient

⁸ Even if it were stated as being a standard, minimum entry requirement, the *Handbook* does not address and therefore stops short of opining whether a general degree combined with five years of related experience would be equivalent to a bachelor's degree in a specific specialty.

minimum requirement for entry into the proffered position. 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 147.⁹ Accordingly, the recognition of a bachelor's degree in business, without specification of a particular academic concentration within that general field, as sufficient for entry into a position is tantamount to an admission that the position is not in fact a specialty occupation.

For all of these reasons, the *Handbook* is not sufficient to establish that the particular duties proposed for the beneficiary which fall within the Financial Managers occupational category constitute a specialty occupation. Having made that determination, the AAO will turn next to duties proposed for the beneficiary which do not fall within the Financial Managers occupational category.

⁹ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

Id.

The director made a similar finding in her certification decision with regard to the *Handbook's* indication that a bachelor's degree would provide an adequate preparation for the proffered position. In his November 20, 2013 brief, counsel attempts to rebut this finding by describing a bachelor's degree in business administration as a "specific specialt[y]." However, as indicated by the *Royal Siam* and *Matter of Michael Hertz Associates* decisions, business administration without more is *not* a specific specialty, and because counsel provides no authority for his claim to the contrary, his assertion will not be further addressed.

The AAO finds that as broadly described in this record of proceeding many of the proffered position's duties more likely fall within the "Bookkeeping, Accounting, and Auditing Clerks" occupational category, including in particular the beneficiary's proposed duties of preparing financial statements, income statements, and balance sheets. Further, we specifically find that the proposed duties of working with accounts payable and receivable;¹⁰ ensuring that invoices are paid in a timely fashion; receiving cash and checks; depositing funds; billing clients; ensuring that amounts due are received and credited; following up on past due amounts; analyzing and preparing written reports on financial activities; assisting with payroll duties; and preparing financial information for outside accountants more clearly fall within the scope of bookkeeping, accounting, and auditing clerks.¹¹

As discussed in the *Handbook*, bookkeeping, auditing, and auditing clerks do not comprise an occupational category that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. The *Handbook* states the following with regard to this occupational category:

Bookkeeping, accounting, and auditing clerks produce financial records for organizations. They record financial transactions, update statements, and check financial records for accuracy.

Duties

Bookkeeping, accounting, and auditing clerks typically do the following:

- Use bookkeeping software as well as online spreadsheets and databases
- Enter (post) financial transactions into the appropriate computer software
- Receive and record cash, checks, and vouchers
- Put costs (debits) as well as income (credits) into the software, assigning each to an appropriate account

¹⁰ Although the petitioner stated that the beneficiary would "oversee" accounts payable and accounts receivable, the record does not indicate who, other than the beneficiary, would perform any work on such matters that would be "overseen."

¹¹ The petitioner's descriptions of the proposed duties indicate that the beneficiary would spend approximately fifty percent of her time performing such duties, when combined with beneficiary's preparation of financial statements, income statements, and balance sheets (the complexity of which is nowhere established in the record.)

- Produce reports, such as balance sheets (costs compared to income), income statements, and totals by account
- Check figures, postings, and reports for accuracy
- Reconcile or note and report any differences they find in the records

The records that bookkeeping, accounting, and auditing clerks work with include expenditures (money spent), receipts (money that comes in), accounts payable (bills to be paid), accounts receivable (invoices, or what other people owe the organization), and profit and loss (a report that shows the organization's financial health).

Workers in this occupation have a wide range of tasks. Some in this occupation are full-charge bookkeeping clerks who maintain an entire organization's books. Others are accounting clerks who handle specific tasks.

These clerks use basic mathematics (adding, subtracting) throughout the day.

As organizations continue to computerize their financial records, many bookkeeping, accounting, and auditing clerks use specialized accounting software, spreadsheets, and databases. Most clerks now enter information from receipts or bills into computers, and the information is then stored electronically. They must be comfortable using computers to record and calculate data.

The widespread use of computers also has enabled bookkeeping, accounting, and auditing clerks to take on additional responsibilities, such as payroll, billing, purchasing (buying), and keeping track of overdue bills. Many of these functions require clerks to communicate with clients.

