



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **APR 29 2013**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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 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 May 10, 2012. In the Form I-129 visa petition, the petitioner describes itself as a freight forwarder business established in 2008. In order to employ the beneficiary in what it designates as a staff accountant position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on July 11, 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 asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. Counsel submitted a brief and additional evidence in support of this assertion.

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 supporting documentation. 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, and the petition will be denied.

Later in this decision, the AAO will also discuss two additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the applicable statutory and regulatory provisions; and (2) failed to submit a Labor Condition Application (LCA) that corresponds to the petition. Thus, the petition cannot be approved for these reasons as well. They are considered independent and alternative bases for denial of the petition.<sup>1</sup>

In this matter, the petitioner stated in the Form I-129 petition that it seeks the beneficiary's services as a staff accountant to work on a full-time basis. In a support letter dated April 24, 2012, the petitioner stated the following regarding the duties and responsibilities of the proffered position:

The candidate is required to input transactions into accounting software and manage inventory and accounting reporting software, perform all standing accounts payable, accounts receivable, and payroll requirements for the full accounting cycle, prepare

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

financial statements, balance sheets, income statements and cash flow analysis, provide income tax reports and statements for tax filing purposes as required according to [the petitioner's] certified public accountant that handles [its] corporate tax filing and audits throughout the year, prepare general journal and adjusting entries to [the petitioner's] books, as required by applicable law, conduct bank reconciliations and perform various other financial and administrative duties assigned by management of the company.

In addition the potential candidate may be required to review or verify the accuracy of customer invoices, complex journal entries or other transaction documents for accuracy, completeness and compliance with company policies, verify and record the invoices for the company, verify the bills, expenses, compensation and other reimbursements of company staff and process the payroll for the company, determine if funds are available for expenditures or requisitions and posts to proper account, monitor fund/account balances and notify appropriate personnel when limits are reached, maintain special logs and reconcile internal accounts, prepare various special and recurring accounting related reports, summaries, and reconciliation, perform and review specialized calculations related to posting and accounting functions, solve problems and recommend changes in procedure in accordance with previous training and experience. In addition, the individual should perform other such related tasks as assigned by [the petitioner's] president.<sup>2</sup>

(Formatting of the paragraphs altered slightly by the AAO.) In its letter of support accompanying the initial I-129 petition, the petitioner described the minimum educational requirements for the proffered position as "a Bachelor's degree in accounting or its equivalent." The petitioner provided documents relating to the beneficiary, including a copy of her diploma and transcript from the [redacted]. The documents indicate that the beneficiary was granted a Master of Science in business administration from the [redacted] in May 2010.

In addition, the petitioner 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 "Accountants and Auditors" - SOC (ONET/OES) code 13-2011, at a Level I (entry level) wage.

Along with the I-129, the petitioner provided evidence regarding its business operations including corporate documents (articles of incorporation, registered name search results, assignment of employer identification number, ocean transportation freight license); a two-page unaudited financial statement for 2011, consisting of a balance sheet and a profit and loss sheet; eleven invoices (for 2011 and 2012); and an unsigned tax return for 2010.<sup>3</sup> The petitioner also submitted a

<sup>2</sup> The AAO notes that the first paragraph of the job duties in the support letter corresponds to the job duties listed in the petitioner's offer letter for the beneficiary dated April 1, 2012. The second paragraph of job duties is not mentioned in the offer letter.

<sup>3</sup> The AAO observes that the tax return was prepared by an outside accountant. The tax return shows the petitioner's ordinary income was approximately \$1,710 in 2009 and approximately -\$7,870 in 2010.

copy of its offer letter for the beneficiary dated April 1, 2012. The duties of the proffered position as described to the beneficiary in the offer of employment letter are as follows:

- Input transactions into accounting software and manage inventory and accounting reporting software.
- Perform all standard A/P, A/R, Payroll requirements for the full accounting cycle.
- Prepare Financial Statements, Balance Sheets, Income Statements, and Cash Flow Analysis.
- Provide Income Tax Preparation documents for CPAs.
- General Journal and Adjusting entries, as required.
- Bank reconciliations.
- Various other financial and administrative duties as assigned by management of the company/companies.<sup>4</sup>

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 18, 2012. The director outlined the evidence to be submitted. The AAO notes that the director specifically requested that the petitioner submit probative evidence to establish that the proffered position is a specialty occupation. In the request, the petitioner was asked to provide a more detailed description of the work to be performed by the beneficiary for the entire period requested, including the specific job duties, the percentage of time to be spent on each duty, the educational requirements for the specific duties, etc.

On June 27, 2012, the petitioner's counsel responded to the director's RFE by providing a revised description of the duties of the proffered position and additional evidence. Specifically, counsel stated the following regarding the duties of the proffered position:

Specific Duties	hrs/wk (40 hrs/wk)	% of job
Internal financial audit of company records to provide due diligence and regulatory compliance with licensing authorities	7	17.5%
Preparation of financial analysis reports	10	25%
Research and preparation of earnings projections	6	15%
General bookkeeping entries to record daily transactions	7	17.5%
Bank and accounts payables reconciliation		

<sup>4</sup> As noted above, the job duties listed in the petitioner's offer letter for the beneficiary correspond to the first paragraph of the job duties as provided in the petitioner's support letter dated April 24, 2012. The second paragraph of the job duties in the support letter is not included in the petitioner's offer letter.

