



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAY 01 2014**

OFFICE: VERMONT SERVICE CENTER

FILE: 

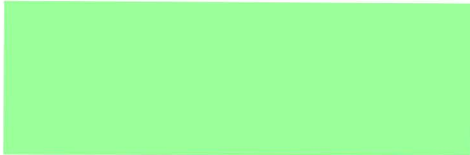
IN RE:

Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:

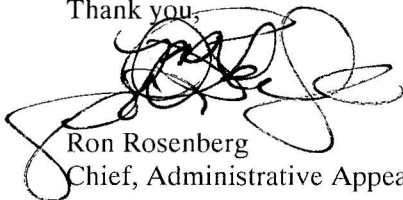


INSTRUCTIONS:

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

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

Thank you,



Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on April 5, 2013. In the Form I-129 visa petition, the petitioner describes itself as a chain of gasoline stations, convenience stores, and automotive repair shops that was established in 2010. In order to employ the beneficiary in what it designates as an administrative service manager position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on May 31, 2013, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

For the reasons that will be discussed later in the decision, the AAO agrees with the director's decision that the record of proceeding does not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Accordingly, the director's decision will not be disturbed.

I. Factual and Procedural History

In this matter, the petitioner states in the Form I-129 that it seeks the beneficiary's services as a full-time administrative service manager at a rate of pay of \$54,000 per year. The record contains a letter from the petitioner dated April 3, 2013, which is missing page 1. The letter describes the duties and responsibilities for the proffered position.

Moreover, the petitioner claims that "the Administrative Services Manager is a specialty occupation inasmuch that it requires the individual entrusted with the duties to have at a minimum a bachelor's degree in Science, Arts, Business or a related field." According to the petitioner, the beneficiary is "uniquely qualified" and he is a "recipient of a Master's degree in Business Administration from [REDACTED] in Virginia and a Bachelor's degree in Commerce from [REDACTED] in India." In support, the petitioner provided a copy of the beneficiary's diploma and academic transcript to establish that the beneficiary received a Master of Business Administration from [REDACTED] on July 31, 2011.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B

petition. The petitioner indicated on the LCA that the proffered position corresponds to the occupational category "Administrative Services Managers" – SOC (ONET/OES Code) 11-3011, 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 April 19, 2013. The director outlined the specific evidence to be submitted.

The petitioner and counsel responded to the RFE by submitting additional evidence in support of the H-1B petition. In a letter dated May 13, 2013, the petitioner provided the following job description:

As stated in the original submission, at this time [the petitioner] wishes to employ [the beneficiary] in the specialty occupation position of Administrative Services Manager. In this specialty occupation position, [the] beneficiary will chiefly be responsible for the overall management and supervision of the current business as well as all additional acquisitions by [the petitioner] and its management and will essentially rel[e]ve the owners and investors of the task of the day-to-day operations of the businesses so that they may concentrate on acquiring other business and investment ventures locally as well as nationally. Towards that end, the Administrative Services Manager at a macro level [sic] will exercise great discretion and executive level authority spanning various functions to include financial management and reporting; managing cross business operations; recruiting and terminating personnel; ensuring compliance with local laws and so on and so forth.

As stated, [the beneficiary] will be responsible for directing and coordinating business activities, product and service pricing, sales, and distribution. He will review financial data and activity reports to measure productivity and determine areas that need improvement. He will relay his findings and observations to upper management and recommend cost efficiencies and business process reengineering procedures to improve productivity and profitability. [The beneficiary] will direct and coordinate the organization and its future acquisition's budget activities to fund operations, maximize investments and increase efficiency.

[The beneficiary] will prepare marketing strategies, he will liaise with franchise principals to determine goods and services to be sold and initiate appropriate business promotion techniques. He will locate, select and procure merchandise for resale and will represent management in procurement and purchase functions. He will eventually monitor the activities of several area managers, store managers, and company staff. He will assign work schedules and duties for store managers and assure that unit specific productivity goals are met. Specifically, as stated in our prior correspondence, in addition to the above, [the beneficiary] will be responsible for the following duties and the anticipated percentage of time spent on the duties are broadly stated as follows:

- Planning, directing, and coordinating business activities;

- Developing, prepare, and implement marketing strategies;
- Liaising with franchise principals to determine goods and services to be sold;
- Initiating business promotion activities;
- Overseeing maintenance, monitoring facilities to ensure regulatory compliance, with safety and security;