Bookkeeping clerks, also known as **bookkeepers**, often are responsible for some or all of an organization's accounts, known as the general ledger. They record all transactions and post debits (costs) and credits (income).

They also produce financial statements and other reports for supervisors and managers. Bookkeepers prepare bank deposits by compiling data from cashiers, verifying receipts, and sending cash, checks, or other forms of payment to the bank.

In addition, they may handle payroll, make purchases, prepare invoices, and keep track of overdue accounts.

Accounting clerks typically work for larger companies and have more specialized tasks. Their titles, such as accounts payable clerk or accounts receivable clerk, often reflect the type of accounting they do.

Often, their responsibilities vary by level of experience. Entry-level accounting clerks may enter (post) details of transactions (including date, type, and amount), add up accounts, and determine interest charges. They also may monitor loans and accounts to ensure that payments are up to date.

More advanced accounting clerks may add up and balance billing vouchers, ensure that account data is complete and accurate, and code documents according to an organization's procedures.

Auditing clerks check figures, postings, and documents to ensure that they are mathematically accurate and properly coded. They also correct or note errors for accountants or other workers to fix.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Bookkeeping, Accounting, and Auditing Clerks," <http://www.bls.gov/ooh/office-and-administrative-support/bookkeeping-accounting-and-auditing-clerks.htm#tab-2> (last visited January 7, 2014).

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

Most bookkeeping, accounting, and auditing clerks need a high school diploma. However, some employers prefer candidates who have some postsecondary education, particularly coursework in accounting. In 2009, 25 percent of these workers had an associate's or higher degree.

Id. at <http://www.bls.gov/ooh/office-and-administrative-support/bookkeeping-accounting-and-auditing-clerks.htm#tab-4> (last visited January 7, 2014).

These statements do not support a conclusion that a bachelor's degree in a specific specialty, or its equivalent, is normally required for employment as a bookkeeping, accounting, or auditing clerk.

In summary, approximately half of the duties proposed for the beneficiary appear to fall within the "Financial Managers" occupational category – the one for which the LCA was certified. The AAO has also addressed the "Bookkeeping, Accounting, and Auditing Clerks" occupational category, because the petitioner ascribed to the proffered position a significant amount of work that persons in those categories may perform. In any event, however, the pertinent information in the *Handbook* does not indicate that a particular position's inclusion within either occupational category establishes that, in the words of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position."¹²

¹² It is noted that, where a petitioner seeks to employ a beneficiary in two distinct occupations, the petitioner should file two separate petitions, requesting concurrent, part-time employment for each occupation. While it is not the case here, if a petitioner does not file two separate petitions and if only one aspect of a combined

The alternative authoritative source cited by counsel – DOL's Occupational Information Network (O*NET OnLine) – also 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). 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. For all of these reasons, the O*NET OnLine excerpt cited by counsel is of little evidentiary value to the issue presented on appeal.

Where, as here, the *Handbook* does not support the proposition that this particular 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)(1), 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 these two occupational categories would be sufficient in and of itself to establish that a

position qualifies as a specialty occupation, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. See generally 8 C.F.R. § 214.2(h). Furthermore and as is the case here, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation and the payment of wages commensurate with the higher paying occupation. See generally 8 C.F.R. § 214.2(h); U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. Thus, filing separate petitions would help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion with regard to the proper classification of the position being offered.

bachelor's or higher degree in a specific specialty or its equivalent "is normally the minimum requirement for entry into [this] particular position," as is required to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

In addition to the fact that the record contains no information from an authoritative source establishing that performance of the duties of the proffered position requires at least a bachelor's degree in a specific specialty, or the equivalent, the petitioner's own statements establish further that such is not the case. In its November 30, 2012 letter, the petitioner stated the following (emphasis added):

The duties of the position are so complex and specialized that it would be impossible for anyone to perform the duties of the position without having knowledge and skills only obtained through completion of a bachelor's-level education in a relevant field related to the position, such as finance, *business administration*, or economics[.]