Customer invoicing and accounts receivable Handling payroll		
Preparation of financial and budgetary reports	5	12.5%
Other duties assigned by President	5	12.5%

The explanation of duties provided by counsel also included, in part, the following statements:

While the duties described in the offer letter and the letter in support indicate that the beneficiary is to perform "financial . . . duties assigned by management[.]" the most important of such duties is the potential candidate's task in the next few years to assist in the preparation of the company's business plan, and the accounting and financial analysis of [the petitioner's] intended project to expand its freight forwarding business to cover interstate or interior shipping and freight or package deliveries within the United States.

\* \* \*

The proposed candidate has as his or her first task to assist management in providing a financial projection of company's earnings growth through this long term investment strategy and to provide rational basis for conservative estimates of expense that might be incurred taking into account potential delays in obtaining facilities and hiring the right personnel for the branch offices.

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While [the petitioner's] president will review the work of the proposed candidate, the candidate assumes full responsibility for the completion and accuracy of the work within time frames given by [the petitioner's] president.

Note that 23 out of the possible 40 hours in a week should be spent on the important task of financial internal audit of the company's records including ensuring regulatory compliance with Department of Commerce and regulations of other government agencies, plus preparation of financial and analytical reports concerning the company's financial condition and in accordance with [Generally Accepted Accounting Principles (GAAP)] rules.<sup>5</sup>

<sup>5</sup> In addition, counsel makes various claims about the petitioner's intention to expand its business operations. Notably, there is no evidence from the petitioner substantiating the plans outlined by counsel. Moreover, the AAO notes that in the appeal, the petitioner does not confirm counsel's statements regarding expansion plans other than to state that it "has expanded globally into Asia." In support of this assertion, the petitioner provided a bill of lading that the petitioner claims "illustrates a transaction originating in China and ending in the United States." The petitioner does not claim and did not submit evidence to support counsel's specific claims as stated in response to the RFE (e.g., a business plan; documentation substantiating the expansion of physical facilities, including a warehouse and sales offices; plans to hire staff; evidence substantiating that

In addition, the response to the RFE included a printout from the Department of Commerce website; a brief from current counsel; a letter from [REDACTED] a certified public accountant (CPA); a letter from [REDACTED] a CPA candidate; and a copy of the petitioner's letter of support (previously submitted with the H-1B petition). Counsel also submitted a block-and-line organizational chart. Notably, the organizational chart depicts the petitioner's business as consisting of four employees: a president, a VP of sales, a warehouse manager, and an administrator.<sup>6</sup>

The director reviewed the information provided by the petitioner. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of 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 11, 2012. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition. In support of the appeal, counsel submitted a brief and additional evidence.

On appeal, the petitioner provided an affidavit dated August 22, 2012 with a new description of the proffered position. The petitioner stated that the staff accountant's primary responsibilities include the following:

- (a) Preparing, examining, and analyzing quarterly and yearly tax returns, payroll statements, monthly expense reports, and financial statements;
- (b) Examine financial statements;
- (c) Perform audits;
- (d) Assess financial operations and make best practices recommendations to management including suggestion of ways to reduce costs, enhance revenues, and improve profits;
- (e) Advise upper management on the advantages and disadvantages of certain business decisions or transactions;
- (f) Monitor [the petitioner's] budgeting, performance evaluation, and cost and assets management;
- (g) Devise a financial system that will help [the petitioner] establish a more systematic and smooth procedure; and

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the petitioner intends to establish branch, subsidiary or affiliate offices; probative evidence substantiating investments or new revenue sources; documents indicating the petitioner's plan "involves additional capital investment or loans of \$2,000,000 from investors and or lenders"; evidence regarding the "addition of the Florida and New York offices and sales teams"; etc. (as asserted by counsel in response to the RFE).

<sup>6</sup> On the Form I-129 petition, the petitioner stated that it has six employees. No explanation was provided.

(h) Modify and coordinate implementation of accounting and control procedures.

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.

The AAO first notes that on the Form I-290B counsel asserts that the director failed to properly apply the preponderance of the evidence standard of proof while adjudicating the instant petition. With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states, in pertinent part, the following:

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

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The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

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

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

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing

eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. 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. As will be discussed, in the instant case, that burden has not been met.

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 substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. 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. That is, 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 attainment of at least a baccalaureate degree in a specific discipline. The AAO finds that the petitioner has not done so.

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 the instant case, the organizational chart provided in response to the RFE indicates that the petitioner has four employees: a president, a VP of sales, a warehouse manager and an administrator. Neither the petitioner nor counsel have addressed how the beneficiary would be relieved from performing non-qualifying duties.

Moreover, the AAO notes that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to the services

the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

Upon review of the record of proceeding, the AAO observes that the job descriptions submitted with the initial Form I-129, in response to the RFE, and on appeal are substantially different from one another. No explanation for the variances was provided.

The AAO notes that the revised position description, as provided by counsel, differs substantially from that as submitted by the petitioner in its April 24, 2012 letter of support and in the offer letter provided to the beneficiary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). In the instant case, the information provided by counsel in the response to the director's request for further evidence did not clarify the original duties of the position, but rather significantly revised the job description. For instance, the descriptions provided by the petitioner with the initial petition indicate that the beneficiary will perform duties such as inputting transactions into accounting software, handling payroll, preparing financial statements, providing income tax preparation documents to the CPAs, performing bank reconciliations, and undertaking various other financial and administrative duties as assigned. These appear to be primary duties of the proffered position. In response to the RFE, counsel represented that these duties comprise only 42.5 % of the proffered position.

