



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **MAR 27 2014**

OFFICE: CALIFORNIA SERVICE CENTER

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

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

## I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a "Kitchen Cabinet Importer and e-Commerce" firm established in 2006. In order to employ the beneficiary in what it designates as a purchasing manager position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds an additional aspect which, although not addressed in the director's decision, nevertheless also precludes approval of the petition. Specifically, the AAO finds that the Labor Condition Application (LCA) filed by the petitioner in support of this petition does not correspond to it. The AAO conducts review of service center decisions on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional ground for denial.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

## II. STANDARD OF REVIEW

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

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

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

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

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

*Id.* at 375-76.

The AAO conducts its review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director's determination that the evidence of record does not establish that the proffered position is a specialty occupation was correct. Upon its review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, the AAO finds that the evidence of record does not establish that the claim of a proffer of a specialty occupation position is "more likely than not" or "probably" true. In other words, as the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claim that the proffered position qualifies as a specialty occupation is "more likely than not" or "probably" true.

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



### III. THE LCA SUBMITTED BY THE PETITIONER IN SUPPORT OF THE PETITION

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

The LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Purchasing Managers" occupational classification, SOC (O\*NET/OES) Code 11-3061, and at a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. Wage levels should be determined only after selecting the most relevant O\*NET code classification. A prevailing wage determination is then made by selecting one of four wage levels for an occupation based upon a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.<sup>1</sup>

Prevailing wage determinations start at Level I (entry) and progress to a wage that is commensurate with that of Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.<sup>2</sup> The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

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

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<sup>1</sup> For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited Mar. 26, 2014).

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



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

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

For example, the record contains multiple references to the complexity and specialization of the duties proposed for the beneficiary. For example, in its April 1, 2013 letter the petitioner claimed that the beneficiary would supervise its purchasing staff, and referred to the proffered position as one that is "specialized." In its June 19, 2013 letter the petitioner reiterated these assertions, described the proposed duties as "complex," and added the following:

The purchasing manager position is very crucial. It's the backbone to support our sales department[.]

On appeal, counsel stated that the petitioner's business model requires it to have "a highly complex purchasing and inventory plan," referred to the proffered position as an "important function," and stated the following:

This position will manage the Petitioner's Purchasing Department and will be part of the upper management team[.]

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

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

required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. Thus, the petitioner's characterizations of the proffered position and the claimed duties and responsibilities conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation.

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

It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ her at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. The petitioner has offered the beneficiary a wage of \$32.76 per hour, which satisfied the Level I (entry level) prevailing wage for a purchasing manager in the Los Angeles-Long Beach-Glendale, California,<sup>3</sup> Metropolitan Statistical Areas at the time the LCA was certified. However, in order to offer employment to the beneficiary at a Level II (qualified) wage-level, which would involve only "moderately complex tasks that require limited judgment," the petitioner would have been required to raise her salary to at least \$43.80 per hour. The Level III (experienced) prevailing wage was \$54.85 per hour, and the Level IV (fully competent) prevailing wage was \$65.89 per hour.<sup>4</sup>

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work as characterized by the petitioner on the Form I-129 and allied submissions and as required under the

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<sup>3</sup> *Id.* at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=11-3061&area=31084&year=13&source=1> (last visited Mar. 26, 2014).

<sup>4</sup> *Id.*



Act, if the petition were granted for a higher-level and more complex position than addressed in the LCA as claimed elsewhere in the petition.

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

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

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

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

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

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

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

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

As the signature at Part 7 of the Form I-129 certifies under penalty of perjury that the "this petition and the evidence submitted with it are true and correct" to the best of the petitioner's knowledge, that signature also certified that the content of the LCA filed with it and identified by the LCA or ETA case number at item 2 of Part 5 (Basic Information about the Proposed Employment and



Employer) truly and correctly matched the related aspects of the petition. However, as just discussed above, this appears to not be the case.

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

Certification by the Department of Labor [DOL] of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.<sup>5</sup>

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

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

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

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

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<sup>5</sup> *See also* 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) ("An approved labor condition application is not a factor in determining whether a position is a specialty occupation").

failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

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

#### IV. SPECIALTY OCCUPATION

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

##### The Law

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



To determine whether a particular job qualifies as a specialty occupation, USCIS does not 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.

