



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 02 2014

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

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)

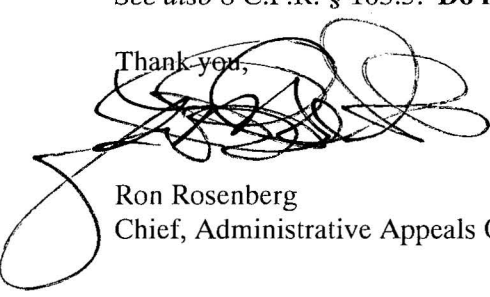
ON BEHALF OF PETITIONER:

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

On the Form I-129 visa petition, the petitioner describes itself as an import wholesaler business, with three employees, that was established in 2001. In order to employ the beneficiary in what it designates as a purchasing manager position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

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

I. FACTUAL AND PROCEDURAL BACKGROUND

In the petition signed on April 3, 2013, the petitioner indicates that it is seeking the beneficiary's services on a full-time basis at the rate of pay of \$45,600 per year. In the April 3, 2013 letter of support, the petitioner claims that the beneficiary will be responsible for the following duties:

- Review and evaluate manufactures and suppliers on the basis of various factors, including manufacturing capability and capacity, production reliability, cost of manufacturing and production, product quality, service quality and support services, and distribution capacity.
- Oversee product development operations, including production and refinement of prototypes, costing, packaging, and development of K-D and assembly capability.
- Solicit bid proposals, review requisitions, and negotiate review and acceptance of terms by all principal parties.
- Research and interview vendors, and visit distribution centers, merchandise preparation/remediation facilities and plants to analyze production and learn about and evaluate products, prices, and services.
- Analyze vendor proposals, financial reports, data, prevailing pricing and other information to determine reasonableness and profit potential of prices. Interview vendors and suppliers' distributions centers to review products, services, and

prices. Negotiate purchase orders and payment schedules with vendors in light of analysis.

- Review and maintain records of purchases, costs, deliveries, performance, and inventory.
- Monitor, facilitate, and assure product quality. Monitor and evaluate contract performance for compliance with contractual obligations and company standards, including product conformance to specification(s), timely product completion, and compliance with quality control processes and standards.
- Monitor and ensure compliance with applicable standards, laws, and regulations, including compliance with production, shipping and receipt schedules with customs brokers. Determine product tariff classifications and ensure all materials are secured from legal/responsible sources. Arrange the payment of duty, freight, and tariff charges.
- Inspect all merchandise for compliance to quality standards and communicate with vendors, staff, and others to discuss unacceptable goods and production problems, and determine corrective action.

The petitioner did not indicate that there are any specific requirements for the proffered position.¹

With the initial petition, the petitioner submitted a credential evaluation from [REDACTED] of [REDACTED]. The evaluation indicates that the beneficiary's professional experience is equivalent to a "Bachelor of Science degree in Management from an accredited institution of higher education in the United States." Ms. [REDACTED] stated that she relied upon "the copies of the original documents of the resume provided by [the beneficiary]." The petitioner provided the beneficiary's resume, but did not include other documentation to support Ms. [REDACTED]'s assertion.²

The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Purchasing Agents, Except Wholesale, Retail, and Farm Products" - SOC (ONET/OES Code) 13-1023, at a Level I (entry level) wage.

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on August 29, 2013. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted.

On October 2, 2013, the petitioner and its counsel responded to the RFE. Specifically, the submission included:

¹ The petitioner does not claim that the position requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as the minimum requirement for entry into the occupation, as required by the Act.

² The resume represents a claim by the beneficiary, rather than evidence to support that claim.

- (1) the petitioner's certificate of incorporation;
- (2) the petitioner's lease agreement;
- (3) one bill of lading issued to the petitioner, dated June 22, 2012;
- (4) one invoice issued to the petitioner, dated August 30, 2013
- (5) an excerpt entitled "Summary Report for: 13-1023.00 – Purchasing Agents, Except Wholesale, Retail, and Farm Products" from the Occupational Information Network (O*NET) OnLine;
- (6) an excerpt entitled "Purchasing Managers, Buyers, and Purchasing Agents " from the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), 2012-13 Edition;
- (7) a letter from [REDACTED];
- (8) job vacancy announcements; and,
- (9) letters from the beneficiary's former employers.

