



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: APR 01 2013

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on November 3, 2011. In the Form I-129 visa petition, the petitioner describes itself as a Christian church established in 2011. In order to employ the beneficiary in what it designates as a pastor position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on July 31, 2012, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

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

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

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a pastor to work on a full-time basis.<sup>1</sup> With the Form I-129 petition, the petitioner submitted a letter dated September 26, 2011, which included the following description of the duties of the proffered position:

The full-time Pastor leads the congregation spiritually through preaching, teaching, counseling, and visiting families. He is also in charge of running the daily function of church ministry and lay leadership. In addition, his duties include administering the holy sacraments such as communion and baptism, conducting weddings and funerals, and visiting hospital, nursing home, and care facilities.

More specifically, the Pastor will devote approximately 8 hours a week to preparing message for Sunday worship; 4 hours to Sunday worship service and fellowship; 3 hours to Wednesday night prayer meeting; 7 hours to counseling and visiting families; 6 hours to research on the Bible and reading; and 8 hours to administration and other activities such as weddings and funerals. Thus, the Pastor will work approximately 36 hours per week.

---

<sup>1</sup> In the Form I-129 petition and the LCA, the petitioner indicated that the beneficiary would be employed on a full-time basis.

In the letter of support, the petitioner provided inconsistent information as to the minimum academic requirements for the proffered position. Initially in the letter (page 1), the petitioner stated "[the beneficiary] will work as [the] full-time Pastor, a position which requires an educational qualification of at least a Master's degree in Theology or a closely related field of study." Later (page 2), the petitioner claimed that "[d]ue to the high level of professional responsibility inherent to the position, [the petitioner's] minimum requirement for this position is a comprehensive understanding of Christian Theology by virtue of at least a Bachelor's degree in the field." No explanation was provided.

The petitioner indicated that the beneficiary is qualified for the proffered position by virtue of his American and Korean degrees. With the initial petition, the petitioner submitted documentation regarding the beneficiary's academic credentials, including evidence that he received a Master of Theological Studies degree from [REDACTED]

The petitioner also provided additional evidence, including (1) documents regarding the petitioner's corporate status (indicating that it was established in January 2011); (2) an organizational chart; (3) evidence regarding the petitioner's business operations; and (4) evidence regarding the petitioner's congregation, including photos, brochures and a church directory.<sup>2</sup>

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Clergy" – SOC (ONET/OES Code) 21-2011, at a Level I wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 2, 2012. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted. Notably, the director acknowledged that the petitioner submitted a job description but specifically asked the petitioner to submit a more detailed description of the work to be performed by the beneficiary for the entire requested period of validity, including the specific job duties, the percentage of the time to be spent on each duty, level of responsibility, hours per week of work, and the minimum education, training and experience necessary to do the job, etc.

On May 29, 2012, counsel for the petitioner responded to the RFE by submitting a brief and additional evidence. Specifically, counsel submitted the following: (1) two opinion letters; (2) an

---

<sup>2</sup> A review of the evidence reveals that the petitioner submitted documentary evidence that is in a foreign language and is not accompanied by an English translation. Any document submitted containing a foreign language must be accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English. See 8 C.F.R. § 103.2(b)(3). Because the petitioner failed to comply with the regulations by submitting a certified translation of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *Id.* Accordingly, the evidence that is in a foreign language is not probative and will not be accorded any weight in this proceeding. The AAO will not attempt to decipher or "guess" the meaning of documents that are not accompanied by a full, certified English language translation.

excerpt from the Constitution of the Presbyterian Church (U.S.A.), Part II Book of Order 2011-2013; and (3) a printout from the Occupational Information Network (O\*NET) OnLine.

In a brief dated May 17, 2012, counsel provided the following revised job description:

[The] Beneficiary's weekly working hours are:

1. [A]pproximately 3 hours of reading (8.33%), 3 hours of prayer and meditation (8.33%), and 2 hours of writing messages for Sunday worships (5.56%);
2. [A]pproximately 1 and a half hours of Sunday worship services (4.17%) and 2 and [a] half hours of fellowship on Sundays (6.94%);
3. [A]pproximately 3 hours of leading Wednesday night prayer meetings (8.33%);
4. [A]pproximately 3 hours of counseling (8.33%) and 4 hours of visiting families, hospital, and nursing home (11.11%);
5. [A]pproximately 4 hours of reading and research on the Bible (11.11%) and 2 hours of mediation (5.56%); and
6. [A]pproximately 3 hours of organizing administration and teaching leaders of church (8.33%);
7. [A]pproximately 3 hours of participating in religious conferences and denomination meetings (8.33%); and
8. [A]pproximately 2 hours of leading other activities such as wedding[s], funerals, Good Friday service, and Christmas service (5.55%).