45%

- Liaising with providers, equipment vendors, suppliers, and other related agencies;
- Analyzing internal processes, recommending and implementing procedural and policy changes to streamline operations;
- Increasing business efficiency and productivity;
- Reviewing budgets, financial reports and presenting data to management to identify problem areas and recommend solutions;

20%

- Hiring and terminating staff and administrative personnel and establishing work schedules and staff assignments;
- Monitoring the use of service facilities, and staff to ensure effective use of resources and assess the need for additional staff, equipment, and services;
- Developing and maintaining computerized record management systems to store and process data such as personnel activities and information, and to produce reports;

35%

The response also included the following documentation, in part:

- Job postings for various manager positions from the Internet;
- Excerpts from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* on "Administrative Services Managers," "Cost Estimators," "Purchasing Managers, Buyers, and Purchasing Agents," and "Top Executives";
- Excerpts from the Occupational Information Network (O*NET) regarding "Administrative Services Managers" and "General Managers";
- 2011 U.S. Income Tax Returns for the petitioner and [REDACTED] Inc., with Schedule K-1, listing [REDACTED] as 100% stock owner;¹
- 2011 U.S. Income Tax Returns for [REDACTED] Inc., [REDACTED] Inc., with Schedule K-1, listing [REDACTED] as 100% stock owner;
- Articles of Incorporation for the petitioner listing the initial director as [REDACTED];

¹ The petitioner's 2011 tax return indicates that it paid \$28,200 in compensation to its officer, and \$17,952 in salaries and wages to employees.

- Articles of Incorporation for [REDACTED] Inc., [REDACTED] Inc., [REDACTED] Inc. and [REDACTED] Inc., listing [REDACTED] as the initial director; and
- Photographs of gas stations, convenience stores and repair shops.

The director reviewed the record of proceeding, and determined that the petitioner failed to establish eligibility for the benefit sought. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent). The director denied the petition on May 31, 2013. Thereafter, counsel submitted an appeal of the denial of the H-1B petition. With the appeal, counsel submitted a brief to the AAO along with additional evidence.²

II. Beyond the Decision of the Director

The AAO reviewed the record of proceeding in its entirety and, as will be discussed below, has identified several issues that preclude the approval of the H-1B petition that were not identified by the director.³ Thus, even if the petitioner overcame the grounds for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought.

A. The Petitioner Does Not Require a Bachelor's or Higher Degree in a Specific Specialty (or Its Equivalent)

² With regard to the new documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533. If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not consider the sufficiency of such evidence requested in the RFE but submitted for the first time on appeal. Nevertheless, the AAO reviewed the documentation but finds that it fails to establish eligibility that the proffered position qualifies as a specialty occupation under the applicable statutory and regulatory provisions.

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

In this case, the petitioner claimed in its support letter that the proffered position "requires the individual entrusted with the duties to have at a minimum a bachelor's degree in Science, Arts, Business or a related field." In the same letter, the petitioner emphasized that the "minimum requirement for the position is a Bachelor's degree in Science, Arts, Business or a related field."

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

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

Here, the petitioner states that a bachelor's degree in a number of fields is acceptable, specifically, science, arts, business or a related field. However, it must be noted that these include broad categories that cover numerous and various specialties. Therefore, it is not readily apparent that a degree in any and all of these fields is directly related to the duties and responsibilities of the particular position proffered in this matter.

The petitioner, who bears the burden of proof in this proceeding, fails to establish either (1) that all of the disciplines are closely related fields, or (2) that all of the disciplines are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that normally the minimum requirement for entry into the particular position proffered in this matter is a bachelor's or higher degree in a specific specialty, or its equivalent, under the petitioner's own standards.

As the evidence of record fails to establish how these dissimilar fields of study form either a body of highly specialized knowledge or a specific specialty, or its equivalent, the petitioner's assertion that the job duties of this particular position can be performed by an individual with a bachelor's degree in any of these fields suggests that the proffered position is not in fact a specialty occupation. Therefore, absent probative evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position

requires, at best, anything more than a general bachelor's degree.⁴ Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Accordingly, without more, the petitioner's statement that the "minimum requirement for the position is a Bachelor's degree in Science, Arts, Business or a related field" fails to establish eligibility for the benefit sought under the applicable statutory and regulatory provisions. The director's decision must therefore be affirmed and the petition denied on this basis alone.