In response to the RFE, the petitioner submitted a letter dated September 6, 2013. The petitioner did not provide a more detailed description of the work to be performed by the beneficiary.⁴ Furthermore, the petitioner did not indicate that its proffered position has any specific requirements.

The director reviewed the record of proceeding to determine whether the petitioner had established eligibility for the benefit sought. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services requiring the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. The director denied the petition on January 7, 2014. Counsel submitted an appeal of the denial of the H-1B petition. With the appeal, counsel submitted a brief.

II. PREPONDERANCE OF THE EVIDENCE STANDARD

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

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence

⁴ Rather, counsel reiterated the duties that were provided by the petitioner in the initial submission.

that he or she is eligible for the benefit sought.

* * *

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

* * *

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

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

Thus, in accordance with the preponderance of the evidence standard, U.S. Citizenship and Immigration Services (USCIS) examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; see e.g., *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). As will be discussed, in the instant case, that burden has not been met.

III. BEYOND THE DIRECTOR'S DECISION

The AAO reviewed the record of proceeding in its entirety and, as will be discussed later in the decision, agrees with the director that the petitioner has not established eligibility for the benefit sought. Moreover, the AAO has identified several, additional issues that preclude the approval of the H-1B petition that were not identified by the director. Consequently, even if the petitioner

overcame the ground for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought.⁵

A. Requirements for the Proffered Position

When determining whether a proffered position qualifies as a specialty occupation, the applicable statutory and regulatory provisions must be read together. *See* 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) and (iii)(A). Accordingly, the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) is interpreted 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 at 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position").

Upon review of the record of proceeding, the AAO notes that the petitioner did not state that there are any particular requirements for the proffered position.⁶ The petitioner simply claims that the beneficiary is qualified for the position. However, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].") Here, the petitioner has not demonstrated that it requires at least a baccalaureate degree in a specific specialty, or its equivalent, for the proffered position.

B. Duties of the Proffered Position

It is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v. Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's operations are relatively small, USCIS reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in a position requiring both the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate degree or higher in a specific specialty, or its equivalent.

⁵ The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

⁶ As previously noted, the petitioner submitted a credential evaluation, which indicates that the beneficiary's professional experience is equivalent to a U.S. bachelor's degree in management.

Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties.

Here, the petitioner stated on the Form I-129 that it employs three people. In the RFE, the director notified the petitioner that the evidence provided did not demonstrate how the beneficiary would be relieved from performing non-qualifying job duties. In response to the RFE, the petitioner did not address this issue, nor did it provide information regarding the duties and responsibilities of the other employee(s). Thus, without additional information, it cannot be ascertained how the beneficiary would be relieved from performing non-qualifying duties such that (1) it would not affect the occupational classification of the position, and (2) it would permit an analysis of the claimed relative complexity, uniqueness, and/or specialization.

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

C. Occupational Category

As previously discussed, the petitioner submitted an LCA in support of the petition that designated the proffered position to the corresponding occupational category of "Purchasing Agents, Except Wholesale, Retail, and Farm Products" - SOC (ONET/OES) code 13-1023. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.⁸ The petitioner stated that the corresponding prevailing wage for a Level I position falling under this occupational category was \$42,973 per year. The LCA was certified on April 3, 2013. The petitioner attested that the information contained in the LCA was true and accurate.

In the appeal brief, counsel claims that the proffered position falls under the occupational category "Purchasing Managers" – SOC (ONET/OES) Code 11-3061. In support of the assertion, counsel stated that a purchasing agent and a purchasing manager have different job duties.

The AAO agrees with counsel that the occupational categories "Purchasing Agents" and "Purchasing Managers" are distinct occupational categories with different job duties (and requirements). Counsel's claim regarding the proper classification for the proffered position is not, however, in accordance with the petitioner's representation on the LCA. The petitioner and its

⁸ The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Office of Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatcenter.com/>.

counsel did not provide an explanation for the discrepancies in their claims.