The AAO notes that the revised description of the proffered position provided by counsel in response to the RFE is almost identical to the job description provided by the petitioner with the initial petition.<sup>3</sup> Thus, despite the director's finding that the petitioner's description of the proposed duties was nonspecific, the petitioner elected not to provide a detailed description of the duties the beneficiary would perform.

Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the

---

<sup>3</sup> The description of the duties of the proffered position submitted in response to the RFE was provided by counsel, not the petitioner. Counsel's brief was not endorsed by the petitioner and the record of proceeding does not indicate the source of the slightly revised description of the duties and responsibilities that counsel attributes to the proffered position. The AAO reviewed the information and notes that without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on July 31, 2012. Counsel submitted an appeal of the denial of the H-1B petition. In support of the Form I-290B, counsel submitted additional evidence.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

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

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. To determine whether the proffered position is a specialty occupation, the AAO must look at the nature of the organization 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 presented the substantive nature of the duties of the proffered position as they would actually be performed for the petitioner and the correlation between the substantive nature of those duties and attainment of a particular level of education in a specific specialty. Without such information, USCIS is unable to discern whether the position indeed 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. 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 a specific specialty, or its equivalent, to perform duties at a level that 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 for the period specified in the petition.

Despite counsel's assertion to the contrary, it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's operations are relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly

specialized knowledge that may be obtained only through a baccalaureate or higher degree in a specific specialty, or its equivalent. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties.

In its support letter dated September 26, 2011, the petitioner described itself as a church. In the appeal, counsel stated that "at the time of filing of [*sic*] this petition the number of the entire congregation including children is less than 35." The petitioner indicated that it leases sanctuary space and rooms for other functions from another church for \$200 per month. The petitioner stated that its annual budget is approximately \$40,000 per year and that the pastor will be compensated \$23,500 per year.<sup>4</sup> According to the petitioner, the pastor is the only paid staff.<sup>5</sup> The petitioner claims that the beneficiary will be "in charge of running the daily function of church ministry and lay leadership." The petitioner and counsel did not address how the beneficiary would be relieved from performing non-qualifying duties.

The petitioner provided inconsistent information as to the requested dates of intended employment. In the Form I-129, the petitioner stated that it intended to employ the beneficiary from October 1, 2011 to September 30, 2012 (one year). In the LCA, the petitioner listed the period of intended employment as October 1, 2011 to September 30, 2014 (three years). In the letter of support submitted with the petition, the petitioner reported that the "intended period of employment is three years." All of these documents are dated September 26, 2011. No explanation was provided for the discrepancy in the record of proceeding.

Moreover, although the petitioner requested that the beneficiary be granted H-1B classification, the evidence does not establish that the petitioner would be able to sustain an employee performing the full-time duties of a pastor at the level required for the H-1B petition to be granted. The petitioner failed to establish that the petition was filed on the basis of employment for the beneficiary as a pastor that, at the time of the petition's filing, was definite and nonspeculative. The petitioner has not established that the beneficiary's overall day-to-day duties would require a baccalaureate or higher degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation.

Without further clarification by the petitioner, it appears that the beneficiary will be employed in a lesser capacity or serving in a different position. The record of proceeding lacks (1) evidence corroborating that the petitioner has work that exists as an ongoing endeavor generating definite employment for the beneficiary's services; and (2) evidence that the beneficiary's duties ascribed

---

<sup>4</sup> The petitioner submitted a two-page "Budget Plan," which consists of two simple charts with the petitioner's income and expenses. The total income is \$40,000, the total expenses is \$37,320. In addition, the petitioner submitted three bank statements, showing funds of less than \$20,000.

