



U.S. Citizenship  
and Immigration  
Services

(b)(6)

SEP 19 2014

DATE: OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

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

## I. INTRODUCTION

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 29-employee manufacturing company of induction melting and heating systems established in [REDACTED]. In order to employ the beneficiary in what it designates as a full-time "Operations Risk Management Director" position at a salary of \$55,000 per year,<sup>2</sup> 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 found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on August 21, 2013. Within the RFE, the director requested specific documentation to establish that the proffered position is a specialty occupation and that the beneficiary is qualified for the proffered position. The director received the petitioner's RFE response on November 13, 2013. The director denied the petition, concluding that the evidence of record failed to establish that the beneficiary was qualified to perform the duties of the proffered position.

The record of proceeding before us contains the following: (1) the Form I-129 and supporting documentation; (2) the director's RFE; (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Notice of Appeal or Motion (Form I-290B) and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's basis for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied. We will also address additional, independent grounds, not identified by the director's decision, that also preclude approval of this petition.<sup>3</sup>

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<sup>1</sup> The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 42183. Notably, the U.S. Department of Commerce, Census Bureau website states that "42183 is not a valid 2012 NAICS code." However, "42383" includes Industrial Machinery and Equipment Merchant Wholesalers and may reflect the petitioner's industry. 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 September 4, 2014).

<sup>2</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Transportation, Storage, and Distribution Managers" occupational classification, SOC (O\*NET/OES) Code 11-3071, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

<sup>3</sup> We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

## II. STANDARD OF PROOF

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

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

\* \* \*

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

\* \* \*

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

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

*Id.* at 375-76.

We conduct our review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145. In doing so, as noted above, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the



petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

### III. FACTS AND PROCEDURAL HISTORY

In its April 2, 2013 support letter, the petitioner stated that in the proffered position, the beneficiary will "evaluate and manage the basic at-risk functions of the corporation in the areas of engineering, quality control, inventory management and control, production management, sales techniques and customer service management." The petitioner indicated the beneficiary will perform the following duties:

- Evaluate the effectiveness of Production and Quality control processes
- Implement Production and Quality Control process improvements
- Provide management with the expertise to improve our product line
- Manage Customer Service personnel activities
- Provide technical information assistance to field and in-house personnel
- Manage the Quality control operations
- Communicate with Personnel, Engineering and Production for customer service requirements
- Establish and maintain Quality Inventory Control System

To perform these duties, the petitioner asserted that the position proffered here requires "at least a bachelor's degree (or equivalent) in industrial engineering, logistics management, logistics engineering or related field, and relevant experience."

In response to the RFE, the petitioner submitted a letter, dated November 6, 2013, from its president, [REDACTED]. The petitioner explained that it had contracted with a third-party company to implement "Lean Manufacturing" techniques and while much had been accomplished it needed to constantly improve its systems and procedures to ensure that it minimized costs to improve its position in the world market place and to make the most efficient use of its resources. In this letter, Mr. [REDACTED] stated that "[a]n Operations Risk Management Director is a management position and is responsible to analyze all risks involved, manage the implementation of Lean management methods and the maintenance of [the petitioner's] systems, policies and procedures." The petitioner reiterated that it required "a minimum of a Bachelor's degree in Industrial Engineering, Logistics Management or Logistics Engineering along with the experience necessary to manage this program."

The petitioner also submitted a job description for the Operations Risk Management Director position, which lists the following job duties and the corresponding percentage of time spent on each task:

- 20% Architectural Design and Implementation of Lean Management, Production, Engineering, Inventory Control, Quality Control and Customer Service Programs.