After submitting an H-1B petition, a petitioner (or its counsel) cannot offer a new position to the beneficiary, or materially change its associated job responsibilities, or the occupational category. The petitioner and counsel must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If material changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

With respect to the LCA, DOL provides specific guidance for selecting the most relevant Occupational Information Network (O*NET) classification code. The "Prevailing Wage Determination Policy Guidance" prepared by DOL states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the [determiner] should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the [determiner] shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

To determine the nature of the job offer, DOL guidance indicates that the first step is to review the requirements of the job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the job offer is used to identify the appropriate occupational classification. If the petitioner believes that its position is described as a combination of O*NET occupations, then according to DOL guidance the petitioner should select the relevant occupational code for the highest paying occupation. *Id.*

A search of the OFLC Online Wage Library reveals that (for the pertinent time period and relevant area of intended employment) the prevailing wage for "Purchasing Agents, Except Wholesale, Retail, and Farm" for a Level I position was \$42,973, whereas the prevailing wage for "Purchasing Managers" for a Level I position was \$66,269 per year. The difference in wages is over \$23,290 per year.⁹

⁹ For more information regarding the prevailing wage for "Purchasing Agents, Except Wholesale, Retail, and Farm" for a Level I position in the area of intended employment, see the All Industries Database for 7/2012 - 6/2013 for this occupational category at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com> (last visited May 29, 2014).

Thus, if the petitioner believed the duties and requirements of the proffered position fell under the occupational category "Purchasing Managers," then it should have selected this occupation (and corresponding prevailing wage) for the LCA. Moreover, if the petitioner believed that the proffered position was a combination of occupations, then according to DOL guidance the petitioner should have chosen the relevant occupational code for the highest paying occupational category, in this case "Purchasing Managers." Here, the petitioner selected the lowest paying occupation.

On the Form I-129 petition and LCA, the petitioner stated that it intended to employ the beneficiary on a full-time basis at a rate of pay of \$45,600 per year. Accordingly, the offered wage to the beneficiary is below the prevailing wage for the occupational category "Purchasing Managers" in the area of intended employment.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the LCA.¹⁰ See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed. Appx. 722, 723 (7th Cir. 2010). The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]").

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational classification in order for it to be found to correspond to the petition.¹¹ To

For more information regarding the prevailing wage for "Purchasing Managers" for a Level I position in the area of intended employment, see the All Industries Database for 7/2012 - 6/2013 for this occupational category at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com> (last visited May 29, 2014).

¹⁰ The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment. The required wage rate means the rate of pay which is the higher of the actual wage for the specific employment in question or the prevailing wage rate for the occupation in which the beneficiary will be employed in the geographic area of intended employment. See 20 C.F.R. § 655.715.

¹¹ To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between DOL and the U.S. Department of Homeland Security (DHS), a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(I); 20 C.F.R. § 655.700(b)(2). Upon receiving DOL's certification, the prospective employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(I). DOL reviews LCAs "for completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application

permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupational category at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, assuming that the proffered position is a purchasing manager as subsequently claimed by counsel, the petitioner has not established that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted.

Moreover, the general requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petitioner, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission. . . .

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from DOL in the occupational specialty in which the H-1B worker will be employed. See 8 C.F.R. §§ 214.2(h)(4)(i)(B) and 214.2(h)(4)(iii)(B)(1). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of an LCA with DOL when submitting the Form I-129.

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

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

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

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation

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

named in the [LCA] is a specialty occupation . . . and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) therefore requires that USCIS ensure that the LCA actually supports the H-1B petition filed on behalf of the beneficiary. In the instant case, assuming again that the proffered position is a purchasing manager as now claimed by the petitioner's counsel, the record does not establish that, at the time of filing, the petitioner had obtained a certified LCA for the proper occupational category and prevailing wage that applied at the time the petition was filed. Therefore, the petitioner has not demonstrated compliance with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) by providing a certified LCA that corresponds to the instant petition. For this reason also, the petition may not be approved.

D. Wage Level

Further, the wage level designated by the petitioner on the LCA for the proffered position is questionable. More specifically, the record of proceeding contains discrepancies between what counsel claims about the level of responsibility and requirements inherent in the proffered position set against the contrary level of responsibility and requirements conveyed by the wage level selected by the petitioner on the LCA. As noted above, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Purchasing Agents, Except Wholesale, Retail, and Farm" at a Level I (entry) wage.

Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing-wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.¹²

It is important to note that prevailing wage determinations start with an entry level wage (Level I) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.¹³ DOL emphasizes that these guidelines should not be implemented in a

¹² For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

¹³ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a

mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

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

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

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

In the instant case, counsel claims that "the duties for [the petitioner's position] include researching, analyzing, evaluating, negotiating, and overseeing highly complex financial and legal transactions involving international trade." Counsel further claims that the petitioner "requires a Purchasing Manager with knowledge 'in the increasingly complex field of international trade' and that [the beneficiary] has the knowledge to carry out the specialized and complex duties associated with the position." Moreover, counsel asserts that "[t]he Purchasing Manager holds a professional position with significant autonomy and discretion over major purchasing operations" and "these duties require ongoing complex research, analyses, and oversight vendor proposals." Furthermore, counsel states that "[a]s an extremely complex position with significant responsibility, the Purchasing Manager at [the petitioner] must possess at least a Bachelor's degree or its equivalent in Management or a related business field." The petitioner's designation of the proffered position at a Level I wage-rate, however, indicates that the beneficiary will be expected to "perform routine tasks that require limited, if any, exercise of judgment" and that he will work "under close supervision."

The petitioner indicates in its letter dated September 6, 2013, however, that it will rely on the beneficiary to guide it in the rapidly growing sector of its operations and its efforts to expand international trade. According to the petitioner, in anticipation of the beneficiary joining the company, it has moved forward on the investment of hundreds of thousands of dollars in product development, merchandise inventory, packaging, warehousing, operating systems, and equipment. Additionally, the petitioner states that it is counting on the beneficiary to join the company so that

"1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

the company will be "in a position to go to market" and bring on new employees to support its sales growth. The petitioner therefore appears to claim that it will be relying heavily on the beneficiary's expertise for the management of its services and employees, as well as to make critical decisions regarding the company's business operations.

Such reliance on the beneficiary's work appears to surpass the expectations of a Level I purchasing agent position, as described above, where the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and limited exercise of judgment. In the instant case, rather than the beneficiary's work being "monitored and reviewed for accuracy," it appears that the petitioner claims that it will be relying on the accuracy of the beneficiary's work with regard to the growth of its operations and important business decisions for the company.

Further, in response to the RFE, counsel for the petitioner submitted an opinion letter from [REDACTED]. The letter is dated September 10, 2013. Counsel for the petitioner relies heavily on this letter to support his assertions. In the letter, Ms. [REDACTED] states that the position requires at least a bachelor's degree in management or a related business field. She also claims that the duties of the proffered position require extensive knowledge and skills in various areas.

Ms. [REDACTED] conclusions do not appear to correspond to the petitioner's designation of the proffered position as a Level I position. For instance, a Level I wage is appropriate for a position requiring only "a basic understanding of the occupation" for an employee who will "receive specific instructions on required tasks and results expected" at a level expected of a "worker in training" or an individual performing an "internship."

Thus, upon review of the assertions regarding the proffered position, the AAO must question the stated requirements for the proffered position, as well as the level of complexity, independent judgment and understanding that are actually needed for the proffered position as the petitioner designated this position as a Level I entry-level job on the LCA certified by DOL. The assertions that the duties require a significant level of responsibility and expertise, as well as counsel's claimed requirements for the position, do not appear to be reflected in the wage level chosen by the petitioner on the LCA for the proffered position.

As previously discussed, under the H-1B program, the petitioner must pay the beneficiary at least the same wage rate as that paid to other employees with similar experience and qualifications or the local prevailing wage for the occupation in the area of employment, whichever is higher. In the instant case, the petitioner designated the proffered position as a Level I position. Notably, if the proffered position had been designated at a higher level, the prevailing wage at that time (for the claimed occupational category "Purchasing Agents, Except Wholesale, Retail, and Farm") would have been \$53,165 per year for a Level II position, \$63,336 per year for a Level III position, and \$73,528 per year for a Level IV position.¹⁴

¹⁴ As discussed, assuming the proffered position falls under the occupational category "Purchasing Managers" (as claimed by counsel), then the prevailing wage would have been significantly higher (i.e., \$66,269 per year for a Level I position, \$84,739 per year for a Level II position, \$103,230 per year for a

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

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

The statements regarding the requirements and claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position.¹⁵ This conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record of proceeding, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed. As a result, even if it were determined that the proffered position were a higher-level and more complex position as described and claimed elsewhere in the petition in support of the petitioner's assertions that this position qualifies as a specialty occupation, the petition could still not be approved for this additional reason.¹⁶

Level III position, \$121,701 per year for a Level IV position).