B. The Petitioner Has Not Established that It Would Pay the Beneficiary the Required Wage for His Work if the Petition Were Granted

The petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational category "Administrative Services Managers – SOC (ONET/OES) Code 11-3011. The petitioner stated that the corresponding prevailing wage for a Level I position falling under this occupational category was \$53,539 per year and that the beneficiary would be paid \$54,000 per year. The LCA was certified on March 25, 2013 and signed by the petitioner on April 3, 2013.

In response to the RFE, counsel claims that the *Handbook* states that "some administrative services managers need at least a bachelor's degree." Counsel further stated "we also attach multiple position descriptions with minimum educational requirements from the [*Handbook*] for occupations similar to the proffered position." Specifically, counsel submitted excerpts from the *Handbook* regarding the occupational categories "Cost Estimators," "Purchasing Managers, Buyers, and Purchasing Agents," and "Top Executives" as well as O*NET's summary on "General and Operations Managers."

On appeal, counsel asserts that the U.S. Citizenship and Immigration Services (USCIS) "acted against its own adjudicatory policy by relying merely on the position title rather than evaluating the duties of the proffered position" by dismissing the evidence from the *Handbook* and O*NET.

⁴ The assertion that a general-purpose degree or a degree in any discipline is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. *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"). There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988) (stating that "[t]he mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility"). Thus, while a general-purpose degree or a degree in any discipline 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.

Counsel claims that the director stated that "the underlying [LCA] is for an Administrative Services Manager and not for the position provided for comparison purposes from the O*[NET] Online database, thereby relegating the fact that several employers, across several industries, use different titles for positions that are essentially similar and fall within the realm of the comparative positions provided under the O*NET Online database."

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

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

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

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

For example, in this case, the petitioner claimed that the proffered position is similar to the *Handbook's* description for "Cost Estimators," "Purchasing Managers, Buyers, and Purchasing Agents," and "Top Executives" as well as O*NET's summary on "General and Operations Managers." A search of the Office of Foreign Labor Certification (OFLC) Online Wage Library reveals that (for the pertinent time period and relevant area of intended employment) the prevailing wage (assuming *arguendo* a Level I for all of the occupational categories) was as follows: "Cost Estimators" was \$44,075 per year; "Purchasing Managers" was \$98,904 per year; "Purchasing Agents" was \$52,083 per year; "Top Executives" which corresponds to "Chief Executives" was \$110,448 per year; and "General and Operations Managers" was \$74,194 per year."⁵

⁵ For more information regarding the prevailing wage for Level I positions in the above mentioned occupations in Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division, see the All Industries Database for 7/2012 - 6/2013 at the Foreign Labor Certification Data Center, Online Wage Library

Thus, if the petitioner believed the duties and requirements of the proffered position were similar to the above mentioned occupations, or that the proffered position was a combination of occupations, then according to DOL guidance the petitioner should have chosen the relevant occupational code for the highest paying occupational category, in this case "Chief Executives" at \$110,448 per year.

On the Form I-129 petition and LCA, the petitioner stated that it intended to employ the beneficiary on a full-time basis at a rate of pay of \$54,000 per year. Accordingly, the offered wage to the beneficiary is below the prevailing wage for the occupational category "Chief Executives" in the area of intended employment.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the LCA.⁶ See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed. Appx. 722, 723 (7th Cir. 2010). The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]").

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational classification in order for it to be found to correspond to the petition.⁷ To

on the Internet. For "Cost Estimators," see <http://www.flcdatacenter.com/OesQuickResults.aspx?area=47894&code=13-1051&year=13&source=1>; for "Purchasing Managers," see <http://www.flcdatacenter.com/OesQuickResults.aspx?code=11-3061&area=47894&year=13&source=1>; for "Purchasing Agents" see <http://www.flcdatacenter.com/OesQuickResults.aspx?code=13-1023&area=47894&year=13&source=1>; for "Chief Executives" see <http://www.flcdatacenter.com/OesQuickResults.aspx?area=47894&code=11-1011&year=13&source=1>; and for "General and Operations Managers" see <http://www.flcdatacenter.com/OesQuickResults.aspx?code=11-1021&area=47894&year=13&source=1> (last visited April 28, 2014).