- 10% Plan, manage and provide ongoing support for the company's global governance, operational and compliance network.
- 5% Develop standards and best practices documentation required to support the security and compliance programs of the company.
- 5% Develop a corporate threat, risk vulnerability and risk remediation assurance and management program to identify, track and remediate security and business operation vulnerabilities across our global systems.
- 10% Work with Technical Information Assistance personnel to design and implement operational Field Service and In-House programs.
- 10% Plan, manage and conduct operational assessments regarding [the petitioner's] Sales and Customer Assistance activities.
- 10% Insure [sic] Customer's Satisfaction with [the petitioner's] Products and Services by developing and implementing the [petitioner's] global Customer Satisfaction programs.
- 20% Work as a team with other members of the company to support and manage the day to day running of the operational infrastructure.
- 10% Work directly with other team members (managers) to develop, implement and train in Lean management procedures under the direction of the President of [the petitioner]. The Director will not directly supervise personnel, but work with department managers to train personnel in implement required programs.

Upon review of the evidence in the record, the director entered her decision and the petitioner filed an appeal.

#### IV. ADDITIONAL GROUNDS THAT PRECLUDE APPROVAL OF THE PETITION

##### A. Adequacy of LCA and Proposed Wage

As a preliminary matter, we will address an additional, independent ground for denial of the petition, not identified by the director's decision, which we find also precludes approval of this petition. Specifically, beyond the decision of the director, we find that the petitioner failed to submit a Labor Condition Application (LCA) that corresponds to the petition. As indicated above, the LCA submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Transportation, Storage, and Distribution Managers" occupational classification, SOC (O\*NET/OES) Code 11-3071, and a Level I (entry-level) prevailing wage rate. In the RFE, the director stated that the job duties the petitioner provided were similar to the duties

of an "Industrial Production Manager" occupation. In the RFE response letter, counsel asserted that the duties of the proffered position were "more complex and demanding when compared to the basic duties involved in a typical Industrial Production Manager position as described in the Occupational Outlook Handbook [(the *Handbook*)]."

We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>4</sup> However, the *Handbook* does not contain a chapter dedicated to those positions in the category of "Transportation, Storage, and Distribution Managers."<sup>5</sup> The Occupational Information Network (O\*NET) Summary Report for 11-3071.00,

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<sup>4</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. Our references to the *Handbook* are from the 2014-15 edition available online.

<sup>5</sup> We note there are occupational categories which are not covered in detail by the *Handbook*, as well as occupations for which the *Handbook* does not provide any information. The *Handbook* states the following about these occupations:

#### **Data for Occupations Not Covered in Detail**

Although employment for hundreds of occupations are covered in detail in the *Occupational Outlook Handbook*, this page presents summary data on additional occupations for which employment projections are prepared but detailed occupational information is not developed. For each occupation, the Occupational Information Network (O\*NET) code, the occupational definition, 2012 employment, the May 2012 median annual wage, the projected employment change and growth rate from 2012 to 2022, and education and training categories are presented.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Data for Occupations Not Covered in Detail," <http://www.bls.gov/ooh/About/Data-for-Occupations-Not-Covered-in-Detail.htm> (last visited September 4, 2014).

Thus, the narrative of the *Handbook* indicates that there are many occupations for which only brief summaries are presented. That is, detailed occupational profiles for these occupations are not developed. The occupation of "Transportation, Storage, and Distribution Managers" is an occupation for which the *Handbook* does not provided detailed data. The text of the *Handbook* regarding this occupational category is as follows:

#### **Transportation, Storage, and Distribution Managers**

(O\*NET 11-3071.00, 11-3071.01, 11-3071.02, and 11-3071.03)

Plan, direct, or coordinate transportation, storage, or distribution activities in accordance with organizational policies and applicable government laws or regulations. Includes logistics managers.

- 2012 employment: **105,200**
- May 2012 median annual wage: **\$81,830**
- Projected employment change, 2012-22:
  - Number of new jobs: **5,100**
  - Growth rate: **5 percent (slower than average)**

the occupational code attested to by the petitioner on the LCA, states that the "Transportation, Storage, and Distribution Managers" "[p]lan, direct, or coordinate transportation, storage, or distribution activities in accordance with organizational policies and applicable government laws or regulations."<sup>6</sup> O\*NET states that this title represents a group of more specific occupations and lists three subcategories under this title: 11-3071.01 Transportation Managers; 11-3071.02 Storage and Distribution Managers; and 11-3071.03 Logistics Managers.<sup>7</sup> The petitioner, however, did not specify whether the proffered position falls within one of these subcategories.