¹⁵ Fundamentally, it appears that (1) the petitioner claimed to DOL that the proffered position is a Level I, entry-level position to obtain a lower prevailing wage; and (2) counsel is now claiming to USCIS that the position is a higher-level and more complex position in order to support its claim that the position qualifies as a specialty occupation. Either the position is a more senior and complex position (based on a comparison of the petitioner's job requirements to the standard occupational requirements) and thereby necessitates a higher required wage, or it is an entry-level position for which a lower wage would be acceptable. To permit otherwise would be directly contrary to the U.S. worker protection provisions contained in section 212(n)(1)(A) of the Act and its implementing regulations.

¹⁶ The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. Moreover, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The regulations at 8 C.F.R. § 214.2(h)(2)(i)(E) instead require that the petitioner "file an amended or new petition, with fee, with the service center where the original petition was filed to reflect any material changes in the terms and conditions of employment"

IV. REVIEW OF THE DIRECTOR'S DECISION

Specialty Occupation

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

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

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be

performed only by an individual with a degree;

- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires

the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

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

The AAO recognizes DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.²² As previously discussed, the petitioner filed the LCA to indicate that the proffered position corresponds to "Purchasing Agents, Except Wholesale, Retails and Farm" – SOC (ONET/OES) Code 13-1023, but thereafter counsel asserted that the proffered position falls under the occupational category "Purchasing Managers," which corresponds to SOC (ONET/OES) Code 11-3061. The *Handbook* addresses these occupational categories in the chapter entitled "Purchasing Managers, Buyers, and Purchasing Agents."²³ Importantly, in the initial submission, the petitioner indicated with the LCA that the

²² All of the AAO's references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The AAO hereby incorporates the excerpt of the *Handbook* regarding the duties and requirements of the occupational category "Purchasing Managers, Buyers, and Purchasing Agents" into the record of proceeding.

²³ According to the *Handbook*, purchasing agents buy items for the operation of an organization, whereas purchasing managers plan and coordinate the work of buyers and purchasing agents. The *Handbook* continues by stating that purchasing managers usually handle purchases that are more complicated. For additional information, see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Purchasing Managers, Buyers and Purchasing Agents, on the Internet at <http://www.bls.gov/ooh/Business-and-Financial/Purchasing-managers-buyers-andpurchasingagents.htm#tab-2> (last visited May 29, 2014).

Based upon the evidence provided by the petitioner, it does not appear that the beneficiary will be responsible for planning and coordinating the work of buyers and purchasing agents. For instance, in the Form I-129 petition, the petitioner states that it has three employees. The petitioner, however, did not submit a job description or provide any further information regarding the duties and roles of its other employee(s). The petitioner also did not provide an organizational chart to USCIS. Without further information, the

duties, responsibilities, and requirements of the proffered position are most similar to those of a purchasing agent (rather than those of a purchasing manager).

As previously mentioned, the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. As a result, the petitioner did not establish the primary and essential functions of the proffered position.

The subchapter of the *Handbook* entitled "How to Become a Purchasing Manager, Buyer, or Purchasing Agent" states the following about this occupational category:

Education

Educational requirements usually vary with the size of the organization. A high school diploma is enough at many organizations for entry into the purchasing agent occupation, although large stores and distributors may prefer applicants who have completed a bachelor's degree program and have taken some business or accounting classes. Many manufacturing firms put an even greater emphasis on formal training, preferring applicants who have a bachelor's or master's degree in engineering, business, economics, or one of the applied sciences.

Purchasing managers usually have at least a bachelor's degree and some work experience in the field. A master's degree may be required for advancement to some top-level purchasing manager jobs.

Training

Buyers and purchasing agents typically get on-the-job training for more than 1 year. During this time, they learn how to perform their basic duties, including monitoring inventory levels and negotiating with suppliers.

Licenses, Certifications, and Registrations

There are several recognized credentials for purchasing agents and purchasing managers. These certifications involve oral or written exams and have education and work experience requirements.

The Certified Professional in Supply Management (CPSM) credential, offered by the [REDACTED], covers a wide scope of duties that purchasing professionals do. The exam requires applicants to either have a bachelor's degree and 3 years of supply management experience, or for those without a bachelor's degree, 5 years of supply management experience and the successful completion of three CPSM exams.

[REDACTED] offers two certifications: the Certified Purchasing

petitioner has not established that the beneficiary will be responsible for planning and coordinating the work of buyers and purchasing agents.

Professional (CPP) and Certified Professional Purchasing Manager (CPPM). Candidates become eligible for these certifications through a combination of purchasing-related experience, education, and professional contributions (such as published articles or delivered speeches).

offers the Certified Supply Chain Professional (CSCP) credential.

offers two certifications for workers in federal, state, and local government: Certified Professional Public Buyer (CPPB) and Certified Public Purchasing Officer (CPPO).

offers preparation courses for these certification exams.