As indicated above, the statement that a range of degrees, including a general-purpose bachelor's degree – i.e., a bachelor's degree in business administration – would adequately prepare an individual to perform the duties of this particular position is tantamount to an admission that the proffered position is not in fact a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

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.

As evidence of an industry recruiting and hiring standard, the petitioner submitted a November 21, 2012 letter from Ms. [REDACTED] of [REDACTED] Ms. [REDACTED] states the following:

This is to confirm that we have an employee who performs the same duties as the proposed duties listed in [the beneficiary's] application as Deputy Controller.

We only hire people with a Bachelor's degree in Finance or Accounting for this position.

Ms. [REDACTED] letter is not probative evidence on this first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

First, Ms. [REDACTED] indicates that they only hire individuals with such degrees for this position, which may just be a preference and not a requirement. Second, the petitioner has not submitted any evidence to demonstrate that the position to which Ms. [REDACTED] refers is "parallel" to the position that is the subject of this petition. Nor does the record contain any evidence demonstrating that the petitioner is "similar" to [REDACTED] in size, scope, and scale of operations, business efforts, expenditures, or any other fundamental dimensions. Nor does the record contain any evidence to support Ms. [REDACTED] assertions. Specifically, the record contains no evidence (1) that her organization actually employs the claimed individual, (2) that the claimed controller possesses the claimed credential, or (3) that her organization has employed such degreed individuals in the past for the position. As stated previously, 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 any event, Ms. [REDACTED] refers only to the practices of her particular company and not to the requirements of the home-care-agency industry in general. Further, neither Ms. [REDACTED] letter nor any other evidence in the record of proceeding establishes that the practices that Ms. [REDACTED] ascribes to her company represent a common recruiting and hiring requirement in the petitioner's industry for positions that are parallel to the proffered position and within organizations that are similar to the petitioner.

Nor is the record's group of 22 job-vacancy announcements probative evidence towards satisfying the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

First, the AAO discounts the vast majority of the 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 requirements of 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."

In the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement, at Part A, section 6, the petitioner specifies its North American Industry Classification System (NAICS) Code as "621610," which refers to the Home Health Care Services Industry. The U.S. Census Bureau's online glossary includes following definition of 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, state, and local governments, the business community, and the general public have used since the 1930s.

U.S. Census Bureau, U.S. Department of Commerce, Glossary, "North American Classification System," Census Bureau Glossary, available on the Internet at http://www.census.gov/glossary/#term_NorthAmericanIndustryClassificationSystemNAICS (last visited January 9, 2014).

The system's latest version – the 2012 NAICS - defines the industry code that the petitioner specified on the Form I-129 as follows:

621610 Home Health Care Services

This industry comprises establishments primarily engaged in providing skilled nursing services in the home, along with a range of the following: personal care services; homemaker and companion services; physical therapy; medical social services; medications; medical equipment and supplies; counseling; 24-hour home care; occupation and vocational therapy; dietary and nutritional services; speech therapy; audiology; and high-tech care, such as intravenous therapy.

Illustrative Examples:

Home health care agencies
Visiting nurse associations
In-home hospice care services

Cross-References.

- In-home health services provided by establishments of health practitioners and others primarily engaged in the independent practice of their profession are classified in Industry 62111, Offices of Physicians; Industry 621210, Offices of Dentists; Industry Group 6213, Offices of Other Health Practitioners; and U.S. Industry 621999, All Other Miscellaneous Ambulatory Health Care Services; and
- Establishments primarily engaged in renting or leasing products for home health care are classified in U.S. Industry 532291, Home Health Equipment Rental.

U.S. Census Bureau, U.S. Department of Commerce, Search for NAICS Code 62160, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited January 14, 2014).

For instance, we derive the following information about the advertising employers from the content of the related job-vacancy announcements: (1) [REDACTED] is a luxury residential rehabilitation treatment center; (2) the [REDACTED] is a nonprofit organization focused on substance abuse; (3) the [REDACTED] is a nonprofit youth empowerment organization; (4) [REDACTED] is a media company; (5) [REDACTED] is a medical services provider – but not a home health care service; (6) [REDACTED] is a healthcare technology company; (7) the [REDACTED] is an educational organization; (8) [REDACTED] is a staffing firm; (9) [REDACTED] provides finance, accounting, and human resources services; and (10) [REDACTED] is a mining company.