We note that DOL provides guidance for selecting the most relevant occupational classification. The "Prevailing Wage Determination Policy Guidance" issued 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. . . .

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

We reviewed the record of proceeding, and upon review of the duties of the proffered position and the description provided in the O\*NET Summary Report, we find that the petitioner has not demonstrated that the proffered position falls under the occupational category of "Transportation, Storage, and Distribution Managers." None of the duties stated by the petitioner include transportation, storage, or distribution activities. Rather, the duties of the proffered position encompass quality assessment and improvement of production processes, which are duties similar to the duties of industrial production managers. The *Handbook* describes the duties of "Industrial Production Managers" in the subsection entitled "What Industrial Production Managers Do" and states the following about the duties of this occupation:

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- Education and training:
    - Typical entry-level education: **High school diploma or equivalent**
    - Work experience in a related occupation: **5 years or more**
    - Typical on-the-job-training: **None**

Accordingly, the *Handbook's* summary data indicates that the "[t]ypical entry-level education" of this occupational category is a "[h]igh school diploma or equivalent." We note that the petitioner has also characterized the proffered position as a Level I (entry level) position on the LCA. Thus, as will be discussed, the *Handbook* does not support the petitioner's assertion that the proffered position, as attested to on the LCA, qualifies as a specialty occupation.

<sup>6</sup> See [www.onetonline.org/link/summary/11-3071.00](http://www.onetonline.org/link/summary/11-3071.00).

<sup>7</sup> *Id.*



Industrial production managers oversee the daily operations of manufacturing and related plants. They coordinate, plan, and direct the activities used to create a wide range of goods, such as cars, computer equipment, or paper products.

### Duties

Industrial production managers typically do the following:

- Decide how best to use a plant's workers and equipment to meet production goals
- Ensure that production stays on schedule and within budget
- Hire, train, and evaluate workers
- Analyze production data
- Write production reports
- Monitor a plant's workers to ensure they meet performance and safety requirements
- Create ways to make the production process more efficient
- Determine whether new machines are needed or whether overtime work is necessary
- Fix any production problems

Depending on the size of the manufacturing plant, industrial production managers (also referred to as *plant managers*) may oversee the entire plant or a specific area of production.

Industrial production managers are responsible for carrying out quality control programs to make sure the finished product meets a specific level of quality. Often called *quality control systems managers*, these managers use programs to help identify defects in products, identify the cause of the defect, and solve the problem creating it. For example, a manager may determine that a defect is being caused by parts from an outside supplier. The manager can then work with the supplier to improve the quality of the parts.

Industrial production managers work closely with managers from other departments as well. For example, the procurement (buying) department orders the supplies that the production department uses. A breakdown in communication between these two departments can cause production slowdowns. Industrial production managers also communicate with other managers and departments, such as sales, warehousing, and research and design.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Industrial Production Managers," <http://www.bls.gov/ooh/management/industrial-production-managers.htm#tab-2> (last visited September 4, 2014).

As quoted above from the *Handbook*, the duties of industrial production managers focus on "carrying out quality control programs to make sure the finished product meets a specific level of quality." As described by the petitioner in its support letter, the duties of the proffered position similarly focus on the quality of the products and the processes. For example, the petitioner stated that the beneficiary would be responsible for "[e]valuat[ing] the effectiveness of Production and Quality control processes," "[i]mplement Production and Quality Control process improvements," "[p]rovide management with the expertise to improve our product line," "[m]anage the [q]uality control operations," and "[e]stablish and maintain Quality Inventory Control System."