Moreover, in response to the RFE, counsel indicated that the proffered position focuses substantially on ensuring regulatory compliance, familiarity with GAAP standards for financial reporting and analysis to lender and investor, and preparing financial analyses for the purpose of the petitioner's future expansion.<sup>7</sup> On appeal, the petitioner submitted an entirely different description of the proffered position, which does not make any mention of regulatory compliance or the preparation of financial projections for the purpose of the petitioner's expansion. Rather, on appeal, the petitioner represents that, in addition to the original duties provided in the offer of employment to the beneficiary, the position also includes audits, assessment of financial operations for the purpose of providing recommendations to management on cost reduction and improvement of profits, providing advice on "business decisions or transactions," devising a financial system for the petitioner, and modifying existing accounting and control procedures.

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<sup>7</sup> Moreover, the AAO notes that on appeal counsel repeatedly and mistakenly references the petitioner as making various statements in response to the RFE regarding the proffered position. Notably, these references are actually from the letter submitted by the petitioner's prior counsel. The revised description of the duties provided in response to the RFE is not probative evidence as the description was provided by prior counsel, not the petitioner. The letter is on prior counsel's letterhead and it is not endorsed by the petitioner. The record of proceeding does not indicate the source of the duties and responsibilities that prior counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of prior 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).

In addition, the AAO observes that in the letter offering employment to the beneficiary, the petitioner stated that the proffered position would include "[v]arious other financial and administrative duties as assigned by management of the company/companies." [Emphasis added.] The AAO notes that in response to the RFE, previous counsel stated that the petitioner's president "has made strategic investments, joint venturing with other partners to secure exclusive freight forwarding business for the petitioner." Counsel further elaborated that the petitioner's president has a 50% stock interest in a company that is "engaged in the wholesale and shipment of custom made cabinets to customers throughout the United States" from cabinet makers in China. Counsel stated that "the petitioner arranges for shipment of cabinet products." In addition, counsel noted that the petitioner's president is invested in a door lock wholesale business that imports custom locks to the United States from China. The AAO notes that if the beneficiary will be performing duties directly for "companies" other than the petitioner, those companies are required to submit a separate Form I-129 petition for the portion of time that the beneficiary would spend performing qualifying duties for those entities.

The AAO observes that in the description of job duties provided in the support letter dated April 24, 2012, the petitioner stated that the beneficiary would prepare reports and statements for tax filing purposes "as required according to [the petitioner's] certified public accountant that handles [its] corporate tax filing and audits throughout the year." Thus, in the initial petition, the petitioner indicated that a person other than the beneficiary "handles [its] corporate tax filing and audits throughout the year." The AAO observes that in the appeal counsel claims that the beneficiary will be responsible for "[p]reparing, examining, and analyzing quarterly and yearly tax returns" and that the beneficiary will perform audits. No explanation was provided for the variance.

Notably, a petitioner (or counsel) cannot offer a new position to the beneficiary, or materially change its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner (or counsel) may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Furthermore, 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).

Further, in the instant case, the record of proceeding also contains discrepancies between what the petitioner claims 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 "Accountants and Auditors" at a Level I (entry level) wage. The LCA was certified on April 13, 2012 and signed by the petitioner's president on April 15, 2012.

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.<sup>8</sup> Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) 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>9</sup> 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. 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).

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<sup>8</sup> For additional information on wage levels, 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).

<sup>9</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.

Throughout the record of proceeding, counsel repeatedly claims that the proffered position involves complex, unique and/or specialized duties. In a letter dated June 13, 2012, counsel states that "the candidate must handle more complex tasks than just keeping accounts, handling payroll or preparing financial and budgetary reports for the company's management." According to counsel, the beneficiary will be responsible for regulatory compliance which he claims "is a complex task." Counsel further claims that "higher standards of training, study, research, critical thinking and advanced financial analysis" are required to fulfill the requirements of the job. Moreover, counsel for the petitioner refers to the low-level of supervision that the beneficiary will receive in the proffered position, stating, "While [the petitioner's] president will review the work of the proposed candidate, the candidate assumes full responsibility for the completion and accuracy of the work within time frames given by [the petitioner's] president." Counsel also references the extensive qualification of the petitioner's staff accountant position.

On appeal, the petitioner indicates that the beneficiary will "[a]ssess financial operations and make best practices recommendations to management including suggestion of ways to reduce costs, enhance revenues, and improve profits," and "[a]dvise upper management on the advantages and disadvantages of certain business decisions or transactions." Counsel claims that the petitioner "requires an accountant who can work with little supervision and handle very complex accounting transactions associated with the freight forward industry." Additionally, counsel emphasizes the "extensive qualifications" required of the staff accountant position, as well as the importance of the staff accountant "to analyze accounts and accounting relationships in complex accounting entries" and "master these complex concepts of Accounting." He continues by stating that the position requires "comprehensive and application of Generally Accepted Accounting Principles (GAAP) guidelines." He claims that the staff accountant "must be fully versed in accounting." According to counsel, "the fact that the Petitioner is a small company and is international in nature giving rise to complex accounting transactions."

In addition, the petitioner and counsel submitted a letter from [REDACTED], a certified public accountant (CPA). Mr. [REDACTED] states that he recommends the petitioner "seek a staff accountant with a good deal of training, experience and accounting knowledge to perform the duties" of the proffered position. He further claims that the "petitioned position requires someone to analyze and understand the accounting information and performs other tasks as an experienced accountant would do." He continues by stating that "the nature of the business requires management to be traveling extensively." He adds that "the international nature of their business can give rise to very complex accounting paramount that the employee be able to enter, analyze and report accurate accounting information on their [sic] own."

