



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **MAR 31 2014**

OFFICE: VERMONT 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 THE 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,

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

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on August 30, 2012. On the Form I-129, the petitioner claims to be engaged in "retail" services, and claims that it was established in 2008.<sup>1</sup> In order to continue to employ the beneficiary in what it designates as an accountant position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on June 18, 2013, finding that the petitioner failed to establish that: (1) the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions; and (2) the beneficiary is qualified to perform the duties of the proffered position in accordance with the applicable statutory and regulatory provisions.; and (3) the beneficiary maintained the previously accorded H-1B status in accordance with the terms and conditions of the prior petition.<sup>2</sup> On appeal, counsel asserts that the director's bases for denial of the petition were erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

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

#### I. Evidentiary Standard Applied on Appeal

As a preliminary matter, and in light of counsel's references to the requirement that the AAO apply the "preponderance of the evidence" standard, the AAO affirms that, in the exercise of its appellate 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, 375-376 (AAO 2010). In pertinent part, that decision states the following:

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<sup>1</sup> On the Labor Condition Application (LCA) submitted with the petition, the petitioner provided a North American Industry Classification System (NAICS) Code of 447110, which corresponds to "Gasoline Stations with Convenience Stores." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "447110 Gasoline Stations with Convenience Stores," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>2</sup> We should note that because the question of the beneficiary's status is beyond the AAO's jurisdiction and therefore not relevant to this appeal, we have not considered the director's comments in that regard for any purpose.

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.*

The AAO conducts appellate review 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 determinations in this matter were 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 petitioner has not established that its claims are “more likely than not” or “probably” true. 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 claims are “more likely than not” or “probably” true.

## II. Factual and Procedural History

In this matter, the petitioner stated in the Form I-129 petition that it seeks the beneficiary’s services as an accountant to work on a full-time basis for its retail business. In a support letter dated July 23,



2012, the petitioner further explained the nature of its business operations, claiming that it was "an acquisition, management and development firm, primarily in the business of purchasing and managing fast-food, convenience stores, and other retail sales operations." The petitioner further claimed that, as a result of the petitioner's business structure, the varied needs of its employees and customers, and the highly specialized nature of the retail sales it provides in today's market, it was required to employ a full-time accountant. Regarding the duties of the proffered position, the petitioner stated as follows:

In this position, [the beneficiary's] specific duties will include: (i) compiling and analyzing financial information and preparing financial reports by applying principles of generally accepted accounting standards; (ii) preparing entries and reconciling general ledger accounts, documenting transactions, and summarizing current and projected financial position; (iii) maintaining payable and receivable records, detailing assets, liabilities, capital, and preparing detailed balance sheet, profit & loss, and cash flow statement; (iv) auditing orders, contracts, individual transactions and preparing depreciation schedules to apply to capital assets; (v) preparing compliance reports for taxing authorities; and (vi) analyzing operating statements, review cost control programs, and make strategy recommendations to management.

In its letter of support accompanying the initial Form I-129 petition, the petitioner stated the following regarding the requirements of the proffered position:

Due to the complex and demanding requirements of the position of an Accountant, only a person of exceptional ability and skills in business administration is capable of qualifying as an Accountant for [the petitioner]. These minimum prerequisites for the offered position require a skilled professional with a Bachelor's degree in Business Administration, Accounting, Finance, or a related field.

The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of his foreign degree and work experience. The petitioner provided a copy of the beneficiary's foreign diploma and transcript, and an evaluation of the beneficiary's credentials prepared by Morningside Evaluations and Consultants. The evaluation opines that based on the beneficiary's academic qualifications and professional experience, she has attained the equivalent of at least a Bachelor of Business Administration degree from an accredited institution of higher education in the United States.

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA was certified for use with a job prospect within the occupational classification "Accountants and Auditors" - SOC (ONET/OES) code 13-2011, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on January 31, 2013. The AAO notes that the director specifically requested that the petitioner submit probative evidence to establish that the proffered position is a specialty



occupation. The director outlined the evidence to be submitted, and requested additional documentation demonstrating that the beneficiary was maintaining status and was qualified to perform the duties of a specialty occupation.