#### The Case Law Cited on Appeal

The AAO is not persuaded by the unpublished AAO decisions that counsel cites on appeal. Although counsel cited several unpublished AAO decisions, he did not provide copies of those decisions. When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [ . . . ] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also* *Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, neither the director nor the AAO was required to request and/or obtain a copy of the unpublished decisions cited by counsel.

If a petitioner wishes to have unpublished decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself through its own legal research and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i). In the instant case, counsel failed to submit a copy of the unpublished decisions. As the record of proceeding does not contain any evidence of the unpublished decisions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding.

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

*cert. denied*, 485 U.S. 1008 (1988).

The AAO turns next to counsel's citation of *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000). In that case, the U.S. district court found that while the former INS was reasonable in requiring a bachelor's degree in a specific field, it abused its discretion by ignoring the portion of the regulations that allows for the equivalent of a specialized baccalaureate degree. According to the U.S. district court, INS's interpretation was not reasonable because then H-1B visas would only be available in fields where a specific degree was offered, ignoring the statutory definition allowing for "various combinations of academic and experience based training." *Tapis Int'l v. INS*, 94 F. Supp. 2d at 176. The court elaborated that "[i]n fields where no specifically tailored baccalaureate program exists, the only possible way to achieve something equivalent is by studying a related field (or fields) and then obtaining specialized experience." *Id.* at 177.

The AAO agrees with the district court judge in *Tapis Int'l v. INS*, that in satisfying the specialty occupation requirements, both the Act and the regulations require a bachelor's degree in a specific specialty *or its equivalent*, and that this language indicates that the degree does not have to be a degree in a single specific specialty. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) (emphasis added).

Moreover, the AAO also agrees that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. The AAO does not find, however, that the U.S. district court is stating that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner.

Instead, USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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 a specific specialty as the minimum for entry into the occupation as required by the Act.

In addition, the district court judge does not state in *Tapis Int'l v. INS* that, simply because there is no specialty degree requirement for entry into a particular position in a given occupational category,



USCIS must recognize such a position as a specialty occupation if the beneficiary has the equivalent of a bachelor's degree in that field. In other words, the AAO does not find that *Tapis Int'l v. INS* stands for either (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, 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].").

Second, in promulgating the H-1B regulations, the former INS made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Tapis Int'l v. INS*. The AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Nor is the AAO persuaded by counsel's citation to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for the proposition that "[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge."

The AAO agrees with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of



section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added). As will be discussed below, however, the petitioner has failed to meet its burden and establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties. *See also Health Carousel, LLC v. U.S. Citizenship & Immigration Services*, \_\_\_\_ F. Supp. 2d \_\_\_\_ (S.D. Ohio 2014) (agreeing with AAO's analysis of *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*).

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.<sup>6</sup> The AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. at 715. Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

For all of these reasons, the AAO reiterates its earlier statements 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); that this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole; and that, 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, as 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. 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.

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<sup>6</sup> It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. The AAO further notes that the service center director's decision was not appealed to the AAO. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, the AAO may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by the AAO in its *de novo* review of the matter.

The Letter Submitted for Consideration as an Expert Opinion

The AAO will next discuss why it accords no probative value to the letter from [REDACTED], a professor at [REDACTED].

In her June 4, 2013 letter [REDACTED] (1) describes the credentials that she asserts qualify him to opine upon the nature of the proffered position; (2) briefly lists some of the duties proposed for the beneficiary; (3) lists six job vacancy announcements she discovered on the Internet; and (4) states her belief that the position requires a bachelor's degree in business administration, economics, accounting, or a related field.

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

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

[REDACTED] references her "in-depth research on this position" at page 5 of her letter. However, the letter does not include copies of whatever materials [REDACTED] relied upon for her information regarding the duties of the proffered position or quote them to any extent, let alone sufficiently for the AAO to discern to which, if any, of the job and position descriptions in the record of proceeding she is referring.

