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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



D2

DATE: JUL 03 2012 Office: CALIFORNIA SERVICE CENTER



IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California Service Center 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.

On the Form I-129 visa petition, the petitioner describes itself as a business engaged in design, wholesale and distribution of home furnishings and accessories with three employees and a stated gross annual income of \$1.5 million. In order to employ the beneficiary in what it designates as an accountant and manager position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition concluding that the petitioner failed to establish that the proffered position is a specialty occupation.

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

The primary issue the AAO will consider is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. 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, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner seeks the beneficiary's services as an accountant and manager. In an attachment filed with Form I-129, the petitioner describes the proposed duties as follows:

[r]esponsible for accounting functions of wholesale, import and distribution. Preparing financial statements and inventory reports. Setting up [c]osting and [p]ricing strategies. International [b]anking including [l]etter of [c]redits, [w]ire [t]ransfers, etc. Analyze company's financial status and recommend budget items and limits. Prepare regular financial reports and advise the president on cash flow, budget control, and other accounting matters. Prepare regular financial reports and advise the president on cash flow, budget control, and other accounting matters. Responsible for daily and regular financial accounting, including invoicing, check, credit card transactions, royalties, commissions and payrolls. Advise company president on international import/export customs, duties and related regulatory issues.

The petitioner also submitted a copy of the beneficiary's diploma and transcript indicating that the beneficiary has a U.S. Bachelor of Arts degree in Business Administration with a concentration in Accounting. The petitioner also submitted pictures of the premise, and copies of a 2008 income statement, a 2008 U.S. Income Tax Return for an S Corporation, a business plan, and an employment letter for the beneficiary regarding benefits and holidays.

On April 23, 2010, the director requested additional information from the petitioner to demonstrate that the proffered position is a specialty occupation, including evidence that a bona fide job offer for an accountant position exists.

In response, the petitioner provided a description of the proffered position and associated responsibilities for an accountant/manager; job advertisements from other companies; an approval notice for a previous H-1B petition; an organization chart; payroll documentation; and a letter from [REDACTED]

The director denied the petition on May 14, 2010, finding that the evidence of record does not establish that the job offered qualifies as a "specialty occupation" under section 101(a)(15)(H)(i)(b) of the Act. The director indicated that although the petitioner had titled the proffered position as an accountant, an analysis of the proposed job duties reflects the duties performed by bookkeeping, accounting and auditing clerks.

On June 7, 2010, the petitioner filed an appeal in response to the denial. The petitioner contends that the position requires a baccalaureate degree due to complexities of its operations.

The AAO finds that the director's determination that the petitioner did not establish the proffered position as a specialty occupation was correct. To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO turns first to the criterion a at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

The AAO recognizes the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹

The AAO's first point with regard to its analysis of the proffered position is that it finds that, despite its *Accountant and Manager* title, the proffered position is neither an accountant nor a manager position. Instead, the AAO finds that, to the extent described in the record of proceeding, the position appears to be a combination of duties of a bookkeeping, accounting, and auditing clerk, cargo and freight agent, and secretary and administrative assistant.

The fact that a person may be employed in a position designated as that of an accountant and may apply some accounting principles in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. Thus, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate accounting services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in accounting. To make this determination, the AAO turns to the record for information regarding the duties and the nature of the petitioner's business operations. In matters where a petitioner's business is relatively small, the AAO reviews the record for evidence that its operations are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in an accounting position requiring a level of knowledge that may be obtained only through a baccalaureate degree or higher in accounting or its equivalent.

In response to the RFE, the petitioner provided a breakdown of duties as follows:

Accounting (3 hours daily): Responsible for daily accounting entries, including invoicing, check, credit card transactions, [g]eneral journals, [p]ayables, etc. Review & follow up on past due payments (A/R) with buyer's accounts payable dept. Prepare [f]inancial [s]tatements, inventory reports, royalties, commissions and payrolls.

Handle and set up Letter of Credits with banks, [p]repare wire transfers with bank. Verify and match records for each payment with P/O's into Quickbooks system. Advise the president on cash flow, budget control.