On April 26, 2013, counsel responded to the director's RFE by providing a brief and additional evidence. The documentation included: (1) corporate documents; (2) tax documents;<sup>3</sup> (3) invoices; (4) commercial lease; (5) Form W-2, Wage and Tax Statements, for 2012 issued by the petitioner to the beneficiary and Mehsaniya Saiyadali; (6) copies of the beneficiary's paystubs from February 2012 through February 2013; (7) the petitioner's bank account statements for 2012; (8) an excerpt from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* regarding "Accountants and Auditors"; (9) a printout of the O\*NET Online summary report for "13-2011.01-Accountants"; (10) copies of numerous job postings;<sup>4</sup> (11) printouts of what appear to be advertisements for the proffered position; (12) diplomas and transcripts for [REDACTED] and [REDACTED] (13) an evaluation of the beneficiary's credentials prepared by [REDACTED] (14) a letter dated June 1, 2012 from [REDACTED] and (15) copies of previously submitted documents.

In response to the RFE, counsel submitted a brief containing a revised description of the duties of the proffered position, along with the approximate percentage of time that the beneficiary will spend performing each duty.<sup>6</sup>

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<sup>3</sup> The petitioner submitted its 2012 federal tax return. Notably, the tax return was not prepared by the beneficiary. Rather, [REDACTED] prepared the 2012 tax return for the petitioner.

<sup>4</sup> The AAO observes that several of the photocopies of the job announcements provided are partially or completely illegible. The AAO will not attempt to decipher or "guess" the meaning or the probative value of information provided in poor, illegible photocopies.

<sup>5</sup> The record also contains an evaluation from [REDACTED]

<sup>6</sup> It is noted that the revised job description provided by counsel is not probative evidence. The description was submitted by counsel, not the petitioner, and counsel's brief was not signed or endorsed by the petitioner. The record of proceeding does not indicate the source of the expanded duties and responsibilities (and the percentages of time allocated to each duty) that counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Moreover, the expanded description provided by counsel describes general duties common to the occupational category rather than the specific duties of this particular position (i.e., "[c]ommon duties for accountants..."; "[t]hey monitor..."; "[t]heir duties..."; "[a]ccountants are responsible . . ."; "[t]he majority of an accountant's day is spent . . ."; "[t]hese managers and supervisors oversee . . ."; "[t]hey must oversee all aspects of the accounting department . . .").

The director reviewed the information provided in response to the RFE. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on June 18, 2013. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.

### III. Analysis

#### A. Specialty Occupation

The first issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, and for the specific reasons described below, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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



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

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

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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 the proffered position qualifies as a specialty occupation, the AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The AAO finds that the petitioner describes the proposed duties in terms of generalized and generic functions that fail to convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. The relatively abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will be responsible for "compiling and analyzing financial information and preparing financial reports." The statement fails to provide insight into the beneficiary's actual duties, nor does it include any information regarding the specific tasks that the beneficiary will perform. Additionally, the petitioner claims that the beneficiary will be responsible for "preparing entries and reconciling general ledger accounts, documenting transactions, and summarizing current and projected financial position." Notably, the petitioner fails to demonstrate how the performance of these duties, as described in the record, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

The petitioner further claims that the beneficiary will be responsible for "preparing compliance reports for taxing authorities" and "analyzing operating statements, review cost control programs, and make strategy recommendations to management." The petitioner's statements fail to convey any pertinent details as to the actual work involved in these tasks within the context of the petitioner's operations. The petitioner does not explain the beneficiary's specific role and how his work will be conducted and/or applied within the scope of the petitioner's business operations. Furthermore, the petitioner fails to convey how a baccalaureate level of education (or higher) in a specific specialty, or its equivalent, would be required to perform these tasks. Thus, the overall responsibilities for the proffered position are related as generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, in which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations.

Such generalized information does not in itself establish a necessary correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. The AAO also

observes, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position.

The AAO further notes that the petitioner has described the duties of the beneficiary's employment in the same general terms as those used from various sources on the Internet, including excerpts from the *Dictionary of Occupational Titles (DOT)*. That is, the AAO notes that the wording of the above duties as provided by the petitioner for the proffered position is recited almost verbatim from other sources. This type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but it fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, generally cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

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

As such, the description of the job duties provided by the petitioner conveys only generalized functions of the occupational category at a generic level. The petitioner fails to convey either the substantive nature of the work that the beneficiary would actually perform in the context of the petitioner's business operations, any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform the duties, or the educational level of any such knowledge that may be necessary. The record of proceeding presents the proffered position's responsibilities as generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations.