⁶ The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment. The required wage rate means the rate of pay which is the higher of the actual wage for the specific employment in question or the prevailing wage rate for the occupation in which the beneficiary will be employed in the geographic area of intended employment. See 20 C.F.R. § 655.715.

⁷ To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between DOL and the U.S. Department of Homeland Security (DHS), a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2). Upon receiving DOL's certification, the prospective employer then submits the certified LCA to USCIS with an H-1B petition on

permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupational category at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted.

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

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

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

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

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

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

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

behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). DOL reviews LCAs "for completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition. 20 C.F.R. § 655.705(b); see generally 8 C.F.R. § 214.2(h)(4)(i)(B).

is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation . . . and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

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

C. The LCA Filed in the Instant Matter Would Not Correspond to a Higher-Level and More Complex Position

Moreover, based upon a review of the record of proceeding, the AAO finds the wage level for the proffered position questionable. More specifically, the record of proceeding contains discrepancies between what the petitioner claims about the level of responsibility and requirements inherent in the proffered position set against the contrary level of responsibility and requirements conveyed by the wage level indicated in the LCA submitted in support of petition. As noted above, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Administrative Services Manager" at a Level I (entry) wage.

Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing-wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.⁸ It is important to note that prevailing wage determinations start with an entry level wage (Level I) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁹ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion

⁸ For additional information on wage levels, see DOL, 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.

⁹ 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

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

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

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

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

DOL guidance indicates that a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones would be an indication that a wage determination at Level II would be proper classification for a position. The occupational category "Administrative Services Managers" has been assigned an O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, "[m]ost occupation in this zone require training in vocational schools, related on-the-job experience, or an associate's degree." See O*NET OnLine Help Center, on the Internet at <http://www.onetonline.org/help/online/zones#zone3> for a discussion of Job Zone 3.

In the instant case, the petitioner designated the proffered position as a Level I position. This suggests that the petitioner's academic and/or professional experience requirements for the proffered position would be *less than* "training in vocational schools, related on-the-job experience, or an associate's degree" as stated for occupations designated as O*NET Job Zone 3. The petitioner claims, however, that "the minimum requirement for the position is a Bachelor's degree in Science, Arts, Business or a related field." The petitioner did not provide an explanation for classifying the proffered position as a Level I position, but stating that it requires more preparation than most occupations falling under this job zone.

The petitioner's designation of the proffered position at a Level I wage-rate indicates that the beneficiary will be expected to "perform routine tasks that require limited, if any, exercise of judgment" and that he will work "under close supervision." However, the petitioner indicated in

"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.

response to the RFE that the beneficiary will "chiefly be responsible for the overall management and supervision of the current business as well as all additional acquisitions" and "essentially rel[ie]ve the owners and investors of the task of the day-to-day operations of the businesses so that they may concentrate on acquiring other business and investment ventures locally as well as nationally." The petitioner further claimed the beneficiary "will exercise great discretion and executive level authority spanning various functions to include financial management and reporting; managing cross business operations; recruiting and terminating personnel; ensuring compliance with local laws and so forth." According to the petitioner, the beneficiary "will be responsible for directing and coordinating business activities, product and service pricing, sales, and distribution." The beneficiary will also "review financial data and activity reports to measure financial productivity and determine areas that need improvement," and "relay his findings and observations to upper management and recommend cost efficiencies and business process reengineering procedures to improve productivity and profitability."

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

Further, the petitioner and counsel claim that the proffered position involves complex, unique and/or specialized duties. Further, in the May 13, 2013 letter, submitted in response to the RFE, the petitioner states that the beneficiary "must be well-versed in office and business automation tools" which typically include "complex software and hardware tools linked to various interface equipment, point of sale terminals, dispensing pumps, and other critical support equipment such as emissions units and safety inspection units." The petitioner also claims that the beneficiary will be single-handedly responsible to oversee "an electronically managed and monitored inventory system that carefully tracks sales at various units and prompts the main office to request inventory replenishment" thus "centralizing the core business operations and reducing the risk of pilferage and theft." In addition, the petitioner states that the beneficiary will also be responsible for user-end operation and maintenance of an automated system that tracks sales, determines franchise fees, and replenishes inventory. Moreover, the petitioner claims that the beneficiary must "ensure adequate staffing to meet business needs at all times" which requires "in-depth knowledge of personnel recruitment, selection, training, benefits and compensation allocation." The petitioner also states that "these complex tasks require that individual to have strong oral and verbal skills, problem recognition and solution abilities, and inductive and deductive reasoning to solve simple and complex issues that may arise during the regular operation of the business."