Prepare cost analysis & Sales confirmation(s) (2 hours daily): Work with our customs broker to locate proper import classification(s) & duty rate(s) for each product. Locate the best freight rates and apply to cubic feet requirements of each product to establish the freight cost. Setting up [c]osting and [p]ricing strategies. Prepare [q]uote [s]heet(s) by posting the item photos, add the duty(s), freight,

¹ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site: <http://www.bls.gov/ooh/>.

agent's commission, free-lance artist costs, gross profit, etc. Prepare sales confirmation(s) for the President to work with [b]uyers for sales orders.

Overseas Costings Management (1 hour daily): Replying daily emails, price negotiations, establish landed costs. Review QC reports from overseas QC agents to see if any guaranteed deposit withhold required. Review [c]ustomer's check payment(s) to see if any deduction or shortages made against our shipment(s). Pass on or divide the deduction from vendor's payment(s).

Customs Brokerage (3 hours weekly): Gather [s]hipping documents from [o]verseas [v]endor(s) and [b]ill of [l]ading(s) from steamship company(s). Monitoring forwarder to send ISF filing(s) in time. Assist customs broker to file entry for each shipment, record & pay duties, freight and other customs ruling requirements. Monitoring if any X ray or customs exam required.

Freight Forwarding (3 hours weekly): Compare and negotiate the best ocean freight rates, book vessel(s) for each shipment. Follow up each transportation step until customs entry(s) cleared, steamship(s) cleared, clean truck fees paid, [p]eak [s]eason [s]urcharge(s) paid, ensure that trucking company(s) pick up container(s) before demurage starts, ensure empty container(s) are returned to terminal before any storage fees are applied. Request P.O.D. (Prove [sic] of Delivery) from buyer's logistics dept.

Specifically, the AAO finds that, as described in the RFE response, some of the duties fall under the *Handbook's* section on bookkeeping, accounting, and auditing clerks while other duties fall under the *Handbook's* description of cargo and freight agents, and others under secretaries and administrative assistants. The breakdown of duties as described by the petitioner confirms the AAO's finding. Duties described under "Accounting" consist only three hours of the beneficiary's daily duties. Remaining duties are described under "Prepare cost analysis & Sales Confirmation(s)," "Overseas Costing Management," "Customs Brokerage," and "Freight Forwarding."

Further, the AAO finds that the position is not a manager position because the description of the position does not correspond to a manager position as described in the *Handbook*. Further, the AAO notes that the Labor Condition Application (LCA) was certified for Level I, which is indicative of a comparatively low, entry-level position relative to others within the occupation. The wage rate specified in the LCA indicates that the proffered position only requires a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment, that she would be closely supervised, that her work would be closely monitored and reviewed for accuracy, and that she would receive specific instructions on required tasks and expected results. This inconsistency will be further developed later in the decision, but for the reasons above, the AAO finds that the position is not a manager position.

The AAO will now discuss how the proposed duties fall within the *Handbook's* sections on bookkeeping, accounting, and auditing clerks, cargo and freight agents, and secretaries and administrative assistants.

First, the AAO will turn to the *Handbook's* description of bookkeeping, accounting, and auditing clerks in the *Handbook*.

According to the *Handbook*, bookkeeping, accounting, and auditing clerks typically do the following:

- Use bookkeeping software as well as online spreadsheets and databases
- Enter (post) financial transactions into the appropriate computer software
- Receive and record cash, checks, and vouchers
- Put costs (debits) as well as income (credits) into the software, assigning each to an appropriate account
- Produce reports, such as balance sheets (costs compared to income), income statements, and totals by account
- Check figures, postings, and reports for accuracy
- Reconcile or note and report any differences they find in the records

Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Bookkeeping, Accounting, and Auditing Clerks," <http://www.bls.gov/ooh/Office-and-Administrative-Support/Bookkeeping-accounting-and-auditing-clerks.htm> (accessed June 13, 2012).

