



**U.S. Citizenship
and Immigration
Services**

(b)(6)

DATE: **APR 29 2013**

OFFICE: VERMONT 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.

On the Form I-129 visa petition, the petitioner describes itself as a fast food restaurant and vending services company established in 1997. In order to employ the beneficiary in what it designates as an administrative coordinator position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, 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.

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

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

Later in the decision, the AAO will also address an additional, independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to submit a Labor Condition Application (LCA) that complies with the applicable statutory and regulatory provisions. Thus, the petition cannot be approved for this reason as well. It is considered an independent and alternative basis for denial.

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as an administrative coordinator to work on a full-time basis. The petitioner submitted a job description with the petition which lists the duties of the position as follows:

- Plan, direct, or coordinate supportive services of organization, such as recordkeeping, mail distribution, telephone operator/receptionist and other office support services;
- Oversee facilities planning and maintenance and custodial operations;
- Supervise and coordinate activities of workers;
- Coordinate logistics between distribution sites and operational facilities;

- Oversee vending machine operations;
- Oversee payroll, conference planning and travel, information and data processing, mail, materials scheduling and distribution, printing and reproduction, records management, telecommunications management security, parking, energy consumption, and personal property procurement, supply, recycling, and disposal;
- Perform basic accounting and watch over billing systems;
- Communicate job assignments and direct employees to the offsite locations;
- Serve as liaison between [the petitioner]'s profit center managers and staff;
- Manage distribution points of sale; and
- Communicate and coordinate with distributors and vending locations.

In the instant case, the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position, and the petitioner did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

Moreover, the AAO notes that the wording of the first duty as provided by the petitioner for the proffered position is partially verbatim from the occupation "Administrative Services Managers" as described in the Occupational Information Network (O*NET) Code Connector. Specifically O*NET states, in pertinent part, the following regarding the occupational category "Administrative Services Managers" SOC Code – 11-3011:

Plan, direct, or coordinate one or more administrative services of an organization, such as records and information management, mail distribution, facilities planning and maintenance, custodial operations, and other office support services.

(Emphasis added to reflect duties listed in the petitioner's job description.) Occupational Information Network (O*NET) Code Connector, Administrative Services Managers – Code 11-3011 on the Internet at <http://www.onetonline.org/link/summary/11-3011.00> (last visited April 25, 2013).

This type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but it fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, cannot be relied upon by a petitioner when discussing the duties attached to specific employment. More

specifically, in establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, 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.

In the letter of support, the petitioner stated that the "[a]dministrative [c]oordinator will hold managerial and administrative duties, which will require a bachelor's degree or experiential equivalent associated with the professional position offered." The petitioner claimed that "[b]ecause of the wide distribution area and varied nature of [the] business, it is necessary that the [a]dministrative [c]oordinator possess a background in business or economics and experience in the field of business."

In addition, the petitioner stated that the proffered position is "a specialty occupation of distinguished merit and responsibility." Based upon the petitioner's statement, it is not clear that it understands the applicable statutory and regulatory provisions for H-1B classification. More specifically, prior to April 1, 1992, the H-1B category applied to persons of "distinguished merit and ability." The standard of "distinguished merit and ability" was defined in the regulations as "one who is a member of the professions or who is prominent in his or her field." On October 1, 1991, the *Immigration Act of 1990* ("IMMACT 90") deleted the term "distinguished merit and ability" from the general H-1B description; however, the implementation of this change was delayed until April 1, 1992. The *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991* ("MTINA"), which was enacted on December 12, 1991, restored the standard of "distinguished merit and ability" to the H-1B category, but only as the qualifying standard for fashion models. There is no evidence in the record of proceeding that the proffered position is for a fashion model.

The petitioner also submitted an LCA in support of the instant H-1B petition. The petitioner indicated that the prevailing wage for administrative coordinator position in Port Wentworth, Georgia is \$16.40 per hour. The AAO notes that this prevailing wage corresponds to the occupational classification of "Administrative Services Managers" – SOC (ONET/OES Code) 11-3011, Level I (entry) position.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE. The petitioner was asked to submit documentation to establish that the proffered position is a specialty occupation position. The director outlined the evidence to be submitted.