Upon review of the assertions regarding the proffered position, the AAO must question the stated requirements for the proffered position, as well as the level of complexity, independent judgment and understanding that are actually needed for the proffered position as the LCA is certified for a

Level I entry-level position. The petitioner's assertions that the duties require a significant level of responsibility and expertise, as well as the petitioner's stated academic requirement for the position, do not appear to be reflected in the wage level chosen by the petitioner on the LCA for the proffered position.

As previously discussed, under the H-1B program, the petitioner must pay the beneficiary at least the same wage rate as that paid to other employees with similar experience and qualifications or the local prevailing wage for the occupation in the area of employment, whichever is higher. In the instant case, the petitioner designated the proffered position as a Level I position. Notably, if the proffered position had been designated at a higher level, the prevailing wage at that time (for the claimed occupational category "Administrative Services Managers") would have been \$72,779 per year for a Level II position, \$91,998 per year for a Level III position, and \$111,238 per year for a Level IV position.¹⁰

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

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

The statements regarding the requirements and claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record of proceeding, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

¹⁰ For more information regarding the prevailing wage for "Administrative Services Managers" for a position in Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division, see the All Industries Database for 7/2012 - 6/2013 for this occupational category at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?code=11-3011&area=47894&year=13&source=1> (last visited April 28, 2014).

As such, a review of the enclosed LCA indicates that the information provided therein does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements, which if accepted as accurate would result in the beneficiary being paid a salary below that required by law. As a result, even if it were determined that the proffered position were a higher-level and more complex position as described and claimed elsewhere in the petition in support of the petitioner's assertions that this position qualifies as a specialty occupation, the petition could still not be approved for this additional reason.¹¹

III. The Director's Basis for Denial of the H-1B Petition

A. Specialty Occupation

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.

¹¹ Fundamentally, it appears that (1) the petitioner previously claimed to DOL that the proffered position is a Level I, entry-level position to obtain a lower prevailing wage; and (2) the petitioner is now claiming to USCIS that the position is a higher-level and more complex position in order to support its claim that the position qualifies as a specialty occupation. The AAO finds the petitioner's assertions questionable. Either the position is a more senior and complex position (based on a comparison of the petitioner's job requirements to the standard occupational requirements) and thereby necessitates a higher required wage, or it is an entry-level position for which a lower wage would be acceptable. To permit otherwise would be directly contrary to the U.S. worker protection provisions contained in section 212(n)(1)(A) of the Act and its implementing regulations.

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

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

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

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

represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

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

The AAO recognizes *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹² As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Administrative Services Managers."

The AAO reviewed the chapter of the *Handbook* entitled "Administrative Services Managers," including the sections regarding the typical duties and requirements for this occupational category. However, the AAO finds that the *Handbook* does not indicate that "Administrative Services Managers" 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.

The subchapter of the *Handbook* entitled "How to Become an Administrative Services Manager" states the following about this occupational category:

Educational requirements vary by the type of organization and the work they do. They must have related work experience.

Education

A high school diploma or a General Educational Development (GED) diploma is typically required for someone to become an administrative services manager. However, some administrative services managers need at least a bachelor's degree. Those with a bachelor's degree typically study business, engineering, or facility management.

¹² 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 chapter of the *Handbook* regarding "Administrative Services Managers."

Licenses, Certifications, and Registrations

The International Facility Management Association offers a competency-based professional certification program for administrative services managers. Completing this program may give prospective job candidates an advantage. The program has two levels: the Facilities Management Professional (FMP) certification and the Certified Facility Manager (CFM) certification. People entering the profession can get the FMP as a steppingstone to the CFM. For the CFM, applicants must meet certain educational and experience requirements.

Work Experience

Administrative services managers must have related work experience reflecting managerial and leadership abilities. For example, contract administrators need experience in purchasing and sales, as well as knowledge of the variety of supplies, machinery, and equipment that the organization uses. Managers who are concerned with supply, inventory, and distribution should be experienced in receiving, warehousing, packaging, shipping, transportation, and related operations.