The AAO does not question the accuracy of [REDACTED] narrative regarding her credentials, and we have considered all information provided therein. Likewise, we have considered her academic standing, background, and degrees. However, she does not provide any information with regard to studies, treatises, statistical surveys, authoritative industry sources, U.S. Department of Labor resources, or any other relevant and authoritative sources of which she may have specialized knowledge that would merit deference or special weight to the particular opinion that she offers in this case.<sup>7</sup> Thus, we accord little to no weight to her position, degrees, academic history, or teaching

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[REDACTED] statement that she reviewed "employment websites" including [www.monster.com](http://www.monster.com), [www.jobs.com](http://www.jobs.com), and [www.careerbuilder.com](http://www.careerbuilder.com) is acknowledged. However, while the six positions she states he encountered while searching through those websites do appear to require a bachelor's degree, it is not clear that any of the employers who placed those job postings required the degrees to come from any particular specialty. As noted above, USCIS 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



duties as endowing her with specialized knowledge relevant to the particular matters upon which she here opines, namely, the educational requirements for the particular position proffered in this petition.

Moreover, it is noted that because Dr. [REDACTED] did not discuss the duties of the proffered position in substantive detail, the degree to which she analyzed them prior to formulating her letter is not evident.

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

Nor does [REDACTED] description of the position upon which she opines indicate that she considered, or was even aware of, the fact that the petitioner submitted an LCA certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation which, as discussed above, signifies that the beneficiary is only expected to possess a basic understanding of the occupation. In any event, she does not discuss this aspect of the petition at any point in her letter. The AAO considers this a significant omission, in that it suggests an incomplete review of the position in question and a faulty factual basis for her ultimate conclusion as to the educational requirements of the position upon which she opines.

As noted earlier, the LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Purchasing Managers" occupational category, SOC (O\*NET/OES) Code 11-3061, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. Again, the above-discussed *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific

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the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Moreover, the fact that none of the job postings were submitted into the record of proceeding makes it impossible for the AAO to review them.



instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.<sup>8</sup>

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

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

Finally, it is noted that Dr. [REDACTED] states that a bachelor's degree in business administration would provide an adequate preparation for performing the duties of the proffered position. However, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

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

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<sup>8</sup> U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited Mar. 26, 2014).

Evidence

As noted, the LCA submitted to support the visa petition states that the proffered position is a Purchasing Manager position, and that it corresponds to Standard Occupational Classification (SOC) code and title 11-3061, Purchasing Managers from the Occupational Information Network (O\*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

With the visa petition, counsel submitted evidence that the beneficiary received a master's degree in economics from the [REDACTED]. Counsel also submitted a letter, dated April 1, 2013, from the petitioner's vice president, which states the following as the duties of the proffered position:

- Ensure a portfolio of best in class kitchen cabinetry suppliers by applying standard procurement practices and techniques such as market knowledge and data analysis, cost management, negotiation and conditioning, and supplier management and development
- Create and execute long-term sourcing strategies while minimizing cost, ensuring product quality and improving product availability
- Manage supplier relationships including the development, negotiation and management of contracts with those suppliers
- Insure [sic] suppliers are held accountable for performance and continuous improvement including lead time reduction, delivery, flexibility, quality improvement, inventory reduction and cost reduction
- Develop, implement and maintain a scorecard system to monitor, rate, and report supplier performance.
- Develop and implement a system for evaluating and approving potential suppliers via factual and measurable assessment
- Coordinate with suppliers and product management to understand supplier product roadmaps
- Manage product transitions through the product life cycle
- Ensure that issues within the supply base relative to purchasing transactions are handled in a timely manner
- Review and improve purchasing department utilization of computer system tracking and implementation of new software functionality
- Ensure that sourcing processes and procedures are fully documented and accurate
- Supervise purchasing staff

As to the educational requirement of the proffered position, the petitioner's vice president stated, "Because this is a specialized position, the person filling this position with our company must possess at least a Bachelor's Degree in economics, accounting, business or a related field."

On April 22, 2013, the service center issued an RFE in this matter and requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The director outlined the specific evidence to be submitted.