Work Experience in a Related Occupation

Purchasing managers typically must have at least 5 years of experience as a buyer or purchasing agent. At the top levels, purchasing manager duties may overlap with other management functions, such as production, planning, logistics, and marketing.

Advancement

An experienced purchasing agent or buyer may become an assistant purchasing manager before advancing to purchasing manager, supply manager, or director of materials management.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Purchasing Managers, Buyers and Purchasing Agents, on the Internet at <http://www.bls.gov/ooh/business-and-financial/purchasing-managers-buyers-and-purchasing-agents.htm#tab-4> (last visited May 29, 2014).

The *Handbook* does not state that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into purchasing agent positions. The narrative of the *Handbook* indicates that the educational requirements usually vary with the size of the organization. It continues by stating that at many organizations, a high school diploma is sufficient for entry into purchasing agent positions.²⁴ The *Handbook* also reports that an experienced purchasing agent or buyer may become an assistant purchasing manager before advancing to purchasing manager, supply manager, or director of materials management.

The *Handbook* states that large stores and distributors may prefer applicants who have completed a bachelor's degree program and have taken some business or accounting classes. According to the

²⁴ When reviewing the *Handbook*, the AAO must again note that the petitioner designated the proffered position on the LCA under the occupational category "Purchasing Agents, Except Wholesale, Retail, and Farm." The AAO reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). This designation is indicative of a comparatively low, entry-level position relative to other purchasing agents. DOL guidance indicates that a Level I designation is appropriate for a position as a research fellow, a worker in training, or an internship.

Handbook many manufacturing firms put an even greater emphasis on formal training, preferring applicants who have a bachelor's or master's degree in engineering, business, economics, or one of the applied sciences. However, based upon the petitioner's statements on the Form I-129 and the supporting evidence, the petitioner does not appear to be a "large store or distributor" or a manufacturing firm.²⁵ Thus, these statements of the *Handbook* appear to be irrelevant to the instant petition. Moreover, the text suggests that a baccalaureate degree may be a *preference* among employers of purchasing agents in some environments, but that many employers hire candidates with less than a bachelor's degree, including candidates possessing a high school diploma. A preference for a candidate with a degree is not an indication of a requirement for the same.

According to the *Handbook*, purchasing managers usually have at least a bachelor's degree and some work experience in the field.²⁶ The *Handbook* does not state, however, that any particular field of study or discipline is required for purchasing manager positions.²⁷ The *Handbook* continues by stating that purchasing managers typically must have at least five years of experience as a buyer or purchasing agent.

The *Handbook* reports that there are several recognized certification credentials for purchasing agents and purchasing managers. It also provides basic information, including the general requirements for these credentials. There is no indication, however, that the petitioner requires the beneficiary to have obtained any certification credential or other professional designation to serve in the proffered position.

Upon review, the *Handbook* does not support a finding that normally the minimum requirement for entry into purchasing agent positions (or purchasing manager positions) is at least a bachelor's degree in a specific specialty, or its equivalent.

In response to the RFE, counsel submitted an O*NET OnLine Summary Report for the occupational

²⁵ In the Form I-129, the petitioner states that it is an import wholesaler with three employees. The petitioner provided one invoice for \$451 from 2013 and one bill of lading for \$2,054 from 2012. Thus, the evidence submitted to USCIS does not support a finding that the petitioner is a "large store or distributor" or a manufacturing firm.

²⁶ As previously discussed, the petitioner claimed in the LCA that the proffered position falls under the occupational category for purchasing agents. Thereafter, counsel asserted that the proffered position falls under the occupational category for purchasing managers. No explanation was provided for this discrepancy by the petitioner or its counsel.