Advancement

Advancement of facility managers is based on the practices and size of individual organizations. Some facility managers transfer among departments within an organization or work their way up from technical positions. Others advance through a progression of facility management positions that offer additional responsibilities. Advancement is easier in large organizations that employ several levels and types of administrative services managers.

A master's degree in business administration or a related field can enhance a manager's opportunities to advance to higher level positions, such as director of administrative services. Some experienced managers may join or establish a management consulting firm to provide administrative management services to other organizations on a contract basis.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Administrative Services Managers, on the Internet at <http://www.bls.gov/ooh/management/administrative-services-managers.htm#tab-4> (last visited April 28, 2014).

When reviewing the *Handbook*, the AAO must again note that the petitioner designated the proffered position under this occupational category at a Level I on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and will perform routine tasks that require limited, if any, exercise of judgment. In accordance with the relevant DOL explanatory information on wage levels, the beneficiary will be closely supervised and his work closely monitored and reviewed for accuracy. Furthermore, he will receive specific instructions on required tasks and expected results. DOL guidance indicates that a Level I designation is appropriate for a research fellow, a worker in training, or an internship. This

designation suggests that the beneficiary will not serve in a high-level or leadership position relative to others within the occupational category.

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 this occupation. The *Handbook* indicates that the educational requirements for the occupational category vary by the type of organization and the work performed. According to this passage of the *Handbook*, employees in this occupation must have related work experience.

Furthermore, the *Handbook* states that a high school diploma or a General Educational Development (GED) diploma is typically required for this occupation. Thus, the *Handbook* indicates that less than a bachelor's degree is acceptable for entry into this occupation. Moreover, the *Handbook* indicates that while some administrative services managers need at least a bachelor's degree, it continues by stating that employees study subjects in a range of fields—typically business, engineering, or facility management. The fact that only some employees in this occupation need a bachelor's degree (and that a range of disparate disciplines is acceptable) is not sufficient to establish that a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.¹³

In response to the RFE, counsel asserts that the *Handbook* states that "the typical work environment for this position is an office setting and the individuals in this position typically possess advanced analytical, communications, and leadership skills." The AAO agrees that the *Handbook* (under section "Work Environment") states that "administrative service managers spend much of their day in an office"; however, the *Handbook* does not indicate that "the individuals in this position typically possess advanced analytical, communications, and leadership skills." Further, possessing such skills does not mean that a bachelor's degree in a specific specialty is required for the position. Accordingly, the *Handbook* does not support the petitioner's claim that the proffered position falls under an occupational group for which a bachelor's degree (or higher) in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding 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

¹³ Here, the *Handbook* indicates that baccalaureate degrees in various fields are acceptable for entry into the occupation. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as business, engineering or facility management would not meet the statutory requirement that the degree be "in the specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will review the record of proceeding 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 (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

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

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source), reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

In support of the petitioner's assertion that the proffered position is a specialty occupation position, the record of proceeding contains multiple job announcements. However, upon review of the evidence, the AAO finds that the petitioner's reliance on the job announcements is misplaced.

In the Form I-129 and supporting documentation, the petitioner stated that it is a chain of gasoline stations, convenience stores and automotive repair shops established in 2010, with 5 employees. The petitioner reported its gross annual income as approximately \$6.4 million and its net annual income as \$95,000. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 447110 – "Gasoline Stations with Convenience Stores."¹⁴ The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

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.

¹⁴ 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 U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited April 28, 2014).

See 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 April 28, 2014).

For the petitioner to establish that an organization is similar, it must demonstrate that it and the advertising organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the 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 to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

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

For example, the petitioner has submitted advertisements for organizations that do not appear to be similar to the petitioner. Such samples of advertisements include Pacific Trade International (wholesale, retail, manufacturing), Mobile Rev (wireless), Papa John's (food), Kaiser Permanente (healthcare), Booze Allen Hamilton (consulting, engineering, IT, government contractor), Hess Corporation (energy), La Quinta (hotels and lodging), and Corning (specialty glass and ceramics). 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. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it.