In response, counsel submitted: (1) his own letter, dated June 26, 2013; (2) a letter, dated June 19, 2013, from [REDACTED], the petitioner's vice president; (3) an organizational chart of the petitioner's operations; (4) a photocopy of a vacancy announcement to the petitioner placed for the proffered position; (5) five vacancy announcements placed by other companies; (6) the college transcript of [REDACTED]

In his June 19, 2013 letter, the petitioner's vice president provided the following description of the duties of the proffered position:

- Ensure a portfolio of best in class kitchen cabinetry suppliers by applying standard procurement practices and techniques such as market knowledge and data analysis, cost management, negotiation and conditioning, and supplier management and development. *(This includes a simple yet key element of the position which is sound inventory management and utilizing material planning to drive purchasing and replenishment.) (7 hours)*
- Create and execute long-term sourcing strategies while minimizing cost, ensuring product quality and improving product availability. *(This includes continuously searching for improved and less costly materials and supplies within the classifications, and monitoring and analyzing trends in firm spending and inventory control in order to make recommendations for the future and to identify areas for possible savings.) (2 hours)*
- Manage supplier relationships including the development, negotiation and management of contracts with those suppliers. *(This includes analyzing supplier selection to ascertain the best products and suppliers in terms of best value, delivery schedules and quality including experience in a global sourcing environment.) (3 hours)*
- Insure suppliers are held accountable for performance and continuous improvement including lead time reduction, delivery, flexibility, quality improvement, inventory reduction and cost reduction. *(This includes continually evaluating vendor and product pricing, service and product specifications to meet organizational standards, and taking full responsibility for issues with suppliers and to implement corrective and preventative actions and determine the root cause of problem.) (3 hours)*
- Develop, implement and maintain a scorecard system to monitor, rate, and report supplier performance. *(This includes compiling data from vendors using Key Performance Indicators in order to properly analyze issues, ensuring compliance with a wide variety of purchasing policies and procedures, and monitoring purchasing processes.) (2 hours)*
- Develop and implement a system for evaluating and approving potential suppliers via factual and measurable assessment. *(This includes working in conjunction with others to ensure the supplier meets company needs for cost, quality, delivery and customer service.) (2 hours)*

- Coordinate with suppliers and product management to understand supplier product roadmaps. *(This includes forecasting material spending and managing appropriate inventory levels to meet build requirements as well as corporate inventory valuation objectives.)* (2 hours)
- Manage product transitions through the product life cycle. *(This includes Recommending new products and revised designs which the incumbent feels are of better quality that will create fewer issues for customer service based product quality.)* (1 hours [sic])
- Ensure that issues within the supply base relative to purchasing transactions are handled in a timely manner. *(This includes taking a lead role in the management of obsolescence issues to ensure alternatives and options are thoroughly investigated in a timely manner to assure continuity of supply.)* (2 hours)
- Review and improve purchasing department utilization of computer system tracking and implementation of new software functionality. *(This includes working with a computer systems analyst in updating and integrating purchasing utilization software into our current hardware scheme.)* (2 hour[s])
- Ensure that sourcing processes and procedures are fully documented and accurate. *(This includes working with H.R. in developing, documenting and assisting with purchasing controls, policies and procedures, and ensuring that the price book is maintained properly)* (1 hours [sic])
- Supervise purchasing staff. *(This includes establishing and implementing purchasing staff performance plan objectives, training plans, and employee evaluations, and providing strong leadership, guidance and direction to purchasing staff.)* (3 hours)

The petitioner's vice president further stated, "The duties of this position are very complex, requiring the thorough knowledge and application of economics and business principles and theories, which ordinarily are studied at the university level." He did not state that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent.

The petitioner's organizational chart shows that, in the proffered position, the beneficiary would supervise a "Purchase Agent" and an "Assistant."

The petitioner's vacancy announcement shows that the petitioner sought to hire a purchasing manager and stated that the minimum educational requirement of the position is a bachelor's degree in "economics, accounting, business, or a related field."

The college transcript of [REDACTED] shows that he was awarded a bachelor's degree in industrial engineering and operations research by [REDACTED]. The résumé of [REDACTED] states that he worked as the petitioner's Vice President, Purchasing from July 2007 to October 2012.

In his June 26, 2013 letter, counsel generally asserted that the evidence submitted demonstrates that the proffered position is a specialty occupation position. Counsel also stated, "[REDACTED]" (current



V.P. at [the petitioner]) performed the duties of purchasing manager which included all purchasing and inventory management activities."