<sup>5</sup> The petitioner submitted an organizational chart, listing various committees/teams (which consist of one person per committee/team), along with a chairman. However, the petitioner did not provide any information as to the function of each committee/team, duties and responsibilities associated with these positions, number of hours dedicated, etc.

would actually require the theoretical and practical application of at least a baccalaureate level of a body of highly specialized knowledge in a specific specialty, as required by the Act.

The abstract level of information provided about the proffered position and its constituent duties is exemplified by the assertion that the beneficiary will spend "2 and [a] half hours of fellowship on Sundays." The petitioner claims that the beneficiary will spend almost 7% of his time performing this function. Notably, the statement does not provide any insight into the beneficiary's actual duties, and it does not include any information regarding the specific tasks that the beneficiary will perform. Counsel states that the beneficiary will spend approximately three hours "reading" and three hours in "prayer and meditation" (in addition to another four hours of "reading and researching the Bible" and two hours of "mediation"). However, the petitioner and counsel fail to sufficiently define how the tasks of "reading" and "prayer and meditation" translate to specific duties and responsibilities as the phrases do not delineate the actual work the beneficiary will perform. More importantly, the phrases do not demonstrate any particular educational level and knowledge necessary to perform the tasks. Counsel also reports that the beneficiary will spend three hours per week "participating in religious conferences and denomination meetings." The petitioner and counsel do not explain the beneficiary's specific role "participating." According to counsel the beneficiary will spend "4 hours of visiting families, hospital, and nursing home" (which counsel indicates is separate and distinct from "counseling"). Thus, as so generally described, the description does not illuminate the substantive application of knowledge involved in "visiting" or any particular educational attainment associated with such application. The overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's operations. Furthermore, the petitioner did not provide sufficient documentation to substantiate the job duties and responsibilities of the proffered position.

Such generalized information does not in itself establish a correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. The AAO also observes, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the AAO finds the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position. Moreover, the job descriptions fail to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis within the petitioner's operations; (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. The petitioner's assertion with regard to the educational requirement for the position is conclusory and unpersuasive, as it is not supported by the job description or probative evidence.

A position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. The record of proceeding does not contain such evidence. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner has failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or any substantive evidence regarding the actual work that the beneficiary would perform. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty.

Moreover, the record of proceeding contains discrepancies between what the petitioner and counsel claim about the level of responsibility inherent in the proffered position set against the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of petition. That is, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Clergy" at a Level I (entry level) wage.

Wage levels should be determined only after selecting the most relevant O\*NET code classification. Then, a prevailing-wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation. It is important to note that prevailing wage determinations start with an entry level wage (Level I) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.<sup>6</sup> The U.S. Department of Labor (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 as indicated by the job description.

---

<sup>6</sup> A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

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

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

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

In the instant case, the petitioner and counsel claim that the proffered position involves complex, unique and/or specialized duties. The petitioner asserts that the beneficiary will be "in charge of running the daily function of church ministry and lay leadership." According to the petitioner, the position requires specialized knowledge. Further, the petitioner reports that the proffered position "requires an educational qualification of at least a Master's degree in Theology or a closely related field of study." Additionally, the petitioner references the "high level of professional responsibility inherent to the position." According to counsel, "[w]ith respect to the level of responsibility, [the] Beneficiary will work on a broad range of complex activities, take initiative, and schedules own works [*sic*]; with minimal supervision or under general direction of the organization." On appeal, counsel references the complexity, uniqueness and/or specialization of the proffered position.

The AAO must question the level of complexity, independent judgment and understanding required for the proffered position as the LCA is certified for a Level I entry-level position.<sup>7</sup> The characterization of the position and the claimed duties and responsibilities as described by the petitioner and counsel conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory

---

<sup>7</sup> In the instant case, the petitioner provided a copy of a prevailing wage determination. The regulations at 20 C.F.R. § 655.731(a)(2)(ii)(A)(3) state that when an employer obtains a prevailing wage determination from the National Prevailing Wage Center, DOL will accept that wage as correct and will not question its validity, i.e. the employer is granted "safe harbor" in connection with the request. However, obviously, this "safe harbor" cannot be accorded to employers who fail to fully and/or accurately describe the position, including such aspects as the tasks, work activities, knowledge, skills, and specific vocational preparation (education, training, and experience) that are considered by DOL for its determining of the nature of the job and wage level. In the instant case, there are significant discrepancies between the information provided in the prevailing wage request and the information provided to USCIS regarding the position. Moreover, the validity of the prevailing wage request determination expired on August 8, 2011 and the petitioner did not submit the H-1B petition until November 3, 2011 (three months later).