The description above closely resembles the proposed duties of the proffered position. The petitioner states the beneficiary will be responsible for, among other duties: daily accounting entries including invoicing, check, credit card transactions, general journals, payables, etc.; preparing financial statements, inventory reports, royalties, commissions and payrolls; and verifying and matching records for each payment into Quickbooks system. Such duties closely resemble the duties listed above from the *Handbook*. The *Handbook* also notes that bookkeeping, accounting, and auditing clerks use bookkeeping software to enter financial transactions. Further, according to the *Handbook*, such clerks reconcile or note and report any differences they find in the records, and produce reports such as income statements.

In addition, as part of its review of the totality of the record of proceeding, the AAO notes that the petitioner does not employ anyone with the job title of a bookkeeper. The organization chart indicates that the petitioner has only two employees: a president and a director. The president claims that he currently performs the beneficiary's duties and wishes to transfer the duties to concentrate on expanding the business. However, once the transfer of duties occurs, it is not clear who, besides the beneficiary, would perform the duties of a bookkeeper. Therefore, since the duties described by the petitioner closely resemble the duties of bookkeeping, accounting, and auditing clerks in the *Handbook*, and the petitioner does not appear to have a bookkeeper in its organization, the AAO concludes that some duties fall under the *Handbook's* description on bookkeeping, accounting, and auditing clerks.

With respect to education and training requirements for bookkeeping, accounting, and auditing clerks, the introduction to the “How to Become a Bookkeeping, Accounting, or auditing clerk” section of the *Handbook* states:

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

Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., “Bookkeeping, Accounting, and Auditing Clerks,” <http://www.bls.gov/ooh/Office-and-Administrative-Support/Bookkeeping-accounting-and-auditing-clerks.htm#tab-4> (accessed June 13, 2012).

Therefore, since the *Handbook* indicates that entry into the bookkeeping, accounting, and auditing clerks occupation does not normally require at least a bachelor’s degree, or the equivalent, in a specific specialty, the *Handbook* does not support the contention that the proffered position qualifies as a specialty occupation.

Next, the AAO will turn to the *Handbook*’s information on cargo and freight agents.

The *Handbook* describes the duties of this occupation as follows in relevant parts:

- Coordinate transportation and logistics details with shipping and freight companies
- Estimate, negotiate, and determine postal rates, shipment costs, and other charges
- Prepare bills of lading, invoices, and other required shipping documents
- Record information such as cargo amount, weight, dimensions, and time of shipment

Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., “Cargo and Freight Agents,” <http://www.bls.gov/ooh/office-and-administrative-support/cargo-and-freight-agents.htm#tab-2> (accessed June 13, 2012).

The *Handbook*’s descriptions above closely resemble the beneficiary’s following duties:

- Locate the best freight rates and apply to cubic feet requirements of each product to establish the freight cost
- Gather shipping documents from [o]verseas [v]endor(s) and [b]ill of [l]ading(s) from steamship company(s)
- Assist customs broker to file entry for each shipment, record & pay duties, freight and other customs ruling requirements.
- Compare and negotiate the best ocean freight rates, book vessel(s) for each shipment
- Follow up each transportation step until customs entry(s) cleared, steamship(s) cleared, clean truck fees paid, [p]eak [s]eason [s]urcharge(s) paid, ensure that trucking company(s) pick up container(s) before demurage starts, ensure empty container(s) are returned to terminal before any storage fees are applied.

With respect to education and training requirements for cargo or freight agents, the introduction to the “How to Become a Cargo and Freight Agent” section of the *Handbook* states “[h]igh school graduates usually qualify for cargo and freight agent positions. Workers typically train informally on the job.” Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., “Cargo and Freight Agents,” <http://www.bls.gov/ooh/office-and-administrative-support/cargo-and-freight-agents.htm#tab-4> (accessed June 13, 2012).

Therefore, since the related chapter of the *Handbook* does not indicate that a bachelor’s degree, or the equivalent, in specific specialty is normally the minimum requirement for entry into cargo and freight agent positions, the *Handbook* does not support the contention that this aspect of the proffered position qualifies it as a specialty occupation.