The director denied the petition on July 12, 2013, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, the director found that the petitioner had satisfied none of the supplemental criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel provided printouts of portions of the U.S. Department of Labor's *Occupational Outlook Handbook* (*Handbook*) and O\*NET and asserted that the evidence submitted demonstrates that the proffered position qualifies as a specialty occupation position. Counsel further stated that the USCIS had improperly amended 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty.

#### Analysis

As is discussed above, section 214(i)(1)(B) of the Act makes explicit that, to qualify as a specialty occupation position, a position must require a minimum of a bachelor's degree in a specific specialty or its equivalent. As is also explained above, the AAO will not interpret the pertinent regulations in any way that is inconsistent with the statute. The AAO will therefore interpret the pertinent regulations as requiring a minimum of a bachelor's degree in a specific specialty or its equivalent.

In a related preliminary matter, the petitioner has never asserted that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent. The closest it has come to such an assertion is the petitioner's vice president's statement, in his April 1, 2013 letter, that the proffered position requires a bachelor's degree in "economics, accounting, business or a related field."

The requirement of a bachelor's degree in business administration is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. at 558. To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding

that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).<sup>9</sup>

Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO 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 U.S. Department of Labor's *Occupational Outlook Handbook* (*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 will first address the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The petitioner claims in the LCA that the proffered position corresponds to SOC code and title 11-3061, Purchasing Managers from O\*NET. It also asserts that O\*NET demonstrates that the proffered position qualifies as a specialty occupation position.

On March 26, 2014, the AAO accessed the pertinent section of the O\*NET Internet site, which addresses Purchasing Managers under the Department of Labor's Standard Occupational Classification code of 11-3061. O\*NET does not state that purchasing manager positions require a bachelor's degree. Rather, it assigns purchasing managers a Job Zone "Four" rating, which groups them among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, the O\*NET does not indicate that four-year bachelor's degrees required by most Job Zone

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

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



Four occupations must be in a specific specialty closely related to the requirements of that occupation. Therefore, the O\*NET information is not probative of the proffered position's being a specialty occupation.

The AAO recognizes the *Handbook*, cited by counsel, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>10</sup> The AAO reviewed the chapter of the *Handbook* (2014-2015 edition) entitled "Purchasing Managers, Buyers, and Purchasing Agents," including the sections regarding the typical duties and requirements for this occupational category. The *Handbook* states the following with regard to the duties of Purchasing Managers, Buyers, and Purchasing Agents:

**What Purchasing Managers, Buyers, and Purchasing Agents Do:**

Purchasing managers, buyers, and purchasing agents buy products for organizations to use or resell. They evaluate suppliers, negotiate contracts, and review product quality.

**Duties**

Purchasing managers, buyers, and purchasing agents typically do the following:

- Evaluate suppliers based on price, quality, and delivery speed
- Interview vendors and visit suppliers' plants and distribution centers to examine and learn about products, services, and prices
- Attend meetings, trade shows, and conferences to learn about new industry trends and make contacts with suppliers
- Analyze price proposals, financial reports, and other information to determine reasonable prices
- Negotiate contracts on behalf of their organization
- Work out agreements with suppliers, such as when products will be delivered
- Meet with staff and vendors to discuss defective or unacceptable goods or services and determine corrective action
- Evaluate and monitor contracts to be sure that vendors and supplies comply with the terms and conditions of the contract and to determine the need for changes
- Maintain and review records of items bought, costs, deliveries, product performance, and inventories

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<sup>10</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2014 – 2015 edition available online.

Purchasing managers, buyers, and purchasing agents buy farm products, durable and nondurable goods, and services for organizations and institutions. They try to get the best deal for their organization—the highest quality goods and services at the lowest cost. They do this by studying sales records and inventory levels of current stock, identifying foreign and domestic suppliers, and keeping up to date with changes affecting both the supply of, and demand for, products and materials.

Purchasing agents and buyers consider price, quality, availability, reliability, and technical support when choosing suppliers and merchandise. To be effective, purchasing agents and buyers must have a working technical knowledge of the goods or services to be bought.