The petitioner claims that the beneficiary has served in the proffered position since 2009. However, the petitioner failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or substantive evidence regarding the actual work that the beneficiary performs. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described fail to communicate (1) the actual work



that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the associated tasks, and (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

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

Assuming, *arguendo*, that the duties of the proffered position as described by the petitioner would in fact be the duties performed by the beneficiary, the AAO will continue its discussion regarding the duties and the evidence in the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). This criterion requires that the petitioner establish that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

The petitioner stated that the beneficiary would be employed in an accountant position. However, 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 AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>7</sup> As previously discussed, the petitioner designated the proffered position in the LCA under the occupational category "Accountants and Auditors."

In the instant case, the AAO finds that the petitioner has not provided sufficient information to establish that the proffered position falls under the occupational category "Accountants and

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<sup>7</sup> All of the AAO's references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The AAO hereby incorporates into the record of proceeding the chapters of the *Handbook* discussed in this decision.



Auditors." Nevertheless, the AAO reviewed the chapter of the *Handbook* entitled "Accountants and Auditors" including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that "Accountants and Auditors" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. This fact is significant, for it means that a particular position's inclusion within the Accountants and Auditors occupational group would not in itself suffice to establish the position as one for which, in the words of this criterion, "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position."

When reviewing the *Handbook*, the AAO must note that the petitioner submitted an LCA that had been certified for a Level I (entry) position. By doing so, the petitioner in effect attested that it viewed the proffered position as a comparatively low, entry-level position relative to others within the occupation and signified that the beneficiary is only expected to possess a basic understanding of the occupation. Furthermore, the petitioner's designation of the position under this wage level signifies that the beneficiary will be expected to work under close supervision and receive specific instructions on required tasks and expected results. Additionally, the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment. Moreover, the beneficiary's work will be closely monitored and reviewed for accuracy. DOL guidance indicates that a job offer for a research fellow, a worker in training, or an internship is an indicator that a Level I wage should be considered.

The *Handbook* reports that certification may be advantageous or even required for some accountant positions. However, the AAO notes that there is no indication that the petitioner requires the beneficiary to have obtained the designation Certified Public Accountant (CPA), Certified Management Accountant (CMA) or any other professional designation to serve in the proffered position.

While the *Handbook* states that most accountant positions require at least a bachelor's degree in accounting or a related field, the *Handbook* continues by stating the following:

In some cases, those with associate's degrees, as well as bookkeepers and accounting clerks who meet the education and experience requirements set by their employers, get junior accounting positions and advance to accountant positions by showing their accounting skills on the job.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Accountants and Auditors, on the Internet at <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-4> (last visited March 27, 2014).

The *Handbook* does not support a finding that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. More specifically, the *Handbook* reports that some graduates from junior colleges or business or correspondence schools, as well as bookkeepers and accounting clerks meeting education and experience requirements set by employers, can advance to accountant positions by demonstrating

their accounting skills. According to the *Handbook*, individuals who have less than a bachelor's degree in a specific specialty, or its equivalent, can obtain junior accounting positions and then advance to accountant positions. The *Handbook* does not state that this education and experience must be the equivalent to at least a bachelor's degree in a specific specialty.

The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is normally the minimum requirement for entry into this occupation. Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. The *Handbook* states that most accountants and auditors need at least a bachelor's degree, however, this statement does not support the view that any accountant job qualifies as a specialty occupation as "most" is not indicative that a particular position within the wide spectrum of accountant jobs normally requires at least a bachelor's degree in a specific specialty, or its equivalent.<sup>8</sup> More specifically, "most" is not indicative that a position normally requires at least a bachelor's degree in a specific specialty, or its equivalent, (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)), or that a position is so specialized and complex as to require knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)). Therefore, even if the proffered position were determined to be an accountant position, the *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.<sup>9</sup>

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<sup>8</sup> For instance, the first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of the positions require at least a bachelor's degree in a specific specialty, it could be said that "most" of the positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner (which as noted above is designated as a Level I entry position in the LCA). Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "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." Section 214(i)(1) of the Act.

<sup>9</sup> In response to the RFE, counsel cites to various unpublished AAO decisions as well as published decisions in support of the contention that certain "specialty occupations in transition" do not follow the same degree requirements imposed herein in order to be deemed a specialty occupation.