Furthermore, the job description for the proffered position, submitted in response to the RFE, also indicates that the duties of this position focus on the quality of the products manufactured and improving customer service through establishing standards and communicating these standards with other members of the business establishment. For example, the job description indicates that the individual in the proffered position would be responsible for "[a]rchitectural [d]esign and [i]mplementation of Lean Management, Production, Engineering, Inventory Control, Quality Control and Customer Service Programs," and would also have responsibility to "[p]lan, manage and conduct operational assessments regarding [the petitioner's] [s]ales and [c]ustomer [a]ssistance activities," "[i]nsure [sic] [c]ustomer's [s]atisfaction with [the petitioner's] [p]roducts and [s]ervices by developing and implementing the [petitioner's] global [c]ustomer [s]atisfaction programs" and "[w]ork as a team with other members of the company to support and manage the day to day running of the operational infrastructure."

When compared, the duties of the proffered position are closely related to quality improvement of the petitioner's operations rather than transporting, storing, or distributing products. Therefore, we agree with the director that the job, as titled and as described by the petitioner, is best classified as an "Industrial Production Managers" position. As such, the petitioner was required to provide at the time of filing an LCA certified for SOC (O\*NET/OES) Code 11-3051, "Industrial Production Managers," not SOC (O\*NET/OES) Code 11-3071, "Transportation, Storage, and Distribution Managers," in order for it to be found to correspond to the petition.

To permit otherwise would result in the petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), by allowing that petitioner to simply submit an LCA for a different occupation and at a lower prevailing wage than the one being petitioned for. In this matter, this results in an LCA certified for a Level I prevailing wage of \$52,582 per year for a transportation, storage, and distribution manager position when a certified LCA should have been submitted for an industrial production manager position with a minimum, Level I prevailing wage of \$58,635 per year.<sup>8</sup> The attested salary of \$55,000 per year on the Form I-129 would fall below

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<sup>8</sup> Even if the duties of a proffered position involved more than one occupational category, DOL provides clear guidance for selecting the most relevant O\*NET code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

If the employer's job opportunity has worker requirements described in a combination of O\*NET occupations, the SWA should default directly to the relevant O\*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job



that required by law for the proffered position of operations risk management director of the petitioner.

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

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

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that has been certified for the proper occupational classification, and the petition must be denied for this additional reason.

#### B. Specialty Occupation

Also beyond the director's decision, we find that the evidence of the record does not establish that the proffered position is a specialty occupation. To meet the petitioner's burden of proof in establishing the proffered position as a specialty occupation, the evidence of record must establish that the employment the petitioner is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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offer is for an engineer-pilot, the SWA 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

Thus, if the petitioner believed its position was described as a combination of occupations, or actually pertained to another occupational category, then according to DOL guidance, the petitioner should have chosen the relevant occupational code for the highest paying occupation. As noted above, the prevailing wage for "Transportation, Storage, and Distribution Managers" is significantly lower than the prevailing wage for "Industrial Production Managers."



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

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

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

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

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

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

§ 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

We 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.

We will now look at the *Handbook*, a source we consider authoritative on the duties and educational requirements of the wide variety of occupations that it addresses. As previously noted, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Transportation, Storage, and Distribution Managers." However, as we have determined above, the proffered position is best classified under the "Industrial Production Managers" occupational category. Therefore, we will review the "Industrial Production Managers" section of the *Handbook* in analyzing whether the proffered position is a specialty occupation. We have covered the *Handbook's* section entitled "What Industrial Production Managers Do" above and we therefore incorporate here by reference the duties of this occupation as described in the *Handbook*.



The subchapter of the *Handbook* entitled "How to Become an Industrial Production Manager" states, in part, the following about this occupation:

Industrial production managers typically need a bachelor's degree and 1 to 5 years of related work experience.

### **Education**

Employers prefer managers have at least a bachelor's degree. While the degree may be in any field, many industrial production managers have a bachelor's degree in business administration or industrial engineering. Sometimes, production workers with many years of experience take management classes and become a production manager. At large plants, where managers have more oversight responsibilities, employers may look for managers who have a Master of Business Administration (MBA) or a graduate degree in industrial management.