In response to the RFE, the petitioner submitted a letter from the petitioner's president/founder, [REDACTED] who claimed that he performed "many of the duties that an [a]dministrative [c]oordinator would normally hold at [the petitioning company]" and that the proffered position was created due to expansion plans.¹ He further stated that "[o]ver the next year or two, [the petitioner]

¹ [REDACTED] indicated that he was the only person to perform the duties of the position. The petitioner submitted a work experience evaluation for [REDACTED] from [REDACTED] who stated that [REDACTED] "professional work experience is equivalent to the U.S. degree of Bachelor of Business Administration awarded by a regionally accredited university in the United States."

will be providing vending machines to almost 200 locations." He continued by asserting that the plans of the company included opening additional branches and "possibly franchising [the petitioner's] brand." The petitioner submitted an Internet printout from the Georgia Secretary of State website, indicating the petitioner's status as "Active/Compliance." Notably, in response to the RFE, the petitioner did not submit a business plan that outlined any particular "expansion plans" or any other documentary evidence to substantiate current or future growth or development of its business operations. Moreover, the petitioner did not submit documentation substantiating the claim that the petitioner would be opening new branches and franchising.

In addition, counsel stated that the proffered position "was created because [the petitioner] is currently expanding. In addition, [REDACTED] the President and Founder of [the petitioning company], is the former Mayor of [REDACTED], Georgia." The petitioner submitted three Internet printouts (dated February 2006, January 2008, and January 2009). The documents contain references to [REDACTED] as the former Mayor of [REDACTED], Georgia. The printouts do not mention the petitioning company and do not demonstrate any expansion or development activities. The printouts also do not provide any insights into current or future activities of [REDACTED]

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. Counsel submitted an appeal of the denial of the H-1B petition.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. The AAO will first discuss some findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

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, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. 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.

The AAO finds that, as reflected in the description of the position as quoted above, the proffered position has been described in terms of generalized and generic functions that fail to convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. The overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves within the petitioner's business operations.

The description of the beneficiary's duties lacks the specificity and detail necessary to support the petitioner's assertion that the position is a specialty occupation. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will "[o]versee vending machine operations." The petitioner's statement – as so generally described – does not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application. In addition, the petitioner claims the beneficiary will "[p]erform basic accounting and watch over billing systems." The statement fails to provide any particular details regarding the demands, level of responsibilities and requirements necessary for the performance of this duty. According to the petitioner, the beneficiary will "[c]ommunicate job assignments and direct employees to the offsite locations." The statement does not delineate the actual work the beneficiary will perform, and the petitioner does not explain the beneficiary's specific role in this task. This is further illustrated by the petitioner's claim that the beneficiary will "[c]ommunicate and coordinate with distributors and vending locations" and will "[c]oordinate logistics between distribution sites and operational facilities." The statements do not provide any information as to the complexity of the job duties, the amount of supervision required, and the level of judgment and understanding required to perform the duties. Furthermore, the phrases could cover a range of issues, and without additional information, do not provide any insights into the beneficiary's day-to-day work.

Such generalized information does not in itself establish a necessary correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. The AAO also observes, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described by the petitioner, the AAO finds, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the demands of the proffered position.

The petitioner has failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or any substantive evidence regarding the actual work that the beneficiary would perform. Without a meaningful job description, the record lacks evidence

sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described fail to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner's assertions with regard to the position's educational requirement are conclusory and unpersuasive, as they are not supported by the job description or substantive evidence.

Moreover, as mentioned above, the petitioner claimed in its letter of support dated April 1, 2009 that the proffered position "will hold managerial and administrative duties, which will require a bachelor's degree or experiential equivalent associated with the professional position offered." The petitioner further added that "it is necessary that the [beneficiary] possess a background in business or economics and experience in the field of business." According to the petitioner, "[a] business background and bachelor's degree are the most appropriate qualifications for [the petitioner]."

Notably, based upon the statements of the petitioner, a degree in a *specific specialty* directly related to the duties of the proffered position is not required. That is, the petitioner claims that a bachelor's degree (or "experiential equivalent") is required for the position, but it does not indicate that a bachelor's degree in a *specific specialty*, or its equivalent, is required. Rather, it appears that the petitioner will accept a degree in any field. The requirement of a general-purpose bachelor's degree (no specific specialty) is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree (or its equivalent), without further specification, does not establish the position as a specialty occupation. *Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study, or its equivalent. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).² Since there must be a close

² Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. See, e.g., *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; cf. *Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be:

correlation between the required specialized studies and the position, the requirement of a degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558.