The advertisements further indicate that the [REDACTED] and the unnamed company located in [REDACTED] California are real estate investment firms. The unnamed company located in [REDACTED] California is an ice cream distributor. The record contains no information regarding the business activities of the unnamed company located in [REDACTED] California, the unnamed company with locations in [REDACTED] California, the unnamed company located in the [REDACTED] or the unnamed company located in [REDACTED] Virginia.

Again, as 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 not relevant to its application.

Second, the evidence of record does not demonstrate that any of these 22 advertisements are from companies "similar" to the petitioner. As noted above, the petitioner described itself on the Form I-129 as a 45-employee provider of homecare services. While the advertisements indicate that the advertisers may operate in the same general business arena as the petitioner, the petitioner has not submitted any documentary evidence to establish that either [REDACTED]

[REDACTED] are "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 22 announcements, other than the announcements themselves. 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. For example, the AAO notes that work experience is required for 20 of these 22 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 – many of which specify substantially higher pay than the petitioner here offers. Furthermore, as it appears that up to half of the duties to be performed would be those of a bookkeeping, accounting, and auditing clerk, the advertisements would have to be for positions which include a similar percentage of such duties to be considered parallel to the position proffered here. Accordingly, the evidence of record fails to establish that the positions described in these announcements are "parallel" to the one being proffered in this matter.

Counsel's statement that the "[p]etitioner could not find any other companies that are identical to it in terms of size, services provided and annual revenues" is acknowledged. This prong's language, however, requires evidence regarding "similar" – not "identical" organizations.

In any event, the aggregate of the job-vacancy advertisements do not reflect a common requirement of at least a bachelor's degree in a specific specialty. For example, the job-vacancy announcements placed by [REDACTED] indicate that a bachelor's degree in any field of study would suffice. The job-vacancy announcements placed by the [REDACTED] and the [REDACTED] indicate that a general-purpose bachelor's degree, such as a bachelor's degree in business or business administration, would adequately prepare an individual to perform the duties of those positions. Finally, [REDACTED] and the unnamed real estate investment firm located in [REDACTED] California do not specify a requirement for a degree.

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."

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 "Financial Managers" or "Bookkeeping, Accounting, and Auditing Clerks" occupational categories, 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 occupations.

The statements of counsel and the petitioner with regard to the claimed complex and unique nature of the proffered position are acknowledged. However, the evidentiary deficiencies of those claims, which involved unsupported assertions regarding the petitioner's claimed growth, the complexity of its financial records, and the beneficiary's supervision of subordinate employees in the petitioner's claimed finance department, were discussed above. Further, those unsupported 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.

We also note 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. The petitioner has offered the beneficiary a wage of \$42.50 per hour, which satisfied the Level I prevailing wage for a financial manager in the pertinent geographical area¹³ at the time the LCA was certified, which was \$42.19 per hour. U.S. Dep't of Labor, Foreign Labor

¹³ That is, the San-Francisco-San Mateo-Redwood City, California Metropolitan Area.

Certification Data Center, Online Wage Library, FLC Quick Search, "Financial Managers," accessible on the Internet at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=11-3031&area=41884&year=12&source=1>. 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 \$58.48 per hour. The Level III (experienced) prevailing wage was \$74.77 per hour, and the Level IV (fully competent) prevailing wage was \$91.06 per hour. *Id.*

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'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.¹⁴

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* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

¹⁴ 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.

In the present case, while the petitioner asserts a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree in a specific specialty or its equivalent, the evidence of record does not support the contention.

The September 13, 2012 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.
- 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.