Evaluating suppliers is one of the most critical functions of a purchasing manager, buyer, or purchasing agent. Many organizations now run on a lean manufacturing schedule and use just-in-time inventories, so any delays in the supply chain can shut down production and potentially cause the organization to lose customers.

Purchasing managers, buyers, and purchasing agents use many resources to find out all they can about potential suppliers. They attend meetings, trade shows, and conferences to learn about new industry trends and make contacts with suppliers.

They often interview prospective suppliers and visit their plants and distribution centers to assess their capabilities. For example, they may discuss the design of products with design engineers, quality concerns with production supervisors, or shipping issues with managers in the receiving department.

Purchasing managers, buyers, and purchasing agents must make certain that the supplier can deliver the desired goods or services on time, in the correct quantities, and without sacrificing quality. Once they have gathered information on suppliers, they sign contracts with suppliers who meet the organization's needs, and they place orders.

Buyers who purchase items to resell to customers largely determine which products their organization will sell. They need to be able to predict what will appeal to their customers. If they are wrong, they could jeopardize the profits and reputation of their organization.

**Wholesale and retail buyers** purchase goods for resale to consumers. Examples of these goods are clothing and electronics. Purchasing specialists who buy finished goods for resale are commonly known as *buyers* or *merchandise managers*. Buyers who work for large organizations usually specialize in one or two lines of merchandise (for example, men's clothing or women's shoes or children's toys). Buyers who work for small stores may be responsible for buying everything the store sells.



***Purchasing agents and buyers of farm products*** buy agricultural products for further processing or resale. Examples of these products include grain, cotton, and tobacco.

***Purchasing agents, except wholesale, retail, and farm products*** buy items for the operation of an organization. Examples of these items include chemicals and industrial equipment needed for a manufacturing establishment, and office supplies.

***Purchasing managers*** plan and coordinate the work of buyers and purchasing agents, and they usually handle purchases that are more complicated. Those employed by government agencies or manufacturing firms usually are called *purchasing directors, managers, or agents*; sometimes they are known as *contract specialists*. Some purchasing managers, called *contract, sourcing, or supply managers*, specialize in negotiating and supervising contracts for supplies.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Purchasing Managers, Buyers, and Purchasing Agents," <http://www.bls.gov/ooh/business-and-financial/purchasing-managers-buyers-and-purchasing-agents.htm#tab-2> (last visited Mar. 26, 2014).

The duties the petitioner's vice president attributed to the proffered position are consistent with the duties of purchasing managers as described in the *Handbook*. The AAO finds that the proffered position is a purchasing manager position as described in the *Handbook*.

The *Handbook* states the following about the educational requirements of purchasing manager, buyer, and purchasing agent positions:

### **How to Become a Purchasing Manager, Buyer, or Purchasing Agent**

Although educational requirements for buyers and purchasing agents may vary by the size of the organization and the type of product, extensive on-the-job training is typically provided. Purchasing managers need a bachelor's degree and work experience as a buyer or purchasing agent.

### **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 Institute for Supply Management, 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.

The American Purchasing Society offers two certifications: the Certified Purchasing 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).

APICS offers the Certified Supply Chain Professional (CSCP) credential.

The Universal Public Procurement Certification Council offers two certifications for workers in federal, state, and local government: Certified Professional Public Buyer (CPPB) and Certified Public Purchasing Officer (CPPO). NIGP: The Institute for Public Procurement 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.

**Important Qualities**

**Analytical skills.** When evaluating suppliers, purchasing managers and agents must analyze their options and choose a supplier with the best combination of price and quality.

**Decision-making skills.** Purchasing managers and agents must have the ability to make informed and timely decisions by choosing products that they think will sell.

**Math skills.** Purchasing managers and agents must possess basic math skills. They must be able to compare prices from different suppliers to ensure that their organization is getting the best deal.

**Negotiating skills.** Purchasing managers and agents often must negotiate the terms of a contract with a supplier. Interpersonal skills and self-confidence, in addition to knowledge of the product, can help lead to successful negotiation.

*Id.* at <http://www.bls.gov/ooh/business-and-financial/purchasing-managers-buyers-and-purchasing-agents.htm#tab-4> (last visited Mar.26, 2014).