Regarding the AAO decisions, it is noted that 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. §



The AAO also reviewed the section of the *Handbook* relating to "Bookkeeping, Accounting, and Auditing Clerks," and finds that the *Handbook* does not indicate that bookkeeping, accounting, and auditing clerks comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree, in a specific specialty, or the equivalent. The *Handbook* provides the following information in the subsection entitled "How to Become a Bookkeeping, Accounting or Auditing Clerk" for this occupational category:

Most bookkeeping, accounting, and auditing clerks need a high school diploma, and they usually learn some of their skills on the job. They must have basic math and computer skills, including knowledge of spreadsheets and bookkeeping software.

#### Education

Most bookkeeping, accounting, and auditing clerks need a high school diploma. However, some employers prefer candidates who have some postsecondary education, particularly coursework in accounting.

#### Training

Bookkeeping, accounting, and auditing clerks usually get on-the-job training. Under the guidance of a supervisor or another experienced employee, new clerks learn how to do their tasks, including double-entry bookkeeping. (Double-entry bookkeeping means that each transaction is entered twice, once as a debit (cost) and once as a credit (income) to ensure that all accounts are balanced.)

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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. In the instant case, the petitioner has not submitted 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. Moreover, 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, although the petitioner also cites to various district court cases to support the proposition that the proffered position should be deemed a specialty occupation, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district, in contrast to the broad precedential authority of the case law of a United States circuit court. *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.



Some formal classroom training also may be necessary, such as training in specialized computer software. This on-the-job training typically takes around 6 months.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 Edition*, Bookkeeping, Accounting, or Audit Clerks, on the Internet at <http://www.bls.gov/ooh/Office-and-Administrative-Support/Bookkeeping-accounting-and-auditing-clerks.htm#tab-4> (last visited March 27, 2014).

The AAO notes that the *Handbook* does not report that, as an occupational group, "Bookkeeping, Accounting or Auditing Clerks" normally require at least a bachelor's degree in a specific specialty for entry. The *Handbook* explains that most bookkeeping, accounting, and auditing clerks need a high school diploma. The *Handbook* continues by stating that some employers prefer candidates who have some postsecondary education, particularly coursework in accounting. The *Handbook* further states that workers usually receive on-the-job training. The *Handbook* does not indicate that at least a baccalaureate degree in a specific specialty (or its equivalent), is normally the minimum requirement for entry into the occupation.

In response to the RFE, counsel submitted a copy of O\*Net Online "Summary Report for Accountants." The AAO reviewed the printout in its entirety. However, the AAO finds that it is insufficient to establish that the position qualifies as a specialty occupation for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. A designation of Job Zone 4 -- Education and Training Code: 5 indicates that a position requires considerable preparation. It does not, however, demonstrate that a bachelor's degree in any specific specialty is required, and does not, therefore, demonstrate that a position so designated qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Moreover, the O\*Net Online Help Center explains that Job Zone 4 signifies only that *most*, but not all, of the occupations within it require a bachelor's degree. See the O\*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>. Further, the Help Center's discussion confirms that Job Zone 4 does not indicate any requirements for particular majors or academic concentrations. *Id.* Therefore, the O\*NET information is not probative of the proffered position qualifying as a specialty occupation. It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

Finally, the petitioner and counsel state that a bachelor's degree in business administration is acceptable for the proffered position. 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 at 147.<sup>10</sup>

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<sup>10</sup> Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

Again, the petitioner and counsel in this matter claim that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

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

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

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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

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

*Id.*



reference its previous discussion on the matter. The record does not contain any letters from the industry's professional association, indicating that it has made a degree a minimum entry requirement.

In response to the director's RFE, counsel submitted copies of a large number of job advertisements as support of the assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations.<sup>11</sup> However, upon review of the evidence, the AAO finds that counsel's reliance on the job announcements is misplaced.

That is, upon review of the documentation, the AAO notes that counsel did not provide any independent evidence of how representative the job advertisements are of the advertising employers' recruiting history for the type of jobs advertised. As the advertisements are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Furthermore, in the Form I-129, the petitioner stated that it is a retail company established in 2008. The petitioner also stated that it has three employees and a gross annual income of approximately \$948,000. Although requested on the Form I-129, the petitioner failed to provide its net annual income. The petitioner's commercial lease, submitted in response to the RFE, indicates that it is required to use the leased premises exclusively for the operation of a gas station. Additionally, the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 447110.<sup>12</sup> The AAO notes that this NAICS code is designated for "Gasoline Stations with Convenience Stores."

