

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

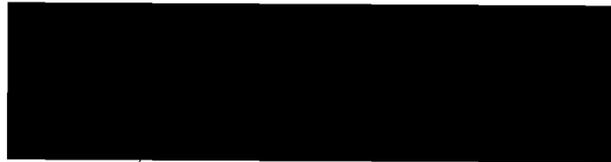
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D2



Date: **MAR 06 2012**

Office: VERMONT SERVICE CENTER

FILE: 

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:

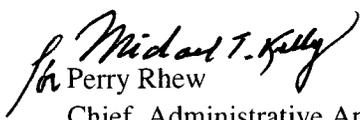


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


for Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on December 8, 2009. The petitioner described its type of business as "sales and services for computerized POS hardware and software system" with 10 employees and a gross annual income of approximately \$2 million and a net annual income of approximately \$105,000.

Seeking to employ the beneficiary in what it designates as an accountant position, the petitioner filed this H-1B petition in an endeavor to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on March 9, 2010, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, counsel asserts that the director's basis for the denial was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

Later in this decision, the AAO will also address two additional, independent grounds, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to properly file the Labor Condition Application (LCA), as it has not been signed by the petitioner's representative; and (2) failed to submit an LCA that corresponds to the petition. Thus, for these reasons as well, the appeal will be dismissed and the petition will be denied, with each considered as an independent and alternative basis for denial.¹

In this matter, the petitioner stated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as an accountant on a full-time basis, from January 2, 2010 January 1, 2013. In its letter of support dated December 4, 2009, the petitioner submitted the following description of the proffered position of accountant:

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[The beneficiary] will have a range of responsibilities of recording, interpreting, and analyzing financial information for executives and also prepare budgets by analyzing costs in relation to the services to be performed for each project before the company submits a proposal to clients. He will also prepare financial reports for a various [sic] group, including creditors and regulatory agencies.

The petitioner stated that it wished to hire the beneficiary because "of continuous growth in our business as an IT related POS services and expansion of our business into a POS Software Development." The petitioner submitted a copy of its two-page, 2008 federal tax return. No further information or documentary evidence regarding the petitioner's business operations and the proposed duties was provided.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on December 22, 2009. The RFE requested that the petitioner submit additional information to demonstrate that the proffered position is a specialty occupation, including a detailed description of the proffered position with the approximate percentage of time for each duty the beneficiary will perform.

In response to the director's RFE, the petitioner's president submitted a letter dated January 13, 2010, stating that he was not a CPA and could not "tell how many hours or percentage of [the beneficiary's] daily hours he will spend on each task in the future." The response included various percentages for some of the duties, which, when totaled equaled to 40-50% (rather than the expected 100%).² The AAO extrapolated the following duties from the petitioner's letter for the proffered position:

- Supervise a book-keeper in conjunction with the Sales and Services departments in identifying and recording various transactions, depending on the nature of the transactions, for journalizing, posting, making trial balance, adjusting entries, making adjusted trial balance, reversing entries, reconciling account receivables and payables and reconciling bank accounts. Spend at least good two (2) hours

² The AAO notes that the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. A service center director may issue an RFE for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any RFE that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The AAO finds that, in the context of the record of proceeding as it existed at the time the RFE was issued, the request for additional evidence was appropriate under the above cited regulations, not only on the basis that it was required initial evidence, but also on the basis that it was material in that it addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it had H-1B caliber work for the beneficiary for the entire period of employment requested in the petition.

for checking all the transactions daily for accuracy depending upon the types of transactions.