Upon review of the record of proceeding, the AAO observes that the petitioner and its counsel have indicated that the petitioner will be relying heavily on the beneficiary's work product for the company's growth and expansion and that the functions she provides will have a significant impact on the company's profits. Such reliance on the beneficiary's work appears to surpass the expectations of a Level I position, as described above, where the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and limited exercise of judgment. Here, rather than the beneficiary's work being "monitored and reviewed for accuracy," the petitioner is relying on the accuracy of the beneficiary's work product

to increase profits.

Upon review of the assertions made by the petitioner and counsel, the AAO must question the level of complexity, independent judgment and understanding actually required for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described by the petitioner 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 information on wage levels, the selected wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The AAO notes that the prevailing wage designated by the petitioner on the LCA corresponds to a Level I position for the occupational category of "Accountants and Auditors" for Scottsdale, Arizona.<sup>10</sup> Notably, if the proffered position had been designated at a higher level, the prevailing wage at that time would have been significantly higher.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted. Thus, for this reason, even if it were determined that the petitioner overcame the director's basis for denial of the petition (which it has not), the petition could not be approved.

Moreover, 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 an LCA that corresponds to the claimed duties and requirements of the proffered position,

<sup>10</sup> For additional information regarding the prevailing wage for Accountants and Auditors in Scottsdale, AZ, D.C., see the All Industries Database for 7/2011 - 6/2012 for Accountants and Auditors at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=13-2011&area=38060&year=12&source=1> (last visited April 10, 2013).

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 and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial (which it has not), the petition could not be approved for this reason.

The AAO will now address 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, and for the specific reasons described below, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

When determining whether a 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. To ascertain the intent of a petitioner, USCIS looks 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, 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."

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 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 determine 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). In the instant case, the petitioner provided various position descriptions for the proffered position. The petitioner has failed to establish nature of the proffered position and in what capacity the beneficiary will actually be employed. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nevertheless, assuming, *arguendo*, that the duties of the proffered position as described by the petitioner would in fact be the duties performed by the beneficiary, the AAO will nevertheless analyze them and the evidence in the record of proceeding to determine whether the proffered position as described would qualify as a specialty occupation. Because the petitioner has provided various descriptions of the proffered position, the AAO's analysis will be based on the job description submitted with the initial petition from the petitioner.<sup>11</sup> To make its determination as to whether the employment described in the above referenced letter qualifies as a specialty occupation, 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 an accountant position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply

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<sup>11</sup> As previously noted, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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. As such, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed and not based on what were merely speculative facts not then in existence. Furthermore, a petitioner (or counsel) may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 176.

rely on a position's title. As previously mentioned, 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 *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>12</sup> As previously discussed, the petitioner designated the proffered position in the LCA under the occupational category "Accountants and Auditors."

In the instant case, the AAO finds that the petitioner has not provided sufficient information to establish that the proffered position falls under the occupational category "Accountants and Auditors." Nevertheless, the AAO reviewed the chapter of the *Handbook* entitled "Accountants and Auditors" including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that "Accountants and Auditors" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

The subsection entitled "What Accountants and Auditors Do" states the following about the duties of this occupation:

Accountants and auditors prepare and examine financial records. They ensure that financial records are accurate and that taxes are paid properly and on time. Accountants and auditors assess financial operations and work to help ensure that organizations run efficiently.

**Duties**

Accountants and auditors typically do the following:

- Examine financial statements to be sure that they are accurate and comply with laws and regulations
- Compute taxes owed, prepare tax returns, and ensure that taxes are paid properly and on time
- Inspect account books and accounting systems for efficiency and use of accepted accounting procedures
- Organize and maintain financial records
- Assess financial operations and make best-practices recommendations to management

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<sup>12</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/>.

- Suggest ways to reduce costs, enhance revenues, and improve profits

In addition to examining and preparing financial documentation, accountants and auditors must explain their findings. This includes face-to-face meetings with organization managers and individual clients, and preparing written reports.

Many accountants and auditors specialize, depending on the particular organization that they work for. Some organizations specialize in assurance services (improving the quality or context of information for decision makers) or risk management (determining the probability of a misstatement on financial documentation). Other organizations specialize in specific industries, such as healthcare.

Some workers with a background in accounting and auditing teach in colleges and universities. For more information, see the profile on postsecondary teachers.

The four main types of accountants and auditors are the following:

**Public accountants** do a broad range of accounting, auditing, tax, and consulting tasks. Their clients include corporations, governments, and individuals.

They work with financial documents that clients are required by law to disclose. These include tax forms and balance sheet statements that corporations must provide potential investors. For example, some public accountants concentrate on tax matters, advising corporations about the tax advantages of certain business decisions or preparing individual income tax returns.

External auditors review clients' financial statements and inform investors and authorities that the statements have been correctly prepared and reported.

Public accountants, many of whom are Certified Public Accountants (CPAs), generally have their own businesses or work for public accounting firms.

Some public accountants specialize in forensic accounting, investigating financial crimes, such as securities fraud and embezzlement, bankruptcies and contract disputes, and other complex and possibly criminal financial transactions. Forensic accountants combine their knowledge of accounting and finance with law and investigative techniques to determine if an activity is illegal. Many forensic accountants work closely with law enforcement personnel and lawyers during investigations and often appear as expert witnesses during trials.