Again, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Furthermore, the record of proceeding 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 corresponds to "Administrative Services Managers" at a Level I (entry level) wage.

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

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.⁴ The

elsewise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

³ For additional information on wage levels and prevailing wage determinations, 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.

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

U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

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.

DOL guidance further indicates that a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones would be an indication that a wage determination at Level II would be proper classification for a position. The occupational category "Administrative Services Managers," has been assigned an O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, most occupation in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." See O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3.

In the instant case, the petitioner designated the proffered position to a wage level corresponding to as a Level I position. This suggests that the petitioner's academic and/or professional experience requirements for the proffered position would be *less than* the preparation listed for Job Zone 3 occupations (i.e., "training in vocational schools, related on-the-job experience, or an associate's degree"). However, the AAO observes that the petitioner claims in its letter of support that a "bachelor's degree or experiential equivalent associated with the professional position offered" is required for the proffered position, along with "a background in business or economics and experience in the field of business."

Moreover, the petitioner and counsel claim that the proffered position involves complex, unique and/or specialized duties. On appeal, counsel claimed that "the position of [a]dministrative [c]oordinator is so complex and unique that it can only be performed by an individual with a degree." Further, the petitioner indicated in the support letter that the beneficiary will hold

"managerial and administrative duties." For example, the beneficiary will "oversee facilities planning and maintenance and custodial operations," "oversee vending machine operations," "supervise and coordinate activities of workers," "manage distribution points of sale," and more. According to the petitioner, the beneficiary will "facilitate current operations, oversee [the] worksites, and coordinate the future expansion of [the] business."

The AAO observes that the petitioner and its counsel have indicated that the petitioner will be relying heavily on the beneficiary to supervise personnel and that he will exercise substantial discretionary authority. Such reliance on the beneficiary's work appears to surpass the expectations of a Level I position, as described above, in which the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and is expected to provide limited exercise of judgment. Here, rather than the beneficiary's work being "monitored and reviewed for accuracy," the petitioner and counsel suggest that the petitioner is relying on the beneficiary services to ensure the growth and success of the petitioner's business operations.

The AAO must question the level of complexity, independent judgment and understanding required for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described by the petitioner and counsel conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. Notably, the Level I designation does not reflect any particular "job requirements, experience, education, special skills/other requirements and supervisory duties" for the proffered position.

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

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

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

classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

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

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

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

The statements regarding the claimed level of complexity, independent judgment 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.

A review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial (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, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below for dismissing the appeal.

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

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

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

The petitioner stated that the beneficiary would be employed as an administrative coordinator. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply 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 DOL's *Occupational Outlook Handbook* (hereinafter the *Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁵ As previously mentioned, the information provided by the petitioner on the LCA

⁵ 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/>.

indicates that the petitioner designated the proffered position under the occupational category "Administrative Services Managers."

The AAO reviewed the chapter of the *Handbook* entitled "Administrative Services Managers," including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that normally the minimum requirement for entry into these positions is at least a bachelor's degree in a specific specialty, or its equivalent.

More specifically, the *Handbook* describes the position of administrative services managers as follows, in pertinent part:

Administrative services managers plan, direct, and coordinate supportive services of an organization. Their specific responsibilities vary by the type of organization and may include keeping records, distributing mail, and planning and maintaining facilities. In a small organization, they may direct all support services and may be called the *business office manager*. Large organizations may have several layers of administrative managers who specialize in different areas.

Duties

Administrative services managers typically do the following:

- Buy, store, and distribute supplies
- Supervise clerical and administrative personnel
- Recommend changes to policies or procedures to improve operations, such as changing what supplies the organization keeps and improving how the organization handles records
- Plan budgets for contracts, equipment, and supplies
- Monitor the facility to ensure that it remains safe, secure, and well maintained
- Oversee the maintenance and repair of machinery, equipment, and electrical and mechanical systems
- Ensure that facilities meet environmental, health, and security standards and comply with government regulations

Administrative services managers plan, coordinate, and direct a broad range of services that allow organizations to operate efficiently. An