The AAO now turns to the *Handbook* chapter that encompasses secretaries and administrative assistants.

The *Handbook* describes the related duties as follows in relevant parts:

- Maintain paper and electronic filing systems for records and messages
- Use computers for spreadsheet, word processing, database management, and other applications
- Complete forms in accordance with company procedures

Secretaries and administrative assistants perform a variety of clerical and organizational tasks that are necessary to run an organization efficiently. They use computer software to create spreadsheets, compose messages, manage databases, and produce presentations, reports, and documents. They also may negotiate with vendors, buy supplies, manage stockrooms or corporate libraries, and get data from various sources.

Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., “Secretaries and Administrative Assistants,” <http://www.bls.gov/ooh/Office-and-Administrative-Support/Secretaries-and-administrative-assistants.htm#tab-2> (accessed June 13, 2012).

The duties quoted from the *Handbook* immediately above closely resemble the beneficiary’s responsibilities associated with maintaining a variety of business records, managing data, and preparing various documents and reports for review, and providing clerical assistance (which are reflected, in such proposed duties as preparing quote sheets, preparing sales confirmations, assisting customs brokers, and requesting Proofs of Delivery from buyers logistics departments).

With respect to education and training requirements for secretary or administrative assistant, the introduction to the “How to Become a Secretary or Administrative Assistant” section of the *Handbook* states “[h]igh school graduates who have basic office and computer skills usually qualify for entry-level secretarial and administrative assistant positions.” Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., “Secretaries and Administrative Assistants,” <http://www.bls.gov/ooh/Office-and-Administrative-Support/Secretaries-and-administrative-assistants.htm#tab-4> (accessed June 13, 2012).

Therefore, since the related chapter of the *Handbook* does not indicate that a bachelor's degree, or the equivalent, in specific specialty is normally the minimum requirement for entry into secretary or administrative assistant positions, the *Handbook* does not support the contention that this aspect of the proffered position qualifies it as a specialty occupation.

In sum, the AAO finds that the *Handbook* does not indicate that the particular position proffered in this petition is one for which a bachelor's degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry.

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.

Moreover, even if the proffered position were determined to be an accountant position, it cannot be concluded based on the *Handbook* that the position qualifies as a specialty occupation normally requiring at least a bachelor's degree or its equivalent in accounting, since accountants do not comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty.

The "Accountants and Auditors" chapter at the 2012-2013 edition of the *Handbook* indicates that not every accountant position requires least a bachelor's degree level of knowledge in accounting or a related specialty.

The introduction to the "How to Become an Accountant or Auditor" section of the *Handbook* states that "[m]ost accountants and auditors need at least a bachelor's degree in business, accounting, or a related field." Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Accountants and Auditors," <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-2> (accessed June 13, 2012).

This does not support the view that any accountant job qualifies as a specialty occupation. "Most" is not indicative that a particular position within the wide spectrum of accountant jobs normally requires at least a bachelor's degree, or its equivalent, in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)), or that a particular accountant position is so specialized and complex as to require knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)).² Further, the "Education" subsection of the aforementioned section of the *Handbook* includes this statement:

² For instance, the first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "Greatest in number, quantity, size, or degree."

In some cases, graduates of community colleges, as well as bookkeepers and accounting clerks who meet the education and experience requirements set by their employers, get junior accounting positions and advance to accountant positions by showing their accounting skills on the job.

Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Accountants and Auditors," <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-4> (accessed June 13, 2012).

Therefore, even if the AAO found that the proffered position was an accountant, the position, as described in this record of proceeding, would not have qualified as a specialty occupation.

As the *Handbook* indicates that the proffered position does not belong to any occupational classification for which there is a categorical requirement for at least a bachelor's degree in a specific specialty, and as the duties of the proffered position as described in the record of proceeding do not indicate that the particular position proffered in this petition is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry, the petitioner failed to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

As reflected in this decision's discussions regarding the *Handbook's* information, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The petitioner has not provided any documentation to indicate that the industry's professional association has made a degree a minimum entry requirement for the occupation. Moreover, the petitioner did not submit any letters or affidavits to meet this criterion of the regulations.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner provided four job announcements and a letter from [REDACTED]. However, upon review of the documents, the petitioner fails to establish that similar organizations to the petitioner

routinely employ individuals with bachelor's degrees (or higher) in a specific specialty, in parallel positions.