- Prepare the reports for inventory control and valuation of inventories by employing different valuation basis for computation and evaluation of the gross profit percentage and retail mark-ups and mark-downs (conventional method) by employing lower-of-cost or market methods to determine at what level of inventory [the petitioner] should maintain, when and how much quantities [the petitioner] should purchase and when promotional sales [the petitioner] should conduct at what percentage of discount and for how long based on the cost-basis approaches after calculating period costs, treatment of purchase discounts in present dollar value, average cost, and resolving what cost flow assumption to adopt.
- Assist Sales in submitting proposals for prospective customer by analyzing raw costs in relation to the future services to be performed for each project before the company submits a proposal to customers. These tasks . . . may take [on] average at least 20 to 30 percent of [the beneficiary's] duties.
- Examine and evaluate firms' financial and accounting information systems, management procedures in revenue recognition and accounting for corporate income taxes, and setting up internal control systems to ensure that records are accurate and controls are adequate in order to prepare analyze and verify financial documents.
- Supervise and works together with a bookkeeper to ensure that [the petitioner] are [sic] run financially efficient, public records kept accurately, and all taxes, including sales and payroll taxes, paid properly and on time.
- Perform budget analysis, financial analysis and financial planning, inventory planning, and cost accounting including but not limited to preparing all financial statements (interim balance sheets, statement of cash flow, assets statements, current and long term liabilities and contingencies, and single-step and multi-step statement) for our executives. It may take at least 20 percent of his duties.
- Audit data for accuracy to help executives evaluate the effectiveness of their controls based on real-time data rather than personal observation.
- Overhaul the existing current accounting software (Simpac) to Quick Books and review controls to ensure their reliability and integrity of the data. This project may take most of [the beneficiary's] days at least for a month or two.
- Advise on the tax advantages and disadvantages of certain business decisions, compensation, and employee healthcare benefits, and to design accounting and

data processing systems and the selection of controls to safeguard assets and monitor the level of inventory and, more over [sic], cash flow.

In the letter of support, the petitioner indicated that the company was established in 1985 and provided a brief description of the company. (The petitioner had previously stated on the Form I-129 petition that it was established 1992. No explanation for the variance was provided.) The petitioner did not submit any further documentation or evidence regarding the duties of the proffered position and/or its business operations.

Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's duties would necessitate services, on a full-time basis, at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the entire period requested. The director denied the petition on March 9, 2010. Thereafter, counsel for the petitioner submitted an appeal of the denial.

The AAO reviewed the record of proceeding in its entirety. Before addressing the grounds for the director's denial of the petition, the AAO will first make some initial findings, beyond the decision of the director, that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

As a preliminary matter, the AAO notes that even if the petitioner were to overcome the ground for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought. That is, upon review of the record, the AAO notes that in the instant case, another issue precludes the approval of the H-1B petition. Specifically, an authorized official of the petitioner has not signed and dated the LCA's Declaration of Employer (section K), as that section requires in order to obtain (1) the petitioner's attestation that the statements in the LCA are true and correct, that the petitioner "agree[s] to comply with the [LCA] Statements as set forth in the Labor Condition Application - General Instructions Form ETA 9035CP and with the Department of Labor regulations (20 CFR part 655, Subparts H and I)," and (2) the petitioner's agreement to make the LCA, its supporting documentation, and other records available to the Department of Labor.

The record contains an unsigned LCA, with a November 30, 2009 certification date. The "Declaration of Employer" (Section K.5., page 4) of the LCA does not contain the petitioner's signature. It is noted that on the first page of the LCA, the petitioner affirmatively checked the box confirming that that it "understood and agreed" to take the listed actions within the specified times and circumstances. The listed actions are the following:

- Print and sign a hardcopy of the electronically filed and certified LCA;
- Maintain a signed hardcopy of this LCA in my public access files;
- Submit a signed hardcopy of the LCA to the United States Citizenship and Immigration Services (USCIS) in support of the I-129, on the date of the submission of the I-129;
- Provide a signed hardcopy of this LCA to each H-1B nonimmigrant who is employed pursuant to the LCA.

In addition, in the section "Signature Notification and Complaints" (Section N, page 5), the following notice is provided:

The signature and dates signed on this form will not be filled out when electronically submitting to the Department of Labor for processing, but **MUST** be completed when submitted non-electronically. If the application is submitted electronically, any resulting certification **MUST** be signed *immediately upon receipt* from the Department of Labor before it can be submitted to USCIS for processing.

[Emphasis in original.] DOL and DHS regulations require that the beneficiary's employer or a representative of the employer submit a copy of the signed, certified Form ETA 9035/ETA 9035E to USCIS in support of the Form I-129 petition.