The *Handbook* states, "Purchasing managers need a bachelor's degree and work experience as a buyer or purchasing agent." It further states, "Purchasing managers usually have at least a bachelor's degree and some work experience in the field." However, the *Handbook* does not assert, in either of those statements or elsewhere, that purchasing manager positions require a minimum of a bachelor's degree *in a specific specialty* or its equivalent.

Further, the AAO finds that, to the extent that they are described in the record of proceeding, the numerous duties that the petitioner ascribes to the proffered position indicate a need for a range of knowledge of commercial purchasing, but do not establish any particular level of formal, postsecondary education leading to a bachelor's or higher degree in a specific specialty as minimally necessary to attain such knowledge.

Where, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies this criterion by a preponderance of the evidence standard, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. The

regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." 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)). In this case, the *Handbook* does not support the proposition that the proffered position satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), and the record of proceeding does not contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category would be sufficient in and of itself to establish that a bachelor's or higher degree in a specific specialty or its equivalent "is normally the minimum requirement for entry into [this] particular position."

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

In determining whether there is 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).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other reliable and authoritative source, indicates that there is a standard, minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent.

Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

As was noted above, the petitioner did submit five vacancy announcements in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar



organizations. Specifically, the petitioner submitted advertisements for the following positions posted on the Internet:

1. Purchasing Manager for an unidentified chemical company requiring an unspecified bachelor's degree and "5+ to 7 years" of experience;
2. Purchasing Manager for [REDACTED] a building materials manufacturer, requiring "10 years business experience in purchasing" and "7 years in a leadership capacity related to purchasing," and stating, "Should have a bachelor's degree";
3. Purchasing Manager for an unidentified automotive parts manufacturer requiring "Education: Bachelors degree (Engineering, Economics...) or equal by experience" and "At least 5 years experience in purchasing";
4. Purchasing Manager for [REDACTED], an automobile parts manufacturer, requiring a "4-year technical degree" and "8 to 10 years of purchasing experience"; and
5. Purchasing Manager for an unidentified company in an unidentified industry requiring a "Bachelor's Degree in a business-related area" and "5+ years' of purchasing experience."

Although the first and second vacancy announcements mention a bachelor's degree, they do not indicate that the degree must be in any specific specialty. As such, they do not indicate that the positions they announce require a minimum of a bachelor's degree in a specific specialty or its equivalent.

The third, fourth, and fifth vacancy announcements require a bachelor's degree in engineering or economics, a 4-year technical degree, and a bachelor's degree in a business-related area, respectively. Each of those requires a degree, but indicates that any degree from within a very wide array of subjects would be acceptable. None of those vacancy announcements require a minimum of a bachelor's degree *in a specific specialty* or its equivalent.

Further, the petitioner is in the industry of providing kitchen cabinets. Demonstrating satisfaction of the alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires showing that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to parallel positions *in the petitioner's industry*. The first four vacancy announcements provided are clearly not in the petitioner's industry. The fourth vacancy announcement does not identify the industry of the company that placed it. As such, whether it was placed by an organization in the petitioner's industry is unclear. Thus, none of the five vacancy announcements provided has been shown to have been placed by an organization in the petitioner's industry. This is an additional reason to find that the vacancy announcements provided do not address the alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Yet further, even if all of the vacancy announcements were for parallel positions with organizations similar to the petitioner and in the petitioner's industry and required a minimum of a bachelor's degree in a specific specialty or its equivalent, the petitioner has failed to demonstrate what statistically valid inferences, if any, can be drawn from five announcements with regard to the

common educational requirements for entry into parallel positions in similar organizations in the petitioner's industry.<sup>11</sup>

Finally, as was noted above, the petitioner has designated the proffered position as a Level I position on the LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. In order to attempt to show that parallel positions require a minimum of a bachelor's degree in a specific specialty or its equivalent, the petitioner would be obliged to demonstrate that other Level I purchasing manager positions, entry-level positions requiring only a basic understanding of the position, require such a specialized degree or equivalent, the proposition of which is not supported by the *Handbook*.