The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments engaged in retailing automotive fuels (e.g., diesel fuel, gasohol, gasoline) in combination with convenience store or food mart items. These establishments can either be in a convenience store (i.e., food mart) setting or a gasoline station setting. These establishments may also provide automotive repair services.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 447110 – Gasoline Stations with Convenience Stores, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch#> (last visited March 11, 2013).

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<sup>11</sup> The AAO notes that counsel did not provide the entire job advertisement for the positions with several of the companies. That is, portions of the text are missing or have been cut-off. In addition, many of the job advertisements are illegible. Consequently, information regarding the requirements for these positions cannot be ascertained.

<sup>12</sup> According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited March 11, 2014).

For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner and counsel to claim that the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. As previously mentioned, 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

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

Although the petitioner submits more than thirty job postings, these postings do not establish eligibility under this criterion of the regulations. For instance, the advertisements include positions with [REDACTED] products and services); [REDACTED] (a national car rental company); [REDACTED] (a national retailer offering flexible rental purchase agreements); [REDACTED] (a nonprofit charitable organization); [REDACTED] Inc. (an independent online retailer of power tools and equipment); and [REDACTED] (a fashion retailer). The advertisements also include a number of confidential or anonymous postings that do not identify the poster or the industry in which the job is offered. Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. Consequently, the record is devoid of sufficient information regarding the employers to conduct a legitimate comparison of the organization to the petitioner. The petitioner and counsel failed to supplement the record of proceeding to establish that the employers are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with these organizations.

Moreover, some of the advertisements do not appear to be for parallel positions. More specifically, counsel provided several postings for "senior" positions requiring years of experience. For example, counsel submitted a posting for a senior accountant position with Fleet Accounting, which requires a degree and "2+ to 5 years" of experience. As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) position. Many of the advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.



Contrary to the purpose for which the advertisements were submitted, some of the postings do not specify at least a bachelor's degree in a specific specialty, or its equivalent, as required for the positions. For example, some of the postings state that a bachelor's degree is required, but they do not provide any further specification. Thus, they do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required. The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the specialty occupation claimed in the petition. Moreover, the AAO observes that counsel submitted some advertisements indicating that a bachelor's degree in business is acceptable. As previously mentioned, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. The evidence does not establish that similar organizations in the same industry require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.<sup>13</sup>

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

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

The AAO notes that it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's

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<sup>13</sup> Furthermore, USCIS "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." *Matter of Chawathe*, 25 I&N Dec. at 376. As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995).

business, as the size impacts upon the duties of a particular position. In matters where a petitioner's business is relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in a specific specialty, or its equivalent. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties.

The record demonstrates that the petitioner operates a gas station/convenience store. On the Form I-129, the petitioner claimed that it employed three persons, one of whom was the beneficiary, and had a gross annual income of \$948,000. The job description provided is entirely too vague and general to establish whatever objective level of complexity or uniqueness may reside in the position. In any event, in the context of a petitioner's claim of requiring a person with at least a bachelor's degree level of highly specialized knowledge in accounting or a related specialty, it is both reasonable and responsible for USCIS to consider the evidence of record related to the extent and nature of the business and financial matters in which the beneficiary would perform the accounting duties, as the substantive nature and performance requirements of the duties will necessarily be decided in material part by the business operations generating those duties.

On appeal, counsel states that the petitioner's "goal is to turn [its operations] into a leading retailer and premier fuel supplier." According to counsel, the petitioner's focus is on "increasing its retail presence." The petitioner also submitted various documents regarding its business operations. For example, the petitioner submitted corporate documents, its business licenses, tax documents, bank account statements, and related documentation. However, while counsel claims that the petitioner has plans to expand its business operations, the petitioner did not provide probative documentation to support the claim (e.g., a business plan; documentation substantiating the expansion of physical facilities; plans to hire staff; evidence substantiating that the petitioner intends to establish branch, subsidiary or affiliate offices; probative evidence substantiating investments or new revenue sources; or other documentation regarding development/expansion plans).<sup>14</sup>

A review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent.<sup>15</sup> Furthermore, the petitioner has not established

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<sup>14</sup> Counsel's claim that the petitioner intends to expand its business operations in the future is insufficient to demonstrate that the proffered position qualifies as a specialty occupation. That is, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. See 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

<sup>15</sup> Moreover, the petitioner has not provided sufficient evidence to establish that the beneficiary has been performing, and will continue to perform, the duties as described by the petitioner.



why a few related courses or industry experience alone is insufficient preparation for the proffered position. Additionally, the AAO finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) position 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>16</sup> DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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

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

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).