### **Work Experience in a Related Occupation**

Many industrial production managers begin as production workers and move up through the ranks. They usually advance to a first-line supervisory position before eventually being selected for management. Most earn a college degree in business management or take company-sponsored classes to increase their chances of a promotion.

Production managers who join a firm immediately after graduating from college sometimes work as first-line supervisors before beginning their jobs as production managers.

Some managers begin working at a company directly after college or graduate school. They spend their first few months in training programs, becoming familiar with the production process, company policies, and safety regulations. In large companies, many also spend short periods of time working in other departments, such as purchasing or accounting, to learn more about the company.

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While not required, industrial production managers can earn certifications that show a higher level of competency in quality or management systems. The Association for Operations Management offers a Certified in Production and Inventory Management (CPIM) credential. The American Society for Quality offers credentials in quality control. Both certifications require specific amounts of work experience before applying for the credential, so they are generally not earned before entering the occupation.



U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Industrial Production Managers," <http://www.bls.gov/ooh/management/industrial-production-managers.htm#tab-4> (last visited September 4, 2014).

The *Handbook* does not report that, as an occupational group, "Industrial Production Managers" require at least a bachelor's degree in a specific specialty, or its equivalent. More specifically, the *Handbook* states that employers prefer managers have at least a bachelor's degree. However, a *preference* for a degree is not an indication of a minimum *requirement*. Furthermore, the *Handbook* states that the degree could be in any field. Thus, for this occupation, a baccalaureate or higher degree in a specific specialty, or its equivalent, is not normally the minimum requirement for entry.

We reviewed the record of proceeding regarding the proffered position and the *Handbook* and find that the *Handbook* does not support the proposition that the proffered position, as described in the record of proceeding, is one that meets the statutory and regulatory provisions of a specialty occupation. As the *Handbook* does not support the proposition that the proffered position is one that normally requires a minimum of a bachelor's degree in a specific specialty, or its equivalent, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue.

In the April 2, 2013 support letter, the petitioner states that the operations risk management director position "is a specialty occupation because (a) it requires theoretical and practical application of a body of specialized knowledge; and (b) [the petitioner] requires at least a bachelor's degree in industrial engineering, logistics management, logistics engineering or related field (or equivalent) plus relevant experience." However, the petitioner fails to explain which duties, if any, require theoretical and practical application of a body of specialized knowledge. The petitioner's declaration alone is insufficient to demonstrate that the proffered position is a specialty occupation.<sup>9</sup> The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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<sup>9</sup> When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise qualifies as a specialty occupation under this criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that indicates whether the position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider all of the evidence presented to determine whether the petitioner has established eligibility for the benefit sought. Upon review of the record, the petitioner has failed to meet its burden in this regard.

The petitioner also asserts that the proffered position is a specialty occupation because it "requires at least a bachelor's degree in industrial engineering, logistics management, logistics engineering or related field (or equivalent) plus relevant experience." In the RFE response letter, counsel asserts that "the petitioner's requirements for an expert in areas of lean manufacturing and logistics are sufficiently complex to warrant the stated education requirement." In support of these assertions, the petitioner submitted an email exchange between [REDACTED] Controller for the petitioner, and [REDACTED] a consultant for the petitioner. In his email, Mr. [REDACTED] stated that "[b]ecause of the technical nature of [the petitioner's] business and the highly custom requirements of [the petitioner's] work," he would recommend that the candidate for the proffered position have a bachelor's degree. Mr. [REDACTED] however, does not state that the degree has to be in a specific specialty. Therefore, Mr. [REDACTED]'s email is not sufficient to demonstrate that the proffered position is a specialty occupation. In addition, Mr. [REDACTED] stated his belief that "the individual would have to have extensive professional experience in Lean Operations to overlook the degree." (Emphasis in the original). Mr. [REDACTED] does not identify the amount of time involved in any specific type of experience that would culminate in "extensive professional experience." Similarly, the resume of [REDACTED] a senior consultant and project manager, is insufficient to demonstrate that the proffered position is a specialty occupation as the petitioner provides no explanation how Mr. [REDACTED] qualifications demonstrate that the proffered position requires the theoretical and practical application of a body of specialized knowledge or whether Mr. [REDACTED] ever held or now holds a position parallel to the proffered position.