**Management accountants**, also called cost, managerial, industrial, corporate, or private accountants, record and analyze the financial information of the organizations for which they work. The information that management accountants prepare is intended for internal use by business managers, not by the general public.

They often work on budgeting and performance evaluation. They may also help organizations plan the cost of doing business. Some may work with financial managers on asset management, which involves planning and selecting financial investments such as stocks, bonds, and real estate.

**Government accountants** maintain and examine the records of government agencies and audit private businesses and individuals whose activities are subject to government regulations or taxation. Accountants employed by federal, state, and local governments ensure that revenues are received and spent in accordance with laws and regulations.

**Internal auditors** check for mismanagement of an organization's funds. They identify ways to improve the processes for finding and eliminating waste and fraud. The practice of internal auditing is not regulated, but the Institute of Internal Auditors (IIA) provides generally accepted standards.

Information technology auditors are internal auditors who review controls for their organization's computer systems, to ensure that the financial data comes from a reliable source.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Accountants and Auditors, on the Internet at <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-2> (last visited April 10, 2013).

The *Handbook* indicates that public accountants generally have their own businesses or work for public accounting firms. The *Handbook* reports that management accountants record and analyze the financial information of the organizations for which they work. According to the *Handbook*, government accountants maintain and examine the records of government agencies and audit private businesses and individuals whose activities are subject to government regulations or taxation. The narrative of the *Handbook* states that internal auditors check for mismanagement of an organization's funds. Furthermore, the *Handbook* indicates that internal auditors identify ways to improve the processes for finding and eliminating waste and fraud.

The *Handbook* reports that certification may be advantageous or even required for some accountant positions. However, 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.

When reviewing the *Handbook*, the AAO must note that the petitioner designated the proffered position as a Level I (entry) position in the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation. Furthermore, the petitioner's designation of the position under this wage level signifies that the beneficiary will be expected to work under close supervision and receive specific instructions on required tasks and expected

results. Additionally, the beneficiary will be expected to perform routine tasks that require limited, if any exercise of judgment. Moreover, the beneficiary's work will be closely monitored and reviewed for accuracy.

While the *Handbook* states that most accountant positions require at least a bachelor's degree in accounting or a related field, the *Handbook* continues by stating the following:

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Accountants and Auditors, on the Internet at <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-4> (last visited April 10, 2013).

The *Handbook* does not support a finding that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. More specifically, the *Handbook* 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 employers, can advance to accountant positions by demonstrating their accounting skills. According to the *Handbook*, individuals who have less than a bachelor's degree in a specific specialty, or its equivalent, can obtain junior accounting positions and then advance to accountant positions. The *Handbook* does not state that this education and experience must be the equivalent to at least a bachelor's degree in a specific specialty.

The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is normally the minimum requirement for entry into this occupation. Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. The *Handbook* states that most accountants and auditors need at least a bachelor's degree, however, this statement does not support the view that any accountant job qualifies as a specialty occupation as "most" is not indicative that a particular position within the wide spectrum of accountant jobs normally requires at least a bachelor's degree in a specific specialty, or its equivalent.<sup>13</sup> More specifically, "most" is not indicative that a position normally requires at least a

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<sup>13</sup> 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 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 (which as noted above is designated as a Level I entry 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.

bachelor's degree in a specific specialty, or its equivalent, (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)), or that a position is so specialized and complex as to require knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)). Therefore, even if the proffered position were determined to be an accountant position, 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 the occupation.

The AAO reviewed the record of proceeding, but is not persuaded by the petitioner's claim that the proffered position falls under the occupational category "Accountants and Auditors." The AAO reviewed the duties of the proffered position, as described by the petitioner to the beneficiary in the offer of employment, and as described by the petitioner in the letter support provided with the initial I-129 petition, and finds that the duties are most similar to those of a bookkeeper or accounting clerk. Further, the record of proceeding does not indicate that the petitioner employs a bookkeeper or accounting clerk and there is no evidence that the beneficiary would be relieved from performing the company's general, financial record keeping, such as recording the petitioner's financial transactions, updating statements, and checking financial records for accuracy (all duties of a bookkeeper and/or accounting clerk), which furthermore, are included in the duties that the beneficiary is being hired to perform.<sup>14</sup>

Moreover, the petitioner has not provided sufficient evidence to establish that the accounting and financial transactions of its business operations are sufficiently complex to require the services of more than a bookkeeper or accounting clerk. The financial documents provided by the petitioner, include a copy of its 2010 tax return; a two-page financial report (consisting of a balance sheet and a profit and loss statement); approximately 15 invoices (from 2011 and 2012); and a four-page customer list (which only includes the names of companies).

The AAO reviewed the sections of the *Handbook* relating to "Bookkeeping, Accounting, and Auditing Clerks," and finds that the *Handbook* does not indicate that bookkeeping, accounting, and auditing clerks comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree, in a specific specialty, or the equivalent. The *Handbook* states, in pertinent part, the following about this occupational category:

Bookkeeping, accounting, and auditing clerks produce financial records for organizations. They record financial transactions, update statements, and check financial records for accuracy.

**Duties**

Bookkeeping, accounting, and auditing clerks typically do the following:

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<sup>14</sup> The AAO again 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.

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

The records that bookkeeping, accounting, and auditing clerks work with include expenditures (money spent), receipts (money that comes in), accounts payable (bills to be paid), accounts receivable (invoices, or what other people owe the organization), and profit and loss (a report that shows the organization's financial health).

Workers in this occupation have a wide range of tasks. Some in this occupation are full-charge bookkeeping clerks who maintain an entire organization's books. Others are accounting clerks who handle specific tasks.