Furthermore, the petitioner has not established that the advertisements are for parallel positions. For instance, a posting for an "Operations Manager" for Cultural Practice, LLC, indicates a preference for a Master's degree and states that "candidates should have at least 10 years of demonstrated experience in managing food security or development programming and overseeing the creation or management of database systems." Another posting for a "West Division Safety Manager" for Stock Building Supply requires a bachelor's degree and seven years of previous full time safety professional experience as well as understanding of OSHA, EPA, Fire Code and DOT rules and regulations, and a working knowledge of the lumber and building industry. A posting from Sapphire Energy for a "Project Controls Manager" requires a bachelor's degree in accounting, engineering or other related degree, and 5 to 7 years of experience working with EPC. As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) position; thus, some advertised positions appear to be for more senior positions than the proffered position. More importantly, many of the advertised positions do not appear to be parallel to the proffered position with regard to job duties and responsibilities.

Additionally, some of the postings do not require a bachelor's degree. The postings include an advertisement for a general manager position at Chick-fil-A, which does not state any academic requirement. The advertisement states that a candidate must be at least 18 years old, and that while "no experience is necessary" the company is "looking for friendly, enthusiastic people who enjoy serving customers." Likewise, an assistant manager position for Dunkin' Donuts requires a "high school diploma (or equivalent)." Contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions.

On appeal, counsel claims that "USCIS contends that most of these job announcements included a wide array of management positions for various employers." Counsel further asserts that "USCIS relied on nothing but the job title thus violating its own adjudicatory policy" by "not merely look[ing] at a job title but more so re[lying] on the specific nature of the job and its inherent duties." However, the AAO notes all visa petition proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations. Further, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

In addition, the petitioner fails to establish the relevancy of the provided examples to the issue here.¹⁵ That is, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹⁶

¹⁵ 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.

¹⁶ According to the *Handbook's* detailed statistics on administrative services managers, there were approximately 280,800 persons employed as administrative services managers in 2012. *Handbook*, 2014-15 ed., available at <http://www.bls.gov/ooh/management/administrative-services-managers.htm#tab-6> (last accessed April 28, 2014). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that organizations similar to the petitioner in its industry, for positions parallel to the proffered position, commonly require at least a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that just these postings (which appear to have been consciously selected) could credibly refute the statistics-based findings of the *Handbook* published

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

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

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted the following:

- 2011 U.S. Income Tax Return for the petitioner and [REDACTED] Inc. with Schedule K-1s, listing [REDACTED] as 100% stock owner
- 2011 U.S. Income Tax Return for [REDACTED] Inc., [REDACTED] Inc. with Schedule K-1. Listing [REDACTED] as 100% stock owner
- Articles of Incorporation for the petitioner listing initial director as [REDACTED]
- Articles of Incorporation for [REDACTED] Inc., [REDACTED] Inc., [REDACTED] Inc. and [REDACTED] Inc. listing [REDACTED] as the initial director
- Photographs of gas stations, convenience stores and repair shops

While the petitioner submitted documents regarding its business operations, the petitioner did not explain how the documents relate to the beneficiary's duties, and the evidence does not establish the relative complexity or uniqueness of the proffered position. For example, throughout the record, counsel and the petitioner claim that the petitioner is "a sister concern of [REDACTED] Inc.; [REDACTED] Inc.; [REDACTED] Inc.; [REDACTED] Inc.; [REDACTED] Inc.; that constitute a chain of gasoline stations, convenience stores, automobile repair facilities and car washes owned and operated by the joint owners: Mr. [REDACTED] and Mr. [REDACTED].¹⁷ Counsel and the petitioner further indicated that "the business focus of the

by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States.

¹⁷ The record does not establish that the petitioner is a "chain of gasoline stations, convenience stores and automotive repair shops." For example, the record does not establish a partnership between Mr. [REDACTED] and Mr. [REDACTED]. As mentioned, the record contains 2011 U.S. Income Tax Return for [REDACTED] Inc., and [REDACTED] Inc. with Schedule K-1s, which lists Mr. [REDACTED] as the 100% stock owner. Likewise, 2011 U.S. Income Tax Return for [REDACTED] Inc. and [REDACTED] Inc. list Mr. [REDACTED] as

chain is to acquire additional multiple gasoline station locations within Northern Virginia and to become the largest franchisee of the [REDACTED] brand in the region." The petitioner indicated that the beneficiary "will chiefly be responsible for the overall management and supervision of the current business as well as all additional acquisitions by [the petitioner] and its management and will essentially relive the owners and investors of the task of the day-to-day operations of the businesses so that they may concentrate on acquiring other business and investment ventures locally as well as nationally."

A review of the record of proceeding indicates that the petitioner has failed to demonstrate that 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. Additionally, 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.