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 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, we 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 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1102).



Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source) reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference our previous discussion on the matter. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry into those positions.

In response to the director's RFE, the petitioner submitted copies of job advertisements in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, upon review of the documents, we find that the petitioner's reliance on the job announcements is misplaced.

In the Form I-129 petition, the petitioner describes itself as a complete induction melting and heating systems manufacturer established in 1979, with 29 employees. The petitioner claims that it has a gross annual income of over \$5 million and \$65,094 of net annual income.

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

We reviewed the six job advertisements submitted by the petitioner. The petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

In addition, the advertisements include positions with [REDACTED] (a "permanent staffing" company); [REDACTED] (a staffing company searching for a candidate for its undisclosed "client"), and [REDACTED] (another staffing company searching for candidate for its undisclosed "client"), which are not similar to the petitioner as they are staffing companies and not manufacturing companies. Although the advertisements from [REDACTED] (a trailer manufacturer), [REDACTED] (a manufacturer of "energy-efficient lighting, intelligent wireless controls systems and direct-renewable solar and photovoltaic technology"), and [REDACTED] (a manufacturer of microscopy supplies) indicate that they are manufacturing companies, no information is provided regarding the size of these companies' staffing or revenues to indicate similarities with the petitioner other than they are manufacturing companies. Without further information, the advertisements appear to be for organizations that are not similar to the



petitioner and the petitioner has not provided any probative evidence to suggest otherwise. Consequently, the record does not contain sufficient information regarding the advertising organizations to conduct a legitimate comparison of the organizations to the petitioner. Upon review, we find that the petitioner did not provide any information regarding which aspects or traits (if any) it shares with these advertising organizations.

Moreover, these advertisements do not appear to be for parallel positions. More specifically, two of the advertised positions require a four-year degree and a minimum of 5 years of experience and the remaining four positions require or prefer a four-year degree and a minimum of ten years of operations experience. As previously discussed, the petitioner designated the proffered position on the LCA as a Level I (entry level) position. The advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Further, it must be noted that even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

Thus, based upon a complete review of the record, we find that the petitioner has not established that a requirement for at least a bachelor's 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).

We 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 the instant case, we acknowledge that the petitioner may believe that the duties of the proffered position are complex or unique. However, we reviewed the record in its entirety and find that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. The petitioner fails to sufficiently develop relative

complexity or uniqueness as an aspect of the proffered position. That is, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position (through the job duties, the petitioner's business operations or by any other means) that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent.

More specifically, the petitioner failed to demonstrate how the duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position.

The lack of complexity and uniqueness of the position proffered here is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, we incorporate by reference and reiterate our earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the 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 simply 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 IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."<sup>10</sup>

Moreover, the description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficient probative evidence to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

We observe that the petitioner has indicated that the beneficiary's education and work experience will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not sufficiently explain or clarify in the record which of the duties, if any, of the

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<sup>10</sup> 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).



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. We usually review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must establish that the imposition of a degree requirement by the petitioner is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish 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.

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

We note that the petitioner, a business established over 35 years, makes no assertion that the proffered position previously existed and that it has previously hired an individual for the proffered position. We reviewed the record of proceeding but find that 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.

Although the petitioner asserts that it has satisfied this criterion, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of



the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent. Further, there is a lack of evidence substantiating the petitioner's assertions.

Moreover, we incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category. The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

Upon review of the record, we find that the petitioner has submitted insufficient probative evidence to establish that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We, therefore, conclude 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 as described qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this additional reason.