These clerks use basic mathematics (adding, subtracting) throughout the day.

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. They must be comfortable using computers to record and calculate data.

The widespread use of computers also has enabled bookkeeping, accounting, and auditing clerks to take on additional responsibilities, such as payroll, billing, purchasing (buying), and keeping track of overdue bills. Many of these functions require clerks to communicate with clients.

Bookkeeping clerks, also known as bookkeepers, often are responsible for some or all of an organization's accounts, known as the general ledger. They record all transactions and post debits (costs) and credits (income).

They also produce financial statements and other reports for supervisors and managers. Bookkeepers prepare bank deposits by compiling data from cashiers, verifying receipts, and sending cash, checks, or other forms of payment to the bank.

In addition, they may handle payroll, make purchases, prepare invoices, and keep track of overdue accounts.

Accounting clerks typically work for larger companies and have more specialized tasks. Their titles, such as accounts payable clerk or accounts receivable clerk, often reflect the type of accounting they do.

Often, their responsibilities vary by level of experience. Entry-level accounting clerks may enter (post) details of transactions (including date, type, and amount), add up accounts, and determine interest charges. They also may monitor loans and accounts to ensure that payments are up to date.

More advanced accounting clerks may add up and balance billing vouchers, ensure that account data is complete and accurate, and code documents according to an organization's procedures.

Auditing clerks 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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Human Resources Specialists, on the Internet at <http://www.bls.gov/ooh/Business-and-Financial/Human-resources-specialists.htm#tab-2> (visited April 10, 2013).

The *Handbook* provides the following information in the subsection entitled "How to Become a Bookkeeping, Accounting or Auditing Clerk" for this occupational category:

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

#### **Education**

Most bookkeeping, accounting, and auditing clerks need a high school diploma. However, some employers prefer candidates who have some postsecondary education, particularly coursework in accounting. In 2009, 25 percent of these workers had an associate's or higher degree.

#### **Training**

Bookkeeping, accounting, and auditing clerks usually get on-the-job training. Under the guidance of a supervisor or another experienced employee, new clerks learn how to do their tasks, including double-entry bookkeeping. (Double-entry bookkeeping means that each transaction is entered twice, once as a debit (cost) and once as a credit (income) to ensure that all accounts are balanced.)

Some formal classroom training also may be necessary, such as training in specialized computer software. This on-the-job training typically takes around 6 months.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 Edition*, Bookkeeping, Accounting, or Audit Clerks, on the Internet at <http://www.bls.gov/ooh/Office-and-Administrative-Support/Bookkeeping-accounting-and-auditing-clerks.htm#tab-4> (visited March 27, 2013).

The AAO notes that the *Handbook* does not report that, as an occupational group, "Bookkeeping, Accounting or Auditing Clerks" normally require at least a bachelor's degree in a specific specialty for entry. The *Handbook* explains that most bookkeeping, accounting, and auditing clerks need a high school diploma. The *Handbook* continues by stating that some employers prefer candidates who have some postsecondary education, particularly coursework in accounting (and that in 2009, about 25 percent of these workers had an associate's or higher degree). The *Handbook* further states that workers usually receive on-the-job training. The *Handbook* does not indicate that at least a baccalaureate degree in a specific specialty (or its equivalent), is normally the minimum requirement for entry into the 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 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 normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding by the petitioner do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, 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 at 1165 (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 of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

As previously mentioned, in the Form I-129, the petitioner stated that it is a freight forwarding company established in 2008. The petitioner indicated that its business operations currently consist of four employees.<sup>15</sup> The petitioner listed its gross annual income as \$1.5 million and its net annual income as \$250,000.<sup>16</sup> The petitioner designated its business operations under the NAICS code 483111 - "Deep Sea Freight Transportation." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This U.S. industry comprises establishments primarily engaged in providing deep sea transportation of cargo to or from foreign ports.

U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 48311 - Deep Sea Freight Transportation, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed April 10, 2013).

The AAO notes that under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must establish that "the degree requirement is common to *the industry in parallel positions among similar organizations.*" (Emphasis added.) For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, letters submitted by other organizations are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. 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).

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<sup>15</sup> The block-and-line organizational chart submitted in response to the RFE indicates that the petitioner has four employees. This was confirmed by the petitioner in the appeal

<sup>16</sup> The AAO again notes that the information provided on the Form I-129 appears to be inconsistent with other evidence in the record of proceeding. The balance sheet for 2011 provided by the petitioner indicates a net income of approximately \$12,000 for 2011. The 2010 tax return indicates a net loss of over \$7,000.

In the instant case, the petitioner submitted two job postings and two opinion letters in support of this criterion of the regulations. The AAO reviewed the job announcements and the letters submitted by the petitioner; however, the petitioner's reliance on the job postings and the letters is misplaced.