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

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

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

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

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

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

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

A review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial, the petition could still not be approved for this reason.

The AAO now addresses the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. 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 constitutes a specialty occupation.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as 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), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

The AAO recognizes 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.<sup>8</sup> However, the AAO notes there are occupational categories which are not covered in detail by the *Handbook*, as well as occupations for which the *Handbook* does not provide any information.<sup>9</sup> The *Handbook* states the following about these occupations:

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

Employment for the hundreds of occupations covered in detail in the *Handbook* accounts for more than 121 million, or 85 percent of all, jobs in the economy. This page presents summary data on 162 additional occupations for which employment projections are prepared but detailed occupational information is not developed. These occupations account for about 11 percent of all jobs. For each occupation, the Occupational Information Network (O\*NET) code, the occupational definition, 2010 employment, the May 2010 median annual wage, the projected employment change and growth rate from 2010 to 2020, and education and training categories are presented. For guidelines on interpreting the descriptions of projected employment change, refer to the section titled "Occupational Information Included in the OOH."

---

<sup>8</sup> 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/OCO/>.

<sup>9</sup> On appeal, counsel disputes the use of the *Handbook* in adjudicating the instant petition as no excerpts from the *Handbook* were submitted by the petitioner as evidence in this case. USCIS recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The petitioner may, of course, submit probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. Whenever more than one authoritative source exists, USCIS will consider all of the evidence presented to determine whether the proffered position qualifies as a specialty occupation.

Approximately 5 percent of all employment is not covered either in the detailed occupational profiles or in the summary data given here. The 5 percent includes categories such as "all other managers," for which little meaningful information could be developed.

Thus, the narrative of the *Handbook* indicates that there are over 160 occupations for which only brief summaries are presented. (That is, detailed occupational profiles for these 160+ occupations are not developed.)<sup>10</sup> The *Handbook* continues by stating that approximately five percent of all employment is not covered either in the detailed occupational profiles or in the summary data. The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed.

Accordingly, in certain instances, the *Handbook* is not determinative. When the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook*'s support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. Whenever more than one authoritative source exists, an adjudicator will consider all of the evidence presented to determine whether the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

The AAO reviewed the information in the *Handbook* regarding the occupational category "Clergy."<sup>11</sup> However, the *Handbook* does not indicate that "Clergy" positions comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. The full-text of the *Handbook* regarding this occupational category is as follows:

**Clergy**  
(O\*NET 21-2011.00)

---

<sup>10</sup> The AAO notes that there are a range of occupational categories for which the *Handbook* only provides summary data. For example, the *Handbook* only provides summary data for travel guides; farm labor contractors; audio-visual and multimedia collections specialists; clergy; merchandise displayers and window trimmers; radio operators; first-line supervisors of police and detectives; crossing guards; agricultural inspectors; postmasters and mail superintendents; agents and business managers of artists, performers, and athletes; as well as others.

<sup>11</sup> For additional information regarding occupations not covered in detail in the *Handbook*, see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Data for Occupations Not Covered in Detail, on the Internet at <http://www.bls.gov/ooh/About/Data-for-Occupations-Not-Covered-in-Detail.htm> (last visited March 13, 2013).

Conduct religious worship and perform other spiritual functions associated with beliefs and practices of religious faith or denomination. Provide spiritual and moral guidance.

- 2010 employment: 230,800
- May 2010 median annual wage: \$43,970
- Projected employment change, 2010-20:
  - Number of new jobs: 40,500
  - Growth rate: 18 percent (about as fast as average)
- Education and training:
  - Typical entry-level education: Bachelor's degree
  - Work experience in a related occupation: None
  - Typical on-the-job-training: Moderate-term on-the-job training

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*; Data for Occupations Not Covered in Detail, on the Internet at <http://www.bls.gov/ooh/About/Data-for-Occupations-Not-Covered-in-Detail.htm> (last visited March 13, 2013).