It is not sufficient to assert that organizations are similar without providing documentation to substantiate those claims. The AAO notes that for the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. 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).

The petitioner fails to establish that the submitted advertisements are for parallel positions in similar organizations in the same industry. For example, the petitioner submitted a job advertisement from [REDACTED] for an accounting, import/export, and sales and purchasing manager position. While the company appears to be involved in a similar industry, the record is devoid of sufficient information, such as size and scope of the organization, to conduct a substantive comparison of its business operations with the petitioner's; and the petitioner failed to establish that the advertising organizations are similar to it. Moreover, the advertisement specifies "some college coursework completed," but does not appear to require a baccalaureate degree in a specific specialty. In addition, the three other submitted advertisements are for an accounting manager, a title indicative of a position not parallel to the proffered position.

The job advertisements do not establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions in the petitioner's industry. Further, it must be noted that even if all of the job postings indicated that 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 four advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.³

³ According to the *Handbook's* detailed statistics on accountants, there were approximately 1,216,900 persons employed as accountants in 2010. *Handbook*, 2012-13 ed., available at <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm> (last accessed May 31, 2012). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from four postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the industry. 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 a degree requirement in a specific specialty was common to the industry for the position of accountants (or parallel positions) among organizations similar to the petitioner, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

The AAO now turns to the letter submitted by [REDACTED]. For a number of reasons, the AAO accords no probative weight to the letter.

First, the evidence of record does not establish [REDACTED] as an expert. [REDACTED] states that she has more than 35 years of experience in business and has managed over 250 employees. However, the record does not provide a factual foundation for [REDACTED] claims. [REDACTED] did not provide evidence to corroborate her claim. Moreover, it is not evident in [REDACTED] letter or anywhere else in the record of proceeding that whatever experience she may have had is relevant to, or equipped her with expert-level knowledge regarding, the recruiting, hiring, and educational requirements for the type of position upon which she is opining. 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)). Therefore, [REDACTED] has not established that her credentials merit deference to her opinion. Accordingly, the AAO accords no special weight to it, and finds it not persuasive.

Second, the purpose of the letter is not clear. [REDACTED] is not rendering her opinion as an expert to state that the proffered position as an accountant requires a baccalaureate or higher degree in accounting. Instead, [REDACTED] appears to be writing a recommendation letter for the beneficiary. In fact, [REDACTED] states that her experience in business and management of employees qualifies her to "write this letter of recommendation for [the beneficiary]." Further, [REDACTED] states, while a college degree certainly qualifies the beneficiary for the position, "just as important to the company is her experience in importing, exporting and human resource management." Therefore, [REDACTED] is not opining that the proffered position requires a bachelor's degree in specific specialty, but instead is opining on the beneficiary's qualifications and the importance of the beneficiary's experience. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The documents provided do not establish that a degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

A review of the record indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Counsel claims that the duties of the proffered position are complex, unique and/or specialized. However, as reflected in this decision's earlier comments about the proffered position and its duties with regard to the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the duties comprising the proffered position are indicative of a combination of positions that neither alone nor together require the services of a person with at least a bachelor's degree in a specific specialty.

Further, as previously discussed, the AAO questions the level of complexity, uniqueness and/or specialization of the duties and responsibilities of the position based upon discrepancies found in LCA.

The AAO previously noted that the petitioner stated on the LCA that the wage level for the proffered position is Level I (entry). The AAO finds the wage level for the proffered position questionable. 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.⁴

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent worker) 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.⁵ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

In the "Prevailing Wage Determination Policy Guidance" prepared by DOL, a Level I wage rate is describes as follows:⁶

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.