Thus, upon review of the assertions made by the petitioner and counsel, the AAO must question the level of complexity, independent judgment and understanding actually required for the proffered

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<sup>16</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.

position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described in the record of proceeding conflict with the wage-rate element of the LCA 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, by submitting an LCA certified for a Level I job opportunity, the petitioner basically attests that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. As noted above, a job offer for a research fellow, a worker in training, or an internship is an indicator that a Level I wage should be considered.

The petitioner fails to demonstrate how the duties of the position as described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background and her prior experience working for the petitioner will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner fails to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, 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).

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



To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. Upon review of the record of proceeding, the petitioner has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

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

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. 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 the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In response to the director's RFE, the counsel submitted copies of advertisements that counsel states represent the "[p]etitioner's recruitment efforts to fill [the] Accountant position." Notably, the advertisements submitted that were placed in various sources indicate that "2 yrs. experience" is required for the position. The advertisements do not indicate that a bachelor's degree or its equivalent is required. Thus, the evidence provided of the petitioner's recruitment efforts does not establish that the petitioner requires a bachelor's degree in a specific specialty or its equivalent to perform duties in the proffered position.

Further, counsel claimed that "[p]rior to employing [the beneficiary], [REDACTED] was employed in the position of Accountant." Counsel provided a copy of this person's diplomas from the [REDACTED] indicating that he has both a Master of Commerce degree and a Master of Business Administration degree. Counsel also submitted an educational credentials evaluation from [REDACTED] [REDACTED] had the U.S. equivalent of a Master of Business Administration Degree. Finally, counsel submitted a copy of Mr. Mehasaniya's W-2 Form for 2012 in support of the contention that he is an employee of the petitioner in the position of general manager.

The petitioner stated in the Form I-129 petition that it was established in 2008 (approximately four years prior to the filing of the instant petition). Notably, the petitioner did not specify the total number of individuals that have performed the duties of the proffered position and how many of them had a bachelor's degree in a specific specialty, or its equivalent. The submission of documentation regarding one individual (the general manager, who holds a general purpose degree, i.e., a master's degree in business administration) is not sufficient to establish eligibility under this criterion of the regulations.<sup>17</sup>

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

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

The AAO acknowledges that the petitioner and counsel may believe that the nature of the specific duties of the position in the context of its business operations is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. As previously discussed, the petitioner and its counsel claim that the petitioner plans to expand and develop its business operations. However, the petitioner failed to provide probative evidence to substantiate the claims. Moreover, even in light of the claimed plans for expansion/development, the petitioner and counsel did not establish that the proffered position qualifies as a specialty occupation.

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<sup>17</sup> Even if the petitioner had otherwise prevailed under this criterion, the record contains no documentary evidence demonstrating that [REDACTED] was employed by the petitioner prior to the beneficiary's assumption of the claimed accounting duties. The petitioner contends that this individual held the position of accountant prior to the beneficiary's employment with the petitioner (i.e., from 2008 to 2009), but submits no evidence to support this claim. As previously stated, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.



The AAO reviewed all of the evidence in the record of proceeding, including the job description and the evidence regarding the petitioner's business operations, such as the petitioner's corporate documents, copies of business licenses and tax documents, bank account statements, and other documentation. The AAO finds that the petitioner's statements and the submitted documentation fail to support the nature of the proposed duties as possessing the relative complexity and specialization required to satisfy this criterion.

The AAO also reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is appropriate for a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, as previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

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

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

#### B. Beneficiary's Qualifications

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. Nevertheless, since raised by the director, the AAO will review the director's findings in order to provide a comprehensive discussion.