## V. REVIEW OF THE DIRECTOR'S DECISION

We will now discuss the director's decision in which she determined that the evidence submitted was insufficient to demonstrate that beneficiary is qualified to perform the duties of the proffered position. We first note that the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. Here, the petitioner has not demonstrated that the proffered position is a specialty occupation. However, in order to address the director's decision, we will discuss whether the evidence submitted was sufficient to demonstrate that the beneficiary was qualified to perform the duties of the proffered position as described.

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

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or

- (C) (i) experience in the specialty equivalent to the completion of such degree, and
- (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

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

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

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

Here, the petitioner asserts that the beneficiary qualifies for the proffered position based on a combination of his education and progressively responsible experience.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) requires a demonstration that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively



responsible positions directly related to the specialty. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) is determined by at least one of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSIS);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;<sup>11</sup>
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

In its support letter, the petitioner states that it requires "at least a bachelor's degree (or equivalent) in industrial engineering, logistics management, logistics engineering or related field" for the proffered position. The petitioner submitted an evaluation by [REDACTED] president of [REDACTED] concluding that the beneficiary possesses a foreign equivalent of a U.S. degree of Doctor of [REDACTED]. We note that this evaluation addresses the beneficiary's education qualification and not his experience. Furthermore, the evaluation from Mr. [REDACTED] would not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), as the evidence of record does not establish that he possesses the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience.

Even if above deficiency was not present, Mr. [REDACTED] evaluation still would not be sufficient to demonstrate that the beneficiary possesses the required education and experience. First, we note that Mr. [REDACTED] provides no explanation regarding how he reached his conclusion, what documents

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<sup>11</sup> The petitioner should note that, in accordance with this provision, we will accept a credentials evaluation service's evaluation of *education only*, not experience.

other than "[c]opy of degree" he reviewed, and to which veterinary program in the U.S. he compared the program that the beneficiary completed. The record of proceeding does not contain any transcripts or English translation of the beneficiary's degree. Because the petitioner failed to submit certified translations of the beneficiary's degree, we cannot determine whether the evidence supports Mr. [REDACTED] conclusion. See 8 C.F.R. § 103.2(b)(3). The copy of the beneficiary's degree in foreign language is not probative evidence and will not be accorded any weight in this proceeding. Accordingly, the evaluation submitted by Mr. [REDACTED] is not probative evidence in demonstrating that the beneficiary possesses a foreign equivalent of a U.S. degree.

The petitioner also submitted an evaluation, dated February 13, 2013, prepared by Dr. [REDACTED] a full-time faculty member at [REDACTED] Georgia. In the denial decision, the director stated that because Dr. [REDACTED] wrote the evaluation on behalf of a credentialing company and not on behalf of an institution that has a program for granting credit based on an individual's training and/or work experience, her evaluation was "given little weight." On appeal, counsel asserts that the director should have given "considerable weight" to Dr. [REDACTED] evaluation because the petitioner has provided "extensive documents related to Dr. [REDACTED] status as an official authorized to grant college level credit for an accredited university." The petitioner submitted letters from [REDACTED] Associate Registrar at [REDACTED] and [REDACTED] Lead Online Program Director at [REDACTED]. We note that neither of the letters is dated, which diminishes the probative value of the letters. Furthermore, although both letters were written on the university's letterhead, the styles of the university name significantly differ. In addition, even though the petitioner claims that Dr. [REDACTED] currently teaches at [REDACTED] it submitted page 124 of the 2009-2010 Academic Catalog for [REDACTED] to demonstrate that she is one of the faculty members. However, there is no explanation in the record why the petitioner did not submit a current catalog to demonstrate Dr. [REDACTED] employment there. Therefore, the probative value of such evidence is diminished.

As a matter of discretion, USCIS may accept expert opinion testimony. However, USCIS will reject an expert opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. *Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. *Id.*; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) ("[E]xpert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to 'fact' but rather is admissible only if 'it will assist the trier of fact to understand the evidence or to determine a fact in issue.'"). Here, for the reasons discussed above, we find that the director did not abuse her discretion in giving "little weight" to Dr. [REDACTED] evaluation.