The AAO will first discuss the two job postings submitted by the petitioner. The job announcement from [REDACTED] is designated under the industry "Transport and Storage – Materials." The posting states that the employer is "a growing Lead Logistics Provider." No further information regarding the advertising employer is provided. In addition, the petitioner submitted a job announcement from [REDACTED]. The record is devoid of information regarding this employer. Upon review of the job postings and the record of proceeding, the AAO notes that the petitioner has not provided information as to which general characteristics (if any) it shares with the advertising organizations. Consequently, the record is devoid of sufficient information regarding the advertising organizations to conduct a legitimate comparison of the organizations to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

Moreover, the petitioner has not established that the job announcements are for parallel positions. Notably both job postings require a degree and several years of experience. Specifically, the position with [REDACTED] requires a degree and three to five years of experience. The career level is designated as "Experienced (Non-Managerial)." Additionally, the position requires "handl[ing] all financial statement reporting responsibilities for multiple entities." The position with [REDACTED] requires a degree and two to five years of experience. Notably, the petitioner does not specifically claim that a degree and several years of experience are required for the proffered position. Moreover, the AAO must note again that the petitioner designated the proffered position as a Level I position in the LCA. As discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation. Thus, it appears that the advertised positions may be more senior positions. The petitioner has not established that the day-to-day duties of the advertised positions are the same or similar to the proffered position. There is a lack of information regarding the complexity of the job duties, supervisory duties, independent judgment required and the amount of supervision received. Accordingly, aside from job title, it is unclear whether the duties and responsibilities of these positions are the same or related to the proffered position. Without further information, the petitioner has not established that the advertised positions are parallel to the proffered position.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

The job advertisements do not establish that the proffered position qualifies as a specialty occupation under this criterion of the regulations. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these few advertisements

with regard to determining the common educational requirements for entry into parallel positions in similar organizations.<sup>17</sup>

The petitioner also submitted two opinion letters. The first is from [REDACTED], CPA. The AAO notes that this letter was first submitted in response to the RFE, and then resubmitted on appeal in the form of an affidavit.

In his letter, Mr. [REDACTED] describes himself as an auditor specializing in small to medium companies. Mr. [REDACTED] opines generally regarding positions entitled "staff accountant" that he has encountered over the past seven years. He claims to "have worked in numerous small to medium companies, in various industries, covering broad range or annual revenue levels." Notably, Mr. [REDACTED] did not provide any documentation to establish his credentials as a recognized authority on the relevant industry-hiring standards. Mr. [REDACTED] does not reference any supporting authority or any empirical basis for his pronouncements.

Mr. [REDACTED] states, "With adequate supervision, the 'staff accountant' role can be filled with an employee with only a very basic understanding of generally accepted accounting principles. However, as the level of supervision decreases . . . the training and experience of the staff accountant must generally increase." Further, Mr. [REDACTED] notes that "[w]hile the data entry portion [of the position] is easily accomplished by an employee with very little understanding of accounting, compiling this information into meaningful reports for management requires a good deal of knowledge and accounting skill." Mr. [REDACTED] recommends that the petitioner "seek a staff accountant with a good deal of training, experience and accounting knowledge" to perform the duties of the proffered position. Mr. [REDACTED] notes that the beneficiary will be "providing reports directly to senior management" and that, "[a]s the level of supervision available to the [beneficiary] will be low, it is paramount that the employee be able to enter, analyze and report accurate accounting information on their [sic] own."

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<sup>17</sup> Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from two job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that organizations similar to the petitioner in its industry commonly require, for positions parallel to the one here proffered, at least a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

Upon review of the opinion letter, there is no indication that Mr. [REDACTED] possesses any knowledge of the petitioner's proffered position and its business operations beyond, perhaps, the job title and the "duties listed on the H-1B petition." His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the requirements for the particular position here at issue. (He simply states that "the company is very small and the nature of the business requires management to be traveling extensively" and references "the international nature of their business.") There is no evidence that Mr. [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. He does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. The very fact that he attributes various attributes to such a generalized treatment of the proffered position undermines the credibility of his opinion. Likewise, he does not provide a substantive, analytical basis for his opinion and ultimate conclusion.

Moreover, the AAO observes that Mr. [REDACTED] does not indicate anywhere in his letter that the training required to perform the duties of a "staff accountant" is obtained through a bachelor's degree or higher in a specific specialty, or its equivalent. Thus, the letter does not support the assertion that the proffered position qualifies as a specialty occupation.

The petitioner also submitted a letter from [REDACTED] a self-described CPA candidate with twelve years of experience in the accounting field. She does not provide any further information regarding her work "in the accounting field," including her job titles and job duties. Thus, she does not establish her expertise pertinent to the recruiting and hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. Without further clarification, it is unclear how her education, training, skills or experience would translate to expertise or specialized knowledge regarding the current recruiting and hiring practices of [REDACTED] companies (as designated by the petitioner with the NAICS code) similar to the petitioner for staff accountant positions (or parallel positions). Moreover, she does not cite specific instances in which her past opinions have been accepted or recognized as authoritative on this particular issue. The opinion letter contains no evidence that it was based on scholarly research conducted by Ms. [REDACTED] in the specific area upon which she is opining. She provides no documentary support for her ultimate conclusions (e.g., statistical surveys, authoritative industry or government publications, or professional studies). Furthermore, the letter describes "staff accountant" positions generally, and states that, in the writer's opinion, "a Staff Accountant has more extensive qualifications than a bookkeeper and generally will require a Bachelor's Degree." The AAO observes that the writer does not state that a degree in a *specific specialty* (or its equivalent) is required for such positions.