The DOL regulation at 20 C.F.R. § 655.705(c) states, in pertinent part, the following:

- (1) The employer shall submit a completed labor condition application (LCA) on Form ETA 9035E or Form ETA 9035 in the manner prescribed in § 655.720. By completing and submitting the LCA, and by signing the LCA, the employer makes certain representations and agrees to several attestations regarding its responsibilities, including the wages, working conditions, and benefits to be provided to the H-1B nonimmigrants (8 U.S.C. 1182(n)(1)); these attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. . . . The employer reaffirms its acceptance of all of the attestation obligations by submitting the LCA to the U.S. Citizenship and Immigration Services (formerly the Immigration and Naturalization Service or INS) in support of the Petition for Nonimmigrant Worker, Form I-129, for an H-1B

nonimmigrant. See 8 CFR 214.2(h)(4)(iii)(B)(2), which specifies the employer will comply with the terms of the LCA for the duration of the H-1B nonimmigrant's authorized period of stay.

* * *

- (3) The employer then may submit a copy of the certified, signed LCA to DHS with a completed petition (Form I-129) requesting H-1B classification.

Furthermore, the regulation at 20 C.F.R. § 655.730(c), in pertinent part, states the following:

- (2) Undertaking of the Employer. In submitting the LCA, and by affixing the signature of the employer or its authorized agent or representative on Form ETA 9035E or Form ETA 9035, the employer (or its authorized agent or representative on behalf of the employer) attests the statements in the LCA are true and promises to comply with the labor condition statements (attestations) specifically identified in Forms ETA 9035E and ETA 9035, as well as set forth in full in the Form ETA 9035CP. . . .
- (3) Signed Originals, Public Access, and Use of Certified LCAs. . . . For H-1B visas only, the employer must submit a copy of the signed, certified Form ETA 9035 or ETA 9035E to the U.S. Citizenship and Immigration Services (USCIS, formerly INS) in support of the Form I-129 petition, thereby reaffirming the employer's acceptance of all of the attestation obligations in accordance with 8 CFR 214.2(h)(4)(iii)(B)(2).

As noted in the DOL regulations cited above, 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), states that the petitioner will provide "[a] statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay."

The regulation at 8 C.F.R. § 103.2(a)(2), which concerns the requirement of a signature on applications and petitions, states the following:

An applicant or petitioner must sign his or her application or petition. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on an application or petition that is being filed with the BCIS is one that is either handwritten or, for applications or petitions filed electronically as permitted by the instructions to the form, in electronic format.

Based on DOL and DHS regulations, the LCA that is filed with USCIS in support of an H-1B

petition must be certified by DOL and signed by the beneficiary's employer or a representative of the employer. Here, the petitioner filed a copy of the certified, but unsigned, Form ETA 9035/9035E with USCIS in support of the Form I-129 petition. Thus, the petitioner failed to comply with the regulatory requirements for H-1B visa classification as set forth at 8 C.F.R. § 103.2(a)(2), 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), 8 C.F.R. § 655.730(c)(2) and (3). Accordingly, the petition must be denied on this basis also.

The AAO will now highlight an aspect of the petition that undermines the petition's credibility with regard to the actual nature and requirements of the proffered position. This particular aspect is the discrepancy between what the petitioner claims about the level of responsibility inherent in the proffered position, on the one hand, and, on the other, the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of petition.

The petitioner and counsel claim that the duties of the proffered position are complex, unique and/or specialized. The petitioner claims that the proffered position is "demanding" and involves "major responsibilities." Furthermore, the petitioner asserts that the beneficiary's responsibilities will include supervisory functions. Additionally, the petitioner states that the beneficiary "is currently in the process of taking [the] CPA exam . . . and furthering his knowledge of Computerized Accounting System . . . to develop essential and practical accounting skills which we find so essential to the successful fulfillment of his job responsibilities." The petitioner asserts that the beneficiary's proficiency in "accounting and auditing computer software and information systems to develop essential and practical computerized accounting systems" is "essential to the successful management of this company."

In this regard, the petitioner's claims are questionable when reviewed in connection with the LCA submitted with the Form I-129 petition. The AAO notes that the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Accountants" at a Level 1 (entry level) wage.