Overall, the record lacks sufficient probative evidence to distinguish the proffered position as more complex or unique from other positions in the occupation that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the position. While a few related courses may be beneficial, or in some cases even required, to perform 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 evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty is not required for the proffered position.

Further, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the Level I wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, the wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; his work will be closely supervised and monitored; he will receive specific instructions on required tasks and expected results; and his work will be reviewed for accuracy.

Without further evidence, it is not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing

100% stock owner. The AAO notes that articles of incorporation for [REDACTED] Inc. lists Mr. [REDACTED] as the initial director; however, since the 2011 U.S. Income Tax Return for [REDACTED] Inc. lists Mr. [REDACTED] as the 100% stock owner, it is insufficient to establish a partnership.

wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹⁸

The petitioner claims that the beneficiary is uniquely qualified for the proffered position because of his education background. 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, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent). The petitioner and counsel do not sufficiently explain or clarify which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. 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. In addition, the petitioner may submit any other documentation it considers relevant to this criterion of the regulations.

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 assert that a proffered position requires a specific degree, that statement 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

¹⁸ For additional information regarding wage levels as defined by DOL, 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.

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.

The petitioner stated in the Form I-129 petition that it has 5 employees and was established in 2010 (approximately three years prior to the filing of the H-1B petition).¹⁹ On appeal, counsel asserted that the "petitioner currently employs an alternate individual namely, Mr. [REDACTED] in the same position at the same location." The AAO notes that in response to the RFE, the petitioner submitted an email notice for the petitioner's Form I-129 on behalf of Mr. [REDACTED] an approval notice for [REDACTED] Inc. t/a [REDACTED] Mr. [REDACTED]'s diploma, and the petitioner's pay stubs issued to Mr. [REDACTED]. Counsel claims that the director denied the petition because "a detailed job description was never submitted when in fact the USCIS never requested a job description for Mr. [REDACTED]. Counsel further asserts that "Mr. [REDACTED]'s job description is in his H-1B visa file with the USCIS and as such should have been easily accessible to the adjudication officer."

¹⁹ It is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's operations are relatively small, 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, and attainment of a bachelor's or higher degree in the 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 petitioner stated on the Form I-129 that it employs five people. The petitioner indicated that one of the individuals, Mr. [REDACTED] serves in the proffered position. The petitioner did not provide the job titles and duties for the other employees. Based on the information provided, the petitioner did not establish how the beneficiary will be relieved from performing non-qualifying duties.

It is worth emphasizing that that each petition filing is a separate proceeding with a separate record. *See Hakimuddin v. Dep't of Homeland Sec.*, No. 4:08-cv-1261, 2009 WL 497141, at *6 (S.D. Tex. Feb. 26, 2009); *see also Larita-Martinez v. INS* 220 F.3d 1092, 1096 (9th Cir. 2000) (stating that the "record of proceeding" in an immigration appeal includes all documents submitted in support of the appeal). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Moreover, the AAO notes that a petitioner's 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). As previously mentioned, in all visa petition proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act.

In support of the appeal, counsel submitted a copy of the petitioner's support letter filed for Mr. [REDACTED] for an administrative services manager position. In the letter, the petitioner states that it requires "a bachelor's degree in Science, Arts, Business or a related field." Thus, as discussed earlier, the petitioner's stated academic requirement is not sufficient to establish eligibility for the benefit sought under the applicable statutory and regulatory provisions.

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 reviewed the documentation submitted by the petitioner regarding the proffered position and its business operations, including the job descriptions, corporate tax returns, articles of incorporation, and photographs of the petitioner's business premises. On appeal, counsel asserts the petitioner intends to explore new investment and business ventures. Counsel further states that since the time of initial filing of the instant petition, "the group of companies has entered into a contract for the purchase of a [REDACTED] demonstrating the petitioner's intent to expand and diversify its business interests."

As previously discussed, the petitioner itself does not require a bachelor's or higher degree *in a specific specialty*, or its equivalent. With regard to the petitioner's expansion plans, it must be noted that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). As previously stated by the Service, "The H-1B classification is not intended . . . for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts." 63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998).

Furthermore, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. The AAO reiterates its earlier

comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Administrative Services Managers," 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, the petitioner has not demonstrated that the 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 III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. 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. 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.

IV. Conclusion and Order

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

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

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

ORDER: The appeal is dismissed.