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

The petitioner also has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." A review of the record indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

For instance, applying standard procurement practices and techniques such as market knowledge and data analysis, cost management, negotiation and conditioning, and supplier management and development, although it clearly requires knowledge of commercial purchasing practices, contains no indication that it renders the proffered position so complex and unique that it can only be

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<sup>11</sup> 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 job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *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").

As such, even if the job announcements supported the finding that the position of purchasing manager for firms similar to and in the same industry as the petitioner required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly demonstrate that such an educational requirement is common throughout the petitioner's industry among companies similar to the petitioner for parallel positions.



performed by a person with a minimum of a bachelor's degree in a specific specialty or its equivalent.

Similarly, creating and executing long-term sourcing strategies; managing supplier relationships; holding suppliers accountable for performance; developing, implementing and maintaining a system to monitor, rate and report supplier performance; developing and implementing a system for evaluating and approving potential suppliers; etc., while they require knowledge of commercial purchasing, contain no indication that they would necessitate a minimum of a bachelor's degree in a specific specialty or its equivalent.

Moreover, while the assertions of record with regard to the claimed complex and unique nature of the proffered position are acknowledged, those assertions are undermined by the fact that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation. This factor is inconsistent with the analysis of the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate selected by the petitioner, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that she will receive specific instructions on required tasks and expected results; and that her work will be reviewed for accuracy.<sup>12</sup>

Accordingly, given the *Handbook's* indication that typical positions located within the "Purchasing Managers, Buyers, and Agents" occupational category do not require at least a bachelor's degree in a specific specialty, or the equivalent, for entry, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* contain such a requirement.

The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that may be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. As the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions within the same occupational category that may not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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<sup>12</sup> U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited Mar. 26, 2014).

The AAO will next address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which may be satisfied if the petitioner demonstrates that it normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position.<sup>13</sup>

Evidence in the record shows that [REDACTED] has a bachelor's degree in Industrial Engineering and Operations Research. The résumé of [REDACTED], presumably the same person, shows that he worked as the petitioner's Vice President, Purchasing from July 2007 to October 2012. Counsel stated that [REDACTED] performed the duties of the proffered position, presumably during that same period.

The petitioner stated, on the visa petition, that it was founded in 2006. Who performed the duties of the proffered position prior to July 2007 and after October 2012 is unknown.

In any event, the AAO does not consider a single previous hire sufficient evidence of a past history of employing only persons with at least a bachelor's degree in a specific specialty, or the equivalent, to establish eligibility under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). It is also not clear that that individual's possession of a particular bachelor's degree was a prerequisite to his hiring.

The petitioner offered no evidence pertinent to anyone else it has employed in the proffered position or who has performed the duties of the proffered position. Therefore, the petitioner has not demonstrated that it normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position and has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. The duties of the proffered position, such as managing product transitions, ensuring that purchasing transaction issues are timely handled, reviewing and improving the purchasing department's use of its computer system, ensuring that sourcing processes

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<sup>13</sup> While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in a specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").



are accurately documented, and supervising purchasing staff, for instance, evince a need for knowledge of commercial purchasing practices, but do not reveal a nature specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

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

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

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

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited Mar. 26, 2014).

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

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

*Id.*

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

of complexity imputed to the proffered position by virtue of the petitioner's Level I wage-rate designation.

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

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

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

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

*Id.*

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

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

*Id.*

Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. As already noted, by virtue of this submission, the petitioner effectively attested to DOL that the proffered position is a low-level, entry position relative to others within the same occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered



position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

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

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.

#### V. CONCLUSION AND ORDER

The evidence of record does not demonstrate that the proffered position is a specialty occupation and therefore does not overcome the director's ground for denying this petition. Consequently, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the petition will also be denied because the LCA filed by the petitioner in support of this petition does not correspond to it, and it fails to establish that the petitioner will pay the beneficiary an adequate salary. Consequently, this petition could be approved even if it were determined that the petitioner had overcome the director's ground for denying this petition, which it has not.

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

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

The director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the denial.<sup>14</sup> In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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

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<sup>14</sup> Because these matters preclude approval of the petition, the AAO will not further discuss any additional issues, deficiencies, or unresolved questions it has observed in the record of proceeding.