When reviewing the *Handbook*, the AAO again notes that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. Thus, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation. That is, 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 and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupational category. The *Handbook* summary data provides "education and training categories" for occupations. The occupational category "Clergy" falls into the group of occupations for which a bachelor's degree (no specific specialty) is the typical entry-level education. However, the AAO notes that although the *Handbook* reports that the typical entry-level education is a bachelor's degree, it does not indicate that it is typically *required* for entry into the occupation. Further, the *Handbook* does not report that bachelor's degrees held by those entering the occupation are limited to any specific specialty. Moreover, the *Handbook* indicates that the median annual wage for clergy positions in May 2010 was \$43,970, while the petitioner stated the salary for the proffered position as \$23,500 per year (a difference of over \$20,000 per year). This further suggests that the proffered position is a comparatively low, entry-level position relative to others within the occupation.

The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the position. See 214(i)(1)(b) of the Act and 8 C.F.R.

§ 214.2(h)(4)(ii). The *Handbook* does not establish that the occupation requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's degree or higher in the *specific specialty*, or its equivalent, as a minimum for entry into the occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Thus, the *Handbook* is not probative evidence of the occupational category "Clergy" requiring at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, the proffered position's inclusion in the "Clergy" occupational classification would not in itself satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

On appeal, counsel disputes the director's use of the *Handbook*, and states that the printout of the O\*NET Summary Report for "Clergy" is the relevant authoritative source. The AAO reviewed the printout in its entirety. However, upon review of the printout, the AAO finds that it is insufficient to establish that the proffered position qualifies as a specialty occupation for which at least a bachelor's degree in a *specific specialty*, or its equivalent, is normally the minimum requirement for entry. The AAO notes that this occupation is assigned a Job Zone "Five" rating. Thus, it is placed among occupations for which most require advanced degrees.<sup>12</sup> However, the O\*NET report does not indicate that such a degree must be in a *specific specialty* directly related to the duties and responsibilities of the occupation.<sup>13</sup> Upon review of the document, the printout is not probative evidence to establish that the proffered position qualifies as a specialty occupation.

It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. As previously mentioned, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting

---

<sup>12</sup> The term "most" is not indicative of a minimum entry requirement. For instance, the first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of the positions require at least an advanced degree, it could be said that "most" positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner, which has been designated as Level I (entry-level) position in the LCA. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

<sup>13</sup> Further, the AAO observes that the O\*NET printout provides information regarding the educational requirements as stated by "respondents." Notably, the printout fails to account for 30 percent of the respondents. Additionally, the graph (regarding the respondents) does not indicate that any particular "education level" must be in a *specific specialty*. The AAO also observes that the O\*NET report does not distinguish the respondents' positions within the occupation, such as by career level (e.g., entry-level, mid-level, senior-level), etc.

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)).

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

Next, the AAO reviews the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common 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. at 1102).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter.

In the instant case, the petitioner submitted an excerpt from the *Constitution of the Presbyterian Church (U.S.A.)*, Part II Book of Order 2011-2013 ("*Constitution*"), along with opinion letters from individuals in the industry in support of the assertion that the proffered position qualifies as a specialty occupation position. However, upon review of the evidence, the AAO finds that the reliance on this evidence is misplaced.

More specifically, the AAO carefully reviewed the record to ascertain whether at the time the petitioner filed the Form I-129 petition it was subject to the provisions of the Presbyterian Church *Constitution*.<sup>14</sup> Notably, the evidence submitted does not establish that the petitioner is an affiliated

---

<sup>14</sup> Under the heading "G-2.0607 Final Assessment and Negotiation for Service," the *Constitution* indicates that an individual seeking service as a teaching elder must submit documentation, including "a transcript showing graduation, with satisfactory grades, at a regionally accredited college or university;" and "a

member of Presbyterian Church (U.S.A.).<sup>15</sup> The AAO notes that the petitioner has not submitted probative documentation establishing its affiliation with Presbyterian Church (U.S.A.), and further notes that the initial Form I-129 petition and its supporting documents were devoid of references to any particular Christian denomination with which the petitioner was associated.<sup>16</sup> The AAO further notes that the petitioner's stated educational requirement of "a comprehensive understanding of Christian Theology by virtue of at least a Bachelor's degree in the field" is not consistent with minimum educational requirements set forth in the *Constitution*, which requires post-baccalaureate studies at a theological institution accredited by the Association of Theological Schools. Thus, for this reason also the AAO finds that the petitioner has failed to establish that the provisions of the *Constitution* are applicable to the instant case.