Wage levels should be determined only after selecting the most relevant *O*NET* occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.³ Prevailing wage determinations start with an entry level wage and progress to a wage that is commensurate with that of a Level 2 (qualified), Level 3 (experienced), or Level 4 (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

³ 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.

to perform the job duties.⁴ The DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels.⁵ A Level 1 wage rate is described by DOL as follows:

Level 1 (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

The petitioner and counsel stated that the duties of the proffered position are complex, unique and/or specialized. The petitioner claimed that the proffered position entails supervisory functions. The petitioner further reported that the proffered position is "demanding" and involves "major responsibilities" and that proficiency in "accounting and auditing computer software and information systems to develop essential and practical computerized accounting systems" is "essential to the successful management of this company." Additionally, the petitioner stated that the beneficiary "is currently in the process of taking CPA exam . . . and furthering his knowledge of Computerized Accounting System . . . to develop essential and practical accounting skills which we find so essential to the successful fulfillment of his job responsibilities." However, the AAO must question the level of complexity, independent judgment and understanding required for the position as the LCA is certified for a Level 1 entry-level position.

The LCA's wage level indicates the position is actually a low-level, entry position relative to

⁴ 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.

⁵ 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.

others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands and level of responsibilities of the proffered position. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether 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:

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.

[Italics added]. 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 corresponds to the claimed duties of the proffered position, that is, specifically, that corresponds to the level of work and responsibilities that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and responsibilities in accordance with the requirements of the pertinent LCA regulations. For this reason also, the petition must be denied.

The AAO will now address the basis upon which the petition was denied, namely, the director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described by the petitioner constitutes a specialty occupation.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To meet its burden of

proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the 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 one requiring the following:

- (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 the following:

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 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.

As will be evident in the discussions of accounting positions later in this decision, accountants comprise an occupational classification that covers a wide range of positions, including some that may be successfully performed with related experience alone, some that may require a level of accounting knowledge attained by an associate’s degree in accounting, and some that may actually require a bachelor’s or higher degree in a accounting or a closely related discipline. To determine whether this particular accountant position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline. The AAO finds that the petitioner has not done so.

The petitioner provided two descriptions of the proffered position but did not provide sufficient information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Although the director specifically requested the petitioner provide the percentage of time the beneficiary would spend on each job duty, the petitioner’s president stated he was not the CPA and he could not provide the number of hours or percentage of time spent on each duty. The petitioner submitted a response in which the total percentage of time spent on the duties of the position is 40-50%. The AAO will not attempt to decipher or “guess” which duties are the primary and essential functions of the proffered

position, which tasks are secondary, and the frequency with which each of the duties will be performed. As previously mentioned, the petitioner stated that it wished to employ the beneficiary on a full-time basis, for a three-year period. It is the petitioner's responsibility to establish eligibility for the benefit sought, including that it has H-1B caliber work for the beneficiary for the entire period requested.

Furthermore, the substantive requirements of the beneficiary's duties, listed above, are questionable when viewed in terms of the size, scope and nature of the petitioning entity's business operations.⁶ Additionally, as described, the duties fail to communicate either the actual work entailed or an adequate correlation between that work and the petitioner's stated business operations. For instance, the abstract level of information provided regarding the proffered position and the duties comprising it is exemplified by the phrases "supervise a book-keeper in conjunction with the Sales and Services departments in identifying and recording various transactions, depending on the nature of the transactions" and "checking all the transactions daily for accuracy depending upon the types of transactions." The petitioner does not adequately describe the actual duties involved in these tasks. The AAO further finds that the minimum level of training, experience, and/or formal education that would be required to attain the requisite knowledge to perform the tasks is not self-evident in the duty descriptions, even considered in the aggregate and in the context of the evidence that the record of proceeding relates about the general business operations in which they would be applied.

The petitioner fails to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. Consequently, the petitioner's assertions with regard to the position's educational requirement are conclusory and unpersuasive, as they are not supported by substantive evidence of specific levels of specialization, complexity and/or uniqueness inherent in the duties of the proffered position. 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)).

It should be noted that, for efficiency's sake, the AAO hereby incorporates the above comments and findings into its analysis of each of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A) below.

⁶ As previously noted, the petitioner reported that its staff consists of ten employees. The AAO notes that it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's business is relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring a level of knowledge that may be obtained only through a baccalaureate degree or higher in or its equivalent. In this case, the only documentary evidence the petitioner submitted regarding its business operations was a two-page federal tax return.

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 criteria 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 the normal minimum requirement for entry into the particular position.