⁴ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

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

⁶ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

The petitioner claims that the company requires a person with a degree in accounting due to "the increasingly complicated nature of managing a small business and working with cumbersome U.S. tax laws." Further, the petitioner states that the position also requires "additional expertise in working with their accounting software to prepare [f]inancial [s]tatements for mandatory tax documentation of semi-monthly payroll input, semi-monthly payroll tax reports and tax submission to Federal and State[sic] governments, quarterly Federal and State payroll tax reports and tax submission and company year-end F/S preparation for payroll and tax documents and tax submission." The petitioner also adds that this person must understand "how to update payroll tax information in our computerized accounting system to keep current with ever changing payroll taxes including state WCB and Unemployment Payroll Tax %'s."

The AAO hereby incorporates by reference its discussion above regarding the wage-rate element of the LCA, which, is indicative of a comparatively low, entry-level position relative to others within the occupation. Since the wage rate specified in the LCA indicates that the proffered position only requires a basic understanding of the occupation and the beneficiary will be closely supervised, the AAO finds that the claimed level of complexity, independent judgment and understanding is materially inconsistent with the LCA certification for a Level I entry-level position.

Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the record of proceeding does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty. Accordingly, the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) has not been satisfied.

The AAO acknowledges that the record of proceeding indicates that the beneficiary previously held H-1B status at the petitioning organization and the beneficiary has a U.S. Bachelor's degree in Business Administration with an Accounting concentration.

The petitioner claims that accounting duties have been performed by the president himself except for the final year-end tax documents which were prepared by an outside CPA firm. The business plan in the record of proceeding indicates that the president of the petitioning organization has a National Diploma of Technology from British Columbia Institute of Technology and it also states that he completed four of five levels towards a professional accounting designation from

1985-1990. However, it has not been established that the president holds a bachelor's degree in accounting, since he did not provide a diploma and academic evaluation showing such.

The AAO also notes the letters from the two outside CPAs, [REDACTED] who state that they prepared the federal, state, and local tax returns for the petitioner. The critical aspect of these CPA letters, the AAO finds, is that neither asserts that the accounting work associated with the petitioner's business requires at least a bachelor's degree, or the equivalent, in a specific specialty.

For the reasons discussed above, 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 its position's 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.

The petitioner states that duties of the proffered position require specialized knowledge to maintain a database for all products and their costs incorporating freight, duties and tariffs along with initial costs. The AAO agrees that the duties as described by the petitioner appear specialized and complex; however, the AAO finds that neither their wording nor any independent documentation in the record of proceeding establishes that they are so specialized and complex as to require knowledge usually associated with at least a baccalaureate or higher degree in a specific specialty.

As evident in this decision's earlier discussions regarding the duties of the proffered position, the AAO finds that those duties are described in generalized terms of generic functions common to bookkeeping, accounting, and auditing clerks; secretaries or administrative assistants; and cargo and freight agents. As clear in this decision's earlier discussions of those aspects of the proffered position, the *Handbook* indicates no usual association between knowledge required to perform such work and the attainment of at least a bachelor or higher degree in a specific specialty.

Now the AAO also notes the implications of the statements in the RFE response that the petitioner has "specialized needs for use of Mandarin and English to manufacture [their] products" and "specialized needs for knowledge of culture and social aspects of Chinese society in dealing with [their] vendors," and that "these are the reasons why this is an H-1B [specialty] occupation requiring specialized knowledge along with language skills and cultural abilities." The AAO notes the same import in the petitioner's statement that the beneficiary meets the requirements for the position since she has experience with the petitioner's systems, products, and vendors, and is also fluent in Mandarin, Taiwanese and English. The implication is that the knowledge required to perform the duties of the position does not necessitate a baccalaureate or higher degree in a specific specialty. Rather, Mandarin and understanding of the petitioner's business operations are viewed as important requirements – but for neither does the record of proceeding establish a usual association with a bachelor's degree in a specific specialty.

Since the petitioner has not establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate

or higher degree, the AAO, therefore, concludes that the proffered position 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 satisfy any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the AAO cannot conclude that the petitioner has established the proffered position as a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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