As mentioned previously, the petitioner submitted an evaluation of education and experience which concluded that the beneficiary's foreign education and prior work experience is equivalent to a U.S. bachelor's degree in business administration. Specifically, while an evaluation of the beneficiary's academic credentials and experience prepared by Morningside Evaluations and Consulting states

that the beneficiary possesses the equivalent of a bachelor's degree in business administration from an accredited institution of higher education in the United States, degree, it fails to designate any specific business specialty. The AAO notes that a general degree in business administration alone is insufficient to qualify the beneficiary to perform the services of a specialty occupation, unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field. *Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm'r 1968). The petitioner must demonstrate that the beneficiary obtained knowledge of the particular occupation in which he or she will be employed. *Id.* Thus, even if the petitioner had demonstrated that the proffered position requires at least a bachelor's degree in a specific specialty or its equivalent, the petition could not be approved, because the petitioner failed to demonstrate that the beneficiary has taken courses or gained knowledge considered to be a realistic prerequisite to any specific specialty within the field of business. For this additional reason, the petition must be denied.

Further, even if USCIS were to accept such commercial evaluations of a beneficiary's work experience, the AAO observes that in the instant case, insufficient documentation of the beneficiary's work experience has been provided. The AAO notes that the evaluation was based upon the beneficiary's foreign degree and "employment history, as represented in letters from employers and a curriculum vitae."

The record contains a copy of one letter dated September 18, 2009 from [REDACTED] which states that the beneficiary was employed by that company from April 2004 to February 2009. This letter, cited by evaluator [REDACTED] simply provided a one-paragraph overview of generic accounting duties and provided little to no probative evidence identifying the actual nature of the beneficiary's former job and work experience. In addition to this vague job description, there is no definitive evidence establishing that the beneficiary was actually employed by this company. The record does not reflect an adequate factual foundation for the evaluator to determine that the beneficiary has the education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and that he has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. See 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

Again, the AAO notes that a degree in business administration alone is insufficient to qualify the beneficiary to perform the services of a specialty occupation, unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field. The petitioner must demonstrate that the beneficiary obtained knowledge of the particular occupation in which he or she will be employed. *Matter of Ling*, 13 I&N Dec. 35. However, the petitioner did not submit sufficient evidence regarding the proffered position for the AAO to make an assessment of whether the beneficiary obtained knowledge equivalent to at least a bachelor's degree in a specific specialty required by the particular occupation in which she will be employed. Indeed, it is not clear what the beneficiary will actually be doing on a day-to-day basis, and the petitioner makes no reference to nor draws a nexus between a concentration in the beneficiary's knowledge and the vague and generic duties of the proffered position.



Finally, when USCIS determines a beneficiary's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), it must be demonstrated that the beneficiary's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the beneficiary has documented recognition of expertise in the specialty. As previously noted, insufficient documentation has been provided in the instant case such that the AAO can ascertain whether the beneficiary's prior work experience included the theoretical and practical application of specialized knowledge and that her experience was gained while working with peers, supervisors, or subordinates who have a degree in the specialty occupation, or its equivalent. Additionally, the petitioner did not submit probative documentation establishing that the beneficiary has recognition of expertise in the specialty. As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in any specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

Therefore, the petitioner has not established that the beneficiary is qualified to perform services in a specialty occupation, and the petition must be dismissed for this additional reason.

#### IV. Prior Approvals and the Yates Memorandum

The AAO observes that the instant petition seeks to extend the beneficiary's H-1B employment with the petitioner, and notes that 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).

In response to the RFE, counsel for the petitioner emphasized that the proffered position is the same position in job title and duties as the previously approved H-1B petition filed by the petitioner on behalf of the beneficiary. Counsel also references an April 23, 2004 memorandum authored by William R. Yates (hereinafter Yates memo) as establishing that USCIS must give deference to those prior approvals or provide detailed explanations why deference is not warranted. Memorandum from William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3, (Apr. 23, 2004).

First, it must be noted that the Yates memo specifically states as follows:

[A]djudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology International*, 19 I&N 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. See 8 C.F.R. § 103.8(d). . . . Material error, changed circumstances, or new material information must be clearly articulated in the resulting request for evidence or decision denying the benefit sought, as appropriate.

Thus, the Yates memo does not advise adjudicators to approve an extension petition when the facts of the record do not demonstrate eligibility for the benefit sought. On the contrary, the memorandum's language quoted immediately above acknowledges that a petition should not be approved, where, as here, the petitioner has not demonstrated that the petition should be granted.

Again, as indicated in the Yates memo, 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. at 597. If the previous nonimmigrant petition was approved based on the same description of duties and assertions that are contained in the current record, they would constitute material and gross error on the part of the director. 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). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. See *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

## V. Conclusion

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

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 petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.