²⁷ To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish in part that the position requires the attainment of a bachelor's or higher degree in a specific specialty or its equivalent. As discussed *supra*, USCIS has consistently interpreted 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. Again, although a general-purpose bachelor's degree 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.

category "Purchasing Agents, Except Wholesale, Retail, and Farm Products." The AAO reviewed the Summary Report in its entirety. However, upon review of the Summary Report, the AAO finds that it is insufficient to establish that the position qualifies as a specialty occupation normally requiring at least a bachelor's degree in a specific specialty, or its equivalent. The Summary Report for purchasing agents, except wholesale, retail, and farm products has a designation of Job Zone 4. This indicates that a position requires considerable preparation. It does not, however, demonstrate that a bachelor's degree in any *specific specialty* is required, and does not, therefore, demonstrate that a position so designated is in a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). The O*NET OnLine Help Center provides a discussion of the Job Zone 4 designation and explains that this zone signifies only that most, but not all of the occupations within it, require a bachelor's degree. See O*NET OnLine Help Center at <http://www.onetonline.org/help/online/zones>. Further, the Help Center discussion confirms that a designation of Job Zone 4 does not indicate any requirements for particular majors or academic concentrations. Therefore, despite counsel's assertion to the contrary, the O*NET Summary Report is not probative evidence that the proffered position qualifies as a specialty occupation.

The record also contains a letter from [REDACTED] of [REDACTED]. The letter is dated September 10, 2013. In the letter, Ms. [REDACTED] states that the proffered position qualifies as a specialty occupation and, therefore, requires a bachelor's degree in management or a related business field.

Ms. [REDACTED] provided a summary of her education and experience and attached a copy of her curriculum vitae. Based upon a complete review of Ms. [REDACTED] letter and curriculum vitae, the AAO notes that, while Ms. [REDACTED] may, in fact, be a recognized authority on various topics, she has failed to provide sufficient information regarding the basis of her claimed expertise on this particular issue. Ms. [REDACTED] claims that she is qualified to comment on the position of purchasing manager because of the position she holds at [REDACTED]. However, without further clarification, it is unclear how her position teaching courses such as management, entrepreneurship, and general business at [REDACTED] would translate to expertise or specialized knowledge on the issue here.

Ms. [REDACTED] opinion letter and curriculum vitae do not cite specific instances in which her past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that she has published any work or conducted any research or studies pertinent to the educational requirements for *purchasing managers* (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that she is an authority on those specific requirements. The opinion letter contains no evidence that it was based on scholarly research conducted by Ms. [REDACTED] in the specific area upon which she is opining. For instance, in reaching her determination, Ms. [REDACTED] provides no documentary support for her ultimate conclusion regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies). Ms. [REDACTED] asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement.³⁰

³⁰ The petitioner indicated that it is an import wholesaler in the "Nursery, Garden Center, and Farm Supply

Upon review of the opinion letter, there is no indication that Ms. [REDACTED] possesses any knowledge of the petitioner's proffered position beyond the job description. The fact that she attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of her opinion. Ms. [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. Her opinion does not relate her conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. For example, there is no evidence that Ms. [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Ms. [REDACTED] provides general conclusory statements regarding the proffered position, but she does not provide a substantive, analytical basis for her opinion and ultimate conclusions.

Further, there is no indication that the petitioner and counsel advised Ms. [REDACTED] that the petitioner characterized the proffered position as a low, entry-level position under the occupational category "Purchasing Agents" (as indicated by the wage-level on the LCA). It appears that Ms. [REDACTED] would have found this information relevant for her opinion letter. Moreover, without this information, the petitioner has not demonstrated that Ms. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine similar positions based upon job duties and responsibilities.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the advisory opinion rendered by Ms. [REDACTED] is not probative evidence to establish the proffered position qualifies as a specialty occupation. The conclusions reached by Ms. [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which she reached such conclusions. There is an inadequate factual foundation established to support the opinion and the AAO finds that the opinion is not in accord with other information in the record.

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the opinion letter into each of the bases in this decision for dismissing the appeal.

Stores" industry. According to the Department of Commerce, U.S. Census Bureau, the North American Industry Classification System is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy, and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited May 29, 2014).

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of the *Handbook's* support on the issue. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

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

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

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source), reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter.

The AAO acknowledges that the record of proceeding contains an opinion letter from Ms. [REDACTED]. However, as previously discussed in detail, the AAO finds that the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

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

counsel's reliance on the job announcements is misplaced.

In the Form I-129 petition, the petitioner stated that it is an import wholesaler business established in 2001, with three employees. The petitioner further stated that it has a gross annual income of approximately \$500,000 and a net annual income of approximately \$300,000. As previously noted, the petitioner designated its business operations under the NAICS code of 444220. This NAICS code is designated for "Nursery, Garden Center, and Farm Supply Stores." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments primarily engaged in retailing nursery and garden products, such as trees, shrubs, plants, seeds, bulbs, and sod, that are predominantly grown elsewhere. These establishments may sell a limited amount of a product they grow themselves. Also included in this industry are establishments primarily engaged in retailing farm supplies, such as animal (non-pet) feed.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 444220 – Nursery, Garden Center, and Farm Supply Stores, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited May 29, 2014).