Further, the AAO notes that, based on the remarks made by Mr. [REDACTED] and Ms. [REDACTED] regarding the proffered position, it does not appear that they are aware that the petitioner designated the proffered position as a Level I (entry) position in the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation. The petitioner's designation of the position under this wage level signifies that the

beneficiary will be expected to work under close supervision and receive specific instructions on required tasks and expected results. Additionally, the beneficiary will be expected to perform routine tasks that require limited, if any exercise of judgment. Moreover, the beneficiary's work will be closely monitored and reviewed for accuracy. It appears that the writers would have found this information relevant for the opinion letters. Moreover, without this information, the petitioner has not demonstrated that Mr. [REDACTED] and Ms. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

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

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

The AAO acknowledges that, on appeal, counsel emphasizes that prior counsel discussed the complexity of the proffered position in response to the director's RFE. The AAO again notes that the position described by prior counsel in response to the RFE differed substantially from the description of the proffered position as described by the petitioner in support of the original Form I-129 submission. As previously mentioned, counsel's brief was not endorsed by the petitioner and the record of proceeding does not indicate the source of the duties and responsibilities that counsel attributes to the proffered position. Again, 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. 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 506.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted job descriptions and various documents, including evidence regarding its business operations. For example, the petitioner submitted corporate documents; a tax return for 2010; a two-page financial statement for 2011 (consisting of a balance sheet and a profit and loss sheet); invoices, and a customer list. The petitioner also submitted a printout from the U.S.

Department of Commerce website entitled "Freight Forwarder Guidance." Upon review of the record of proceeding, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of staff accountant. That is, the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. The petitioner 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.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. 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 she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she 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>18</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.

More specifically, the evidence in the record of proceeding fails to demonstrate how the duties of the proffered position require the theoretical and practical application of a body of highly specialized knowledge such that a baccalaureate 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 that it claims are so complex or unique. While related courses may be beneficial, or even required, in performing certain duties of the proffered 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 particular position here.

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<sup>18</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 reviewed the record in its entirety and 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. 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. Thus, the record lacks sufficient probative evidence to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. The evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information to the effect that a bachelor's degree is not required for these positions. In other words, the record lacks sufficiently detailed information to discern the proffered position as unique from or more complex than similar 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 prior work experience in the accounting field will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify at any time in the record 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 has thus failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. Upon review of the record of proceeding, the petitioner has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may 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").

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

The petitioner stated in the Form I-129 petition that it has six employees and was established in 2008 (approximately four years prior to the filing of the H-1B petition). In a letter dated June 13, 2012, counsel stated that "[a]t the inception of the organization, the accounts and finance task were handled by the petitioner's president." Counsel continued by stating that "due to the overburden of handling too many management tasks [the president] had decided to hire a professional individual who could handle the finance management related tasks of the petitioner company." The record of proceeding does not contain any documentation regarding employees who have previously held the position and/or probative evidence regarding the petitioner's recruiting and hiring practices. The record is devoid of information to satisfy this criterion of the regulations.

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

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

On appeal, counsel asserts that the duties of the proffered position as described by counsel in response to the RFE (and the petitioner's revised description submitted with the appeal) along with the evidence provided regarding the petitioner's business operations demonstrate that the nature of

the specific duties is specialized and complex. The AAO here incorporates its previous discussion and findings regarding the substantial variances in the job descriptions submitted with the initial petition, in response to the RFE and with the appeal. The AAO acknowledges that the petitioner may believe that the nature of the specific duties of the position in the context of its business operations is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO reviewed all of the evidence in the record, including the job descriptions and the evidence regarding the petitioner's business operations, such as corporate documents; a tax return for 2010; a two-page financial statements for 2011, invoices; a customer list; and a printout from the U.S. Department of Commerce website entitled "Freight Forwarder Guidance." The AAO finds that the petitioner's statements and the submitted documentation fail 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, 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."

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).

The AAO notes that on appeal the petitioner has submitted three unpublished AAO cases, and indicates that the facts of the instant case are analogous to these cases. Counsel refers to unpublished decisions in which the AAO determined that the positions proffered in those matters qualified as specialty occupations. When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [ . . . ] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190. The AAO notes that the petitioner has not provided any underlying evidence from these cases that would establish that the facts of these

unpublished cases are analogous to those facts presented in the instant matter.<sup>19</sup> Without further information, it does not appear that the facts of the referenced cases are analogous to those of the instant petition.<sup>20</sup> Furthermore, any suggestion that USCIS must request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act. Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

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 145 (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

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<sup>19</sup> The AAO reviewed the copies of the decisions submitted with the appeal and notes that the petitioner has not established that the cases are analogous to the instant proceeding. The AAO notes that one of the cases involved a construction contractor. In that case, the AAO found that the "totality of the information that the petitioner provided about its business operations and about the duties of the proffered position" demonstrated that the proffered position qualified as a specialty occupation. Another case involved an importer and wholesale distributor. On motion, counsel submitted new evidence demonstrating that the petitioner's business operations are complex as it is the largest distributor of chocolate in North America and its gross annual income is approximately \$13 million. The AAO found that the duties of the position, in combination with the particular information about the business, established the position as a specialty occupation. The petitioner also submitted an unpublished case involving an ocean freight shipments transportation company. The AAO found that the detailed information and documentation regarding the proposed duties, the petitioner's business operations, and the petitioner's organizational structure, established the position as a specialty occupation. As discussed above, in the instant case, there are numerous inconsistencies and discrepancies in the record of proceeding, which undermine the assertions of the petitioner and counsel with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. As detailed in this decision, the documentation provided by the petitioner fails to establish the proffered position as a specialty occupation.

<sup>20</sup> This record of proceeding contains insufficient information regarding various aspects of the positions in the unpublished decisions, such as the complexity of the job duties, supervisory duties (if any), independent judgment required, and the amount of supervision received, as well as information regarding the employers' business operations, the occupational categories and wage levels at which the LCAs were certified, et cetera (to list just a few factors that could be relevant).

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. Here, that burden has not been met.

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