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

The AAO recognizes the *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁷ The two sections of the *Handbook* most relevant to this proceeding are the chapters "Bookkeeping, Accounting, and Auditing Clerks" and "Accountants and Auditors."⁸ The AAO notes that there is no indication that the petitioner requires the beneficiary to have obtained the designation Certified Public Accountant (CPA), Certified Management Accountant (CMA) or any other professional designation to serve in the proffered position.

The AAO finds that the discussions of both "Bookkeeping, Accounting, and Auditing Clerks" and "Accountants and Auditors" in the *Handbook* encompass the proposed duties as described in the record of proceeding, and both occupations require some understanding of accounting principles. However, the question is not whether the petitioner's position requires some knowledge of accounting principles, but rather whether it is one that normally requires the level of knowledge of a body of highly specialized knowledge in accounting that is signified by at least a bachelor's degree, or its equivalent, in accounting or a closely related specialty.

As will now be discussed, bookkeeping, accounting, and auditing clerks do not comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty. The *Handbook* states, in pertinent part, the following about this occupation:

⁷ All of the AAO's references are to the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁸ For these chapters, *see* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition*, Bookkeeping, Accounting, and Auditing Clerks, on the Internet at <http://www.bls.gov/oco/ocos144.htm> (visited February 29, 2012) and Accountants and Auditors at <http://www.bls.gov/oco/ocos001.htm>. (also visited February 29, 2012).

Bookkeeping, accounting, and auditing clerks are financial record keepers. They update and maintain accounting records, including those which calculate expenditures, receipts, accounts payable and receivable, and profit and loss. These workers have a wide range of skills from full-charge bookkeepers, who can maintain an entire company's books, to accounting clerks who handle specific tasks. All these clerks make numerous computations each day and must be comfortable using computers to calculate and record data.

In small businesses, bookkeepers and bookkeeping clerks often have responsibility for some or all the accounts, known as the general ledger. They record all transactions and post debits (costs) and credits (income). They also produce financial statements and prepare reports and summaries for supervisors and managers. Bookkeepers prepare bank deposits by compiling data from cashiers, verifying and balancing receipts, and sending cash, checks, or other forms of payment to the bank. Additionally, they may handle payroll, make purchases, prepare invoices, and keep track of overdue accounts.

In large companies, accounting clerks have more specialized tasks. Their titles, such as accounts payable clerk or accounts receivable clerk, often reflect the type of accounting they do. In addition, their responsibilities vary by level of experience. Entry-level accounting clerks post details of transactions, total accounts, and compute interest charges. They also may monitor loans and accounts to ensure that payments are up to date. More advanced accounting clerks may total, balance, and reconcile billing vouchers; ensure the completeness and accuracy of data on accounts; and code documents according to company procedures.

Auditing clerks verify records of transactions posted by other workers. They check figures, postings, and documents to ensure that they are mathematically accurate, and properly coded. They also correct or note errors for accountants or other workers to fix.

As organizations continue to computerize their financial records, many bookkeeping, accounting, and auditing clerks use specialized accounting software, spreadsheets, and databases. Most clerks now enter information from receipts or bills into computers, and the information is then stored electronically. The widespread use of computers also has enabled bookkeeping, accounting, and auditing clerks to take on additional responsibilities, such as payroll, procurement, and billing. Many of these functions require these clerks to write letters and make phone calls to customers or clients.

With respect to education and training requirements for bookkeeping, accounting, and auditing clerks, the *Handbook* states:

Most bookkeeping, accounting, and auditing clerks are required to have a high school degree at a minimum. However, having some postsecondary education is increasingly important and an associate degree in business or accounting is required for some positions. Although a bachelor's degree is rarely required, graduates may accept bookkeeping, accounting, and auditing clerk positions to get into a particular company or to enter the accounting or finance field with the hope of eventually being promoted.

As evident in the excerpt above, the *Handbook* does not support the view that the occupational category "Bookkeeping, Accounting, and Auditing Clerks" qualifies as a specialty occupation. The *Handbook* reports that most bookkeeping, accounting, and auditing clerks have at least a high school degree but that a bachelor's degree is rarely required for entry to the occupation. Thus, the passage does not indicate that these positions normally require a bachelor's degree, or its equivalent, in a specific specialty for entry into the occupation.