We also find Dr. [REDACTED] evaluation deficient in other areas. Dr. [REDACTED] stated that she reviewed the documents submitted on behalf of the beneficiary "including the educational background, work experience letters issued by his previous employers[,] and detailed curriculum vitae." Similar to Mr. [REDACTED] also concluded that the beneficiary's degree was the foreign equivalent of a U.S. degree of Doctor of Veterinary Medicine. Dr. [REDACTED] also stated that the beneficiary "completed over five years of documented progressively responsible professional work experience



in the field of business/logistics management." Dr. [REDACTED] concluded that based on "three-for-one formula, and based on a minimum of 120 undergraduate semester credit hours needed to obtain a Bachelor's degree[,] . . . [the beneficiary's] work experience is the equivalent of 50 semester credit hours." Dr. [REDACTED] determined that the beneficiary's education and work experience were equivalent to a "U.S. degree of Bachelor of Business Administration in Logistics Management awarded by a regionally accredited college or university in the United States." With respect to the beneficiary's foreign degree, Dr. [REDACTED] does not state whether she reviewed an English translation of the document, whether transcripts were submitted for her review, or to which veterinary program in the U.S. she compared the program that the beneficiary completed. Here, we incorporate by reference our earlier discussion about foreign documents submitted without English translations. Dr. [REDACTED] provides no explanation how she concluded, without reviewing transcripts associated with a particular foreign degree program, that the beneficiary's foreign degree is equivalent to a U.S. degree. In addition, with regards to the beneficiary's progressive work experience, Dr. [REDACTED] provides no insight to how she determined that the listed duties in the experience letters from former employers were progressive. In the RFE letter, the director requested specific evidence, such as copies of personnel records, performance evaluations, pay records, or other documents that reflect promotion or achievement of progressively responsible positions directly related to the specialty.<sup>12</sup> The petitioner submitted none of these documents and Dr. [REDACTED] does not explain how she ascertained from duties listed in bullet fashion that one duty was more progressive than another. Dr. [REDACTED] opinion letter is devoid of any analysis of her evaluation process of the beneficiary's experience, rather she simply concludes that the beneficiary's experience was progressive in the field of "business/logistics management."

Based on the deficiencies noted, the evaluations submitted by Mr. [REDACTED] and Dr. [REDACTED] are not probative evidence. Therefore, the petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

No evidence has been submitted to establish, and the petitioner does not assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires submission of the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI).

Nor does the beneficiary qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). As was the case under 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(1) and (2), the beneficiary is unqualified under this criterion because he did not earn a baccalaureate or higher degree from an accredited college or university in the United States and does not possess a foreign degree that has been determined to be equivalent to a baccalaureate or higher degree from an accredited college or university in the United States. Here

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<sup>12</sup> Depending on the specificity, detail, and credibility of a letter, USCIS may give the document more or less persuasive weight in a proceeding. The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

we incorporate by reference our earlier discussion regarding the copy of the beneficiary's foreign degree without translation.

No evidence has been submitted to establish, and the petitioner does not assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that the beneficiary submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

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

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

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;<sup>13</sup>
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

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<sup>13</sup> *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. See 8 C.F.R. § 214.2(h)(4)(ii).



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

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i)-(v) and therefore does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). As such, the petitioner has failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation.<sup>14</sup> Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

## VI. CONCLUSION

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

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

The petition will be denied and the appeal dismissed for the above stated reason.<sup>15</sup> 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. The petition is denied.

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<sup>14</sup> As stated above, we have determined that the proffered position does not qualify as a specialty occupation. However, we have discussed the beneficiary's qualification in order to address the basis of the director's decision.

<sup>15</sup> As the grounds discussed above are dispositive of the petitioner's eligibility for the benefit sought in this matter, we will not address and will instead reserve our determination on the additional issues and deficiencies that we observe in the record of proceeding with regard to the approval of the H-1B petition.