The record of proceeding contains a letter from [REDACTED]

[REDACTED] The letter is dated May 6, 2012. In the letter, [REDACTED] states that the petitioner is "*seeking membership of the [REDACTED]*" (Emphasis added.) Thus, the letter does not establish that the petitioner was a member of the Presbyterian Church (U.S.A.), and thus subject to the *Constitution*, at the time the Form I-129 petition was filed.

[REDACTED] states that he has been retired since 2004 and now serves "as an honorary retired pastor" and that he is on the mission development resource committee. [REDACTED] claims that the Presbyterian Church (U.S.A.) "requires at least a Master of Divinity (M. Div.) degree from an accredited theological graduate school or seminary in addition to his/her Bachelor's degree."<sup>17</sup> Again, the petitioner has not established that it is subject to the Presbyterian Church (U.S.A.) requirements. Moreover, [REDACTED] fails to provide the basis of his knowledge and did not indicate that he relied on any authoritative source(s) to support his assertion. Further, there is no indication that [REDACTED] possess any knowledge of the petitioner's proffered position beyond, perhaps, simply the job title. There is no evidence that [REDACTED] reviewed the petitioner's job description and he does not demonstrate or assert in-depth knowledge of the petitioner's specific organization or how

---

transcript from a theological institution accredited by the Association of Theological Schools acceptable to the presbytery, showing . . . graduation or proximity to graduation."

<sup>15</sup> The AAO notes that section G-2.0610 allows a presbytery to waive the above cited educational requirements by a three-fourths vote. Even if the petitioner had provided probative evidence regarding its affiliation with Presbyterian Church (U.S.A.), and were thus found to be subject to the hiring requirements of the *Constitution*, the petitioner would still need to establish that performance of the duties of the proffered position requires the theoretical and practical application of a body of highly specialized knowledge requiring the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent.

<sup>16</sup> The AAO notes that on the Form I-129, the petitioner described itself as a "Christian church," but does not specify that it is a Presbyterian church.

<sup>17</sup> [REDACTED] does not state that he relied upon any authoritative source(s) to support his conclusion. However, the AAO notes that by the terms of the Presbyterian Church (U.S.A.) *Constitution*, a presbytery may waive the educational requirements for an ordained pastor by a three-fourths vote. Notably, [REDACTED] fails to acknowledge this exception to the educational requirements.

the duties of the position would actually be performed in the context of the petitioner's operations. Notably, his opinion is not supported by independent, objective evidence demonstrating the manner in which he reached such conclusion. Accordingly, for the reasons discussed, the letter is not probative in this matter.

The petitioner also submitted a letter dated May 16, 2012 from [REDACTED] writes. "I am writing this letter in support of [the petitioner], a member of our denomination . . . ." While [REDACTED] states that the petitioner is a member of the denomination, the AAO notes that he failed to provide any probative evidence to support the statement. Notably, other letters within the record of proceeding do not support [REDACTED] assertion on this matter. The AAO again notes that the petitioner has not provided any probative evidence to establish that it is formally affiliated with Presbyterian Church (U.S.A.).

[REDACTED] states that "an ordained pastor of The Presbyterian Church (U.S.A.) is required to have at least a Master of Divinity (M. Div.) degree from an accredited theological graduate school or seminary in addition to his/her bachelor degree."<sup>18</sup> [REDACTED] concludes that "all of the ordained pastors of the churches affiliated with our denomination have their M. Div. degrees."<sup>19</sup> Notably, neither the reverend nor the petitioner submitted any probative evidence substantiating the claim that "all of the ordained pastors affiliated with [Presbyterian Church (U.S.A.)] have their M. Div. degrees." While the reverend makes a general claim regarding the academic requirements, he did not provide substantive evidence to support his assertion. Moreover, there is no specific information in the record of proceeding regarding [REDACTED] claimed expertise on the issue here. He asserts a general industry educational standard, without referencing any supporting authority or any empirical basis for the pronouncement. He does not provide sufficient details or documentary support for his conclusion.<sup>20</sup> While he makes a blanket statement, he did not identify the specific elements of his knowledge and experience that he may have applied in reaching his conclusions here. He did not indicate that he relied upon any objective quantifying information to substantiate his opinion.