The petitioner responded as follows in the related section of its November 30, 2012 letter replying to the RFE:

Past Employment Practices:

In the past the petitioner has always hired only individuals with at least a bachelor's degree to perform the duties of the proffered position. The duties of the position are so complex and specialized that it would be impossible for anyone to successfully perform the duties of the position without having knowledge and skills only obtained through completion of a bachelor's-level education in a relevant field related to the position, such as finance, business administration, or economics; or have the equivalent in professional experience.

Although USCIS provided the petitioner an additional opportunity to substantiate the claimed recruiting and hiring history, the petitioner provided no documentary evidence to support its assertions. Accordingly, we find that these unsupported assertions merit little to no evidentiary weight. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Additionally, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof as unsupported assertions of counsel do not constitute evidence. *Matter of*

Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO notes yet another inconsistency in the record of proceeding which undermines the credibility of this petition. In contrast with the aforementioned statement by the petitioner with regard to a history of hiring for the position, on appeal counsel indicated that the petitioner has never before filled or hired someone for the position described in this petition, as counsel stated the following (emphasis added):

The company recently experienced rapid growth . . . they *now* require a knowledgeable individual with a bachelor's degree in finance or a related field to perform the [proposed] duties[.]¹⁵

Regardless, the record contains no evidence regarding any previous hires for the proffered position. While a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, a petitioner that has never employed someone in the proffered position, or that provides no documentary evidence of such a history, cannot satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that the petitioner 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 also 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 "Financial Managers" or "Bookkeeping, Accounting, and Auditing Clerks" occupational categories. 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. On the contrary, it indicates precisely the opposite for entry-level positions, and the record indicates no factors, such as supervisory responsibilities or higher-level duties, that may elevate them above those discussed in

¹⁵ Again, 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. at 591-92.

the *Handbook*.¹⁶ 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.

The AAO also reiterates its earlier discussion regarding the claimed specialized and complex nature of the duties of the proffered position. Again, the evidentiary deficiencies of those claims, which involved unsupported assertions regarding the petitioner's claimed growth, the complexity of its financial records, and the beneficiary's supervision of subordinate employees in the petitioner's claimed finance department, were discussed above.

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.

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

¹⁶ For instance, the petitioner does not indicate that any subordinate employees would report to the beneficiary or relieve her from having to perform any non-qualifying bookkeeping, accounting, or auditing clerk duties, such as those necessary to administer and produce the petitioner's financial records.

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 recommending denial of the petition will be affirmed.

VIII. Beneficiary Qualifications

As noted at the outset of this discussion, the AAO also finds, beyond the decision of the director, that the evidence of record fails to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation. Thus, even if the petitioner had overcome the director's recommended ground for denying the petition, which it did not, the petition still could not be approved because the evidence of record does not demonstrate the beneficiary's qualifications to perform the duties of a specialty occupation.

The statutory and regulatory framework that the AAO must apply in its consideration of the evidence of the beneficiary's qualifications to serve in a specialty occupation follows below.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C)
 - (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In addition, 8 C.F.R. § 214.2(h)(4)(v)(A) states the following:

General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the evidence of record must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the evidence of record must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

As the beneficiary did not earn a baccalaureate or higher degree from an accredited college or university in the United States, she does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(1).

In order to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), the record of proceeding must demonstrate that the beneficiary possesses a foreign degree that has been determined to be equivalent to a baccalaureate or higher degree from an accredited college or university in the United States. As

evidence of eligibility under this criterion, the record contains an evaluation of the beneficiary's foreign education prepared by the [REDACTED] on April 5, 2012. Based upon her review of the beneficiary's diploma and academic record listing the beneficiary's coursework and grades received, the [REDACTED] evaluator found the beneficiary's education equivalent to a bachelor's degree in finance awarded by a regionally accredited college or university in the United States.

However, while the record contains a copy and translation of the beneficiary's diploma, a copy of the academic record was not submitted. Without a copy of the academic record upon which the [REDACTED] evaluator based her findings and ultimate conclusion with regard to the beneficiary's educational credentials, the [REDACTED] evaluator has not established, and the AAO cannot assess, the accuracy and reliability of the [REDACTED] evaluation, or even the source, and adequacy, of the academic record upon which the [REDACTED] evaluator based her evaluation. 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. The AAO may, in its discretion, use an evaluation of a person's foreign education as an advisory opinion. However, where an opinion is not in accord with other information or is in any way questionable, the AAO may discount or give less weight to that evaluation. *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988).