Despite counsel's assumption to the contrary, "Accountants and Auditors" do not comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty. The *Handbook* states the following regarding this occupational group:

Accountants and auditors help to ensure that firms are run efficiently, public records kept accurately, and taxes paid properly and on time. They analyze and communicate financial information for various entities such as companies, individual clients, and Federal, State, and local governments. Beyond carrying out the fundamental tasks of the occupation—providing information to clients by preparing, analyzing, and verifying financial documents—many accountants also offer budget analysis, financial and investment planning, information technology consulting, and limited legal services.

Specific job duties vary widely among the four major fields of accounting and auditing: public accounting, management accounting, government accounting, and internal auditing.

Under the *Handbook's* description of accountants and auditors, government accountants work in the public sector, and internal auditors check for mismanagement, waste or fraud. Since these descriptions of accountants clearly do not apply to the proffered position, the focus of the analysis will be on whether the proffered position is that of a public or management accountant.

According to the *Handbook*:

Public accountants perform a broad range of accounting, auditing, tax, and consulting activities for their clients, which may be corporations, governments, nonprofit organizations, or individuals. For example, some public accountants concentrate on tax matters, such as advising companies about the tax advantages and disadvantages of certain business decisions and preparing individual income tax returns. Others offer advice in areas such as compensation or employee

healthcare benefits, the design of accounting and data processing systems, and the selection of controls to safeguard assets. Still others audit clients' financial statements and inform investors and authorities that the statements have been correctly prepared and reported. These accountants are also referred to as external auditors. *Public accountants, many of whom are Certified Public Accountants (CPAs), generally have their own businesses or work for public accounting firms.*

* * *

Management accountants—also called *cost, managerial, industrial, corporate, or private accountants*—record and analyze the financial information of the companies for which they work. Among their other responsibilities are budgeting, performance evaluation, cost management, and asset management. Usually, management accountants are part of executive teams involved in strategic planning or the development of new products. They analyze and interpret the financial information that corporate executives need to make sound business decisions. They also prepare financial reports for other groups, including stockholders, creditors, regulatory agencies, and tax authorities. Within accounting departments, management accountants may work in various areas, including financial analysis, planning and budgeting, and cost accounting.

Under the *Handbook's* description, it therefore appears to be unusual for small businesses to employ a public or management accountant, since public accountants are usually CPAs with their own business or employed by accounting firms, while management accountants are usually part of executive teams and prepare financial reports for other entities in addition to their employer. Thus, it is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in accounting or a closely related specialty, or the equivalent, to perform the duties of an accountant on a full-time basis.

The *Handbook* further states, in pertinent part, the following regarding the requirements for the occupational category "Accountants and Auditors" in the "Education and training" section of the chapter:

Education and training. Most accountant and auditor positions require at least a bachelor's degree in accounting or a related field. Some employers prefer applicants with a master's degree in accounting, or with a master's degree in business administration with a concentration in accounting. Some universities and colleges are now offering programs to prepare students to work in growing specialty professions such as internal auditing. Many professional associations offer continuing professional education courses, conferences, and seminars.

Some graduates of junior colleges or business or correspondence schools, as well as bookkeepers and accounting clerks who meet the education and experience

requirements set by their employers, can obtain junior accounting positions and advance to accountant positions by demonstrating their accounting skills on the job.

Therefore, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is normally required for this occupational category. Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. The *Handbook* reports that "[m]ost accountants and auditors need at least a bachelor's degree accounting or a related field." 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.⁹ The *Handbook* further reports that some graduates from junior colleges or business or correspondence schools, as well as bookkeepers and accounting clerks meeting education and experience requirements set by employer, can advance to accountant positions by demonstrating their accounting skills. Thus, the *Handbook* does not state that at least a bachelor's degree in a specific specialty is required for entry to these positions.

In this context, the fact that a person may be employed in a position designated by an employer 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.

The proffered job duties as described by the petitioner are generalized descriptions of functions generic to accounting positions. As such, they do not establish that their performance requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. While the AAO acknowledges that some of the duties described by the petitioner are similar to those under the section on accountants and auditors in the *Handbook*, it here incorporates and reiterates by reference its earlier comments in this decision regarding the lack of evidence substantiating the nature and educational level of accounting

⁹ 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." As such, if merely 51% of the positions require at least a bachelor's degree in specific specialty, it could be said that "most" of the positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist.

knowledge that would be required for the actual performance of the beneficiary's work. Furthermore, as earlier discussed, the petitioner indicated by the wage-level specified in the LCA that its proffered position for the beneficiary is a low-level, entry position relative to others within the occupation. Based upon that wage rate, the LCA indicates that the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment, will be closely supervised and monitored, will receive specific instructions on required tasks and expected results. Therefore, even if viewed as falling within the general occupational category of "Accountants and Auditors," the petitioner has failed to establish that the beneficiary's actual work in that capacity would require at least a bachelor's degree, or the equivalent, in accounting or a closely related specialty.

The petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that there is a categorical requirement for at least a bachelor's degree in a specific specialty. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that position is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong 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.

As previously mentioned, the petitioner described its type of business on the Form I-129 petition as "sales and services for computerized POS hardware and software system." The petitioner further reported that it has ten employees and a gross annual income of approximately \$2 million and a net annual income of approximately \$105,000.

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. at 1102).

As reflected in the discussion above, 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. Also, there are no submissions from professional associations 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. The petitioner did not submit any letters or affidavits from firms or individuals in the industry to meet this criterion of the regulations.

Thus, based upon a complete review of the record, the petitioner has not established that at least a bachelor's 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 position 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 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.

As noted earlier, the AAO here incorporates by reference and reiterates its earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position.

Moreover, as reflected in this decision's previous comments about the generalized and generic nature of the description of the proposed duties, the petitioner has established that the position involves application of accounting principles, but not at such a level as to distinguish the position as so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in accounting or a closely related specialty. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other accounting positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Additionally, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex or unique. While a few related courses in accounting may be beneficial in performing certain of the proposed duties, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position.

Accordingly, the petitioner failed to establish that the position is so complex or unique that it can only be performed by an individual who has attained at least a bachelor's degree, or the equivalent, in accounting or a related specialty. Thus, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion entails an employer demonstrating that it normally requires a degree or its equivalent for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring a bachelor's degree, or the equivalent, in a specific specialty in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position.¹⁰

As previously mentioned, in the instant matter, the petitioner reported on the Form I-129 that it was established in 1992. The petitioner stated that it "prefer[s] applicants with a master's degree in accounting with a few years of experience, or CPA" but that the budget is limited for this position at this time. Upon review of the record, the petitioner did not provide any documentary evidence regarding its current or past recruitment efforts for this position. Furthermore, the petitioner did not submit any information regarding employees who have previously held the position. The petitioner also did not provide any information or documentation regarding its methods for recruiting the beneficiary for the position. Thus, 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, or the equivalent, in a specific specialty.

In the appeal, counsel asserted that the petitioner satisfied this criterion of the regulations because the petitioner's "self-imposed employment requirement suffices on its face." The AAO is not persuaded by counsel's claim. While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be

¹⁰ To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d 384. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

In the instant case, no evidence was submitted regarding the petitioner's past recruiting and hiring practices. The record of proceeding does not establish that the petitioner normally requires at least a bachelor's degree, or the equivalent, in a specific specialty 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.

Counsel asserts that the petitioner has met this criterion because "the employer is often in the best position to determine whether specific duties require and attainment of a baccalaureate or higher degree. [The petitioner] determined that the bookkeeper it currently employs is unqualified to perform specialized and complex duties traditionally performed by accountants."

As earlier noted, the AAO also incorporates here this decision's earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position on the LCA as a low-level, entry position relative to others within the occupation. The AAO finds that the petitioner failed to provide evidence showing that performance of the proffered position would require a higher degree of knowledge than would normally be required of bookkeeping clerks, accounting clerks, auditing clerks, tax preparers, or other types of employees, including those bearing the title "accountant," who engage in some accounting duties and employ some accounting principles, but not at a level of an accountant applying theoretical and practical knowledge of accounting that is usually associated with at least a bachelor's degree in accounting or a closely related specialty or its equivalent. The record contains insufficient documentary evidence to support counsel's assertion that the petitioner has met this criterion.

The petitioner failed to meet its burden of proof to establish that the duties of the position are 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. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

The petition will be denied for each of the above stated reasons, with each considered as an independent and alternative basis for denial.

As previously mentioned, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the director's decision will be dismissed, and the petition will be denied.

ORDER: The director's decision is affirmed. The petition is denied.