In a letter submitted on appeal, dated August 28, 2012, [REDACTED] writes that the petitioner is a "*promising candidate* to be a member of our presbytery and denomination." (Emphasis added.) The letter further states that "the application" from the petitioner "is reviewed and accepted by the Coordinating Council of the Presbytery and the Council has decided to report

---

<sup>18</sup> The AAO again references its earlier discussion that the petitioner has not established that it is formally affiliated with Presbyterian Church (U.S.A.). Moreover, the AAO incorporates by reference its analysis regarding the petitioner's stated educational requirement of "a comprehensive understanding of Christian Theology by virtue of at least a Bachelor's degree in the field," which does not appear to be consistent with [REDACTED] statement. No explanation was provided.

<sup>19</sup> Contrary to [REDACTED] representations, section G-2.0610 of the *Constitution* allows a presbytery to waive the educational requirements for an ordained pastor by a three-fourths vote.

<sup>20</sup> [REDACTED] does not state that he relied upon the *Constitution* or any other source(s) in support of his conclusion.

that decision to the Stated Meeting of the [REDACTED] scheduled on September 10, 2012." The AAO declines to speculate as to what type of application the petitioner may have made or as to the significance of the application being "reviewed and accepted." The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). As previously mentioned, a visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. This evidence does not establish that the petitioner was a member of Presbyterian Church (U.S.A.), and thus subject to the *Constitution*, at the time the Form I-129 petition was filed.

[REDACTED] additionally claims that "all of the ordained pastors of the churches affiliated with our denomination have their M. Div. degrees" and references the *Constitution*. For the reasons already discussed with regard to the other advisory opinion letters, the AAO finds that [REDACTED] letter is also not probative in this matter. For instance, again, there is no supporting evidence to substantiate the claim. As previously mentioned, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Moreover, the AAO observes that that [REDACTED] did not mention the exception to the educational requirements for pastors delineated in section G-2.0610 of the *Constitution*.

The AAO may, in its discretion, use as advisory opinions or 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). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letters as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the opinion letters into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

The AAO acknowledges that the petitioner and its counsel may believe that the proffered position qualifies as specialty occupation under this criterion of the regulations. In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted an organizational chart; a "budget plan" for 2011; several bank statements; a lease agreement; a member directory; a log of events; an insurance bill; and photographs and flyers of the

petitioner's activities.<sup>21</sup> The AAO reviewed the record of proceeding in its entirety. However, upon review of the record, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of pastor.

A review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Additionally, the AAO finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition.

More specifically, the LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position 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. Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."<sup>22</sup>

The petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty. Thus, 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. Specifically, the petitioner fails to demonstrate how the duties of the position as described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

---

<sup>21</sup> The petitioner and its counsel also submitted several advisory opinion letters, which the AAO discussed in depth. As previously mentioned, as a reasonable exercise of its discretion the AAO discounts the advisory opinion letters as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

<sup>22</sup> For additional information regarding wage levels as defined by DOL, see Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

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

The AAO observes that the petitioner has indicated that the beneficiary's educational background and experience working in religious organizations will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner failed to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

To satisfy this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

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

On the Form I-129, the petitioner indicated that it was established in 2011. The petitioner did not submit any documentation regarding its recruitment and hiring practices. It appears that the pastor position is a new position. The record is devoid of information to satisfy this criterion of the regulations.

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

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of 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 in a specific specialty or its equivalent.

The AAO acknowledges that in the appeal counsel claims that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. In support of the petition, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted an organizational chart; a "budget plan" for 2011; several bank statements; a lease agreement; a member directory; a log of events; an insurance bill; and photographs and flyers of the petitioner's activities.<sup>23</sup> However, the AAO reviewed the documentation submitted by the petitioner and finds that it fails to support the assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

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

---

<sup>23</sup> As previously discussed, the petitioner and its counsel also submitted several advisory opinion letters, which the AAO addressed earlier in the decision. As a reasonable exercise of its discretion the AAO discounts the advisory opinion letters as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, 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.