Furthermore, absent copies of the documents upon which the [REDACTED] evaluator relied upon in reaching her determination, the evidence of record fails to satisfy the documentary requirements for H-1B classification at 8 C.F.R. § 214.2(h)(4)(iv)(A)(I), and consequently also fails to satisfy the requirement at 8 C.F.R. § 103.2(b)(1), requiring the petitioner to submit all required evidence at the time of filing.

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

General documentary requirements for H-1B classification in a specialty occupation. An H-1B petition involving a specialty occupation shall be accompanied by:

- (A) Documentation, certifications, affidavits, declarations, degrees, diplomas, writings, reviews, or any other required evidence sufficient to establish that the beneficiary is qualified to perform services in a specialty occupation as described in paragraph (h)(4)(i) of this section and that the services the beneficiary is to perform are in a specialty occupation. The evidence shall conform to the following:
 - (I) School records, diplomas, degrees, affidavits, declarations, contracts, and similar documentation submitted must reflect periods of attendance, courses of study, and similar pertinent data, be executed by the person in charge of the records of the educational or other institution, firm, or establishment where education or training was acquired.

The regulation at 8 C.F.R. § 103.2(b)(1) states the following:

Demonstrating eligibility. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCICS instructions. . . .

As the record does not contain a copy of the academic record upon which the [redacted] evaluator based her evaluation, the AAO will accord it little to no evidentiary weight. Accordingly, the beneficiary does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2) based on the evidence of record as currently constituted.

As the petitioner has not demonstrated that the beneficiary holds an unrestricted state license, registration or certification to perform the duties of a specialty occupation, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(3), either.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), is, therefore, the only remaining avenue for the petitioner to demonstrate the beneficiary's qualifications to perform the duties of a specialty occupation.

To qualify under the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) the beneficiary must have both (1) "education, specialized training, and/or progressively responsible experience" that is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation and (2) "recognition of expertise in the specialty through progressively responsible positions directly related to the specialty."

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equivalence to completion of a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) is determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSII);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;¹⁷

¹⁷ The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . .

The [redacted] evaluation does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) because the evidence of record does not establish that the [redacted] evaluator has the authority to grant college-level credit for training and/or experience at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. As such, the beneficiary does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

No evidence has been submitted to establish that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires submission of the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONS).

Nor does the beneficiary qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(3) by virtue of an "evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials." As discussed above, without a copy of the academic record upon which the [redacted] evaluator based her conclusion, the AAO will accord the evaluation little to no evidentiary weight.

The evidence of record does not establish that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that the beneficiary submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) further states the following with regard to USCIS analyzing an alien's qualifications:

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty

occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;¹⁸
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Although the record contains some information regarding the beneficiary's work history, it does not establish that this work experience included the theoretical and practical application of specialized knowledge required by the proffered position; that it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the field; and that the beneficiary achieved recognition of her expertise in the field as evidenced by at least one of the five types of documentation delineated in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i)-(v).

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i)-(v), either, and therefore does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) based on the current record of proceeding. As such, the evidence of record does not establish that the beneficiary qualifies to perform the duties of a specialty occupation. Accordingly, the petition must also be denied on this basis. Thus, even if it were determined that the petitioner had overcome the director's grounds for denying this petition (which it has not), the petition could still not be approved for this additional reason.

IX. Conclusion

As discussed above, the AAO finds that the evidence of record does not demonstrate that the proffered position is a specialty occupation. The AAO, therefore, finds that the evidence of record

¹⁸ *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. 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. See 8 C.F.R. § 214.2(h)(4)(ii).

does not overcome the director's recommended ground for denying this petition. Consequently, the director's decision recommending denial of the petition will be affirmed, and the petition will be denied. The petition will also be denied due to the record's failure to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation.

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 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

The 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 director's decision dated September 27, 2013 is affirmed. The petition is denied.