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

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

For instance, counsel submitted job postings placed by staffing firms () and The () and two job postings that indicate "Confidential Posting" for which little or no information regarding the employers is provided. Consequently, the record is devoid of sufficient information regarding these advertising employers to conduct a legitimate comparison of the organizations to the petitioner.

Furthermore, the advertisements include positions with () (for which the industry is listed as "Aerospace and Defense"); () ("the oldest manufacturer of design-leading wall coverings in the United States, while serving 60 countries globally"); and () (for which the industry is listed as "Automotive and Parts Mfg"). Without further information, the advertisements appear to be for organizations that are not similar to

the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations. Again, the petitioner must demonstrate the degree requirement is *common to the industry* in parallel position *among similar organizations*.

Moreover, some of the advertisements do not appear to be for parallel positions. The record contains a posting from [REDACTED] which requires a degree and "3-5 years of related work experience." Counsel also provided a posting from [REDACTED] which requires a degree and "5+ years of related experience." Moreover, counsel submitted a "Confidential Posting" which requires a degree and "5+ years of experience in strategic sourcing and vendor management in related industry, (purchasing technical, wood, metal, electric products)." Additionally, counsel submitted a job posting by [REDACTED], which requires candidates to possess a degree and "7 to 10 years of relevant experience in purchasing and inventory control in the food industry." As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) position. The advertised positions appear to be for more senior positions than the proffered position.

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

Additionally, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, most of the postings state that a bachelor's degree is required, but they do not provide any further specification. That is, they do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required. The advertisements that require a general purpose degree (without stating a specific discipline) include the postings by [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the duties and responsibilities of the position.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. The evidence does not establish that the proffered position qualifies as a specialty occupation under this criterion of the regulations.³¹

³¹ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the

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

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

To begin with and as discussed previously, the petitioner itself does not require a baccalaureate or higher degree in a specific specialty, or its equivalent. In addition, the petitioner failed to demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. Furthermore, the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

In the instant case, the record of proceeding contains information regarding the petitioner's business operations, including the petitioner's certificate of incorporation, lease agreement, an invoice and a bill of lading. Upon review of the record of proceeding, the AAO finds that the petitioner has not demonstrated how the duties of the position as described require the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial in performing certain duties of the position, the petitioner has not demonstrated how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Purchasing Agents, Except Wholesale, Retail, and Farm Products" at a Level I (entry level) wage, which is the

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

Further, without more, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States.

lowest of four assignable wage levels. The wage level of the proffered position indicates that (relative to other positions falling under this occupational category) the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

Without further evidence, it is not credible that the petitioner's proffered position is complex or unique in comparison to others within the occupation, as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."³²

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

The petitioner claims that the beneficiary's professional experience will assist him in carrying out the duties of the proffered position. However, as previously mentioned, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation. The petitioner does not sufficiently explain or clarify which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the petitioner has not established the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position. Here, in the letter dated September 6, 2013, the petitioner stated that it has not previously hired anyone for the proffered position. Thus, the petitioner has not satisfied this criterion of the regulations.

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

³² For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

its equivalent.

The petitioner and its counsel assert that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. However, the AAO again notes that the petitioner itself does not require a baccalaureate or higher degree in a specific specialty, or its equivalent.

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

The AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as an entry-level position relative to others within the occupational category of "Purchasing Agents, Except Wholesale, Retail, and Farm Products." The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it has not been established that the petitioner's proffered position is one with specialized and complex duties compared to others within the occupation as such a position would likely be classified at a higher-level, such as a Level III (experienced) or IV (fully competent) position, requiring a substantially higher prevailing wage.³³ As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

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

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

³³ If the proffered position were designated as a higher level position, the prevailing wage for the occupational category in [REDACTED] Virginia at that time would have been \$53,165 per year for a Level II position, \$63,336 per year for a Level III position, and \$73,528 per year for a Level IV position.

V. BENEFICIARY'S QUALIFICATIONS

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty, or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree, or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications.

VI. CONCLUSION AND ORDER

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

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

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

ORDER: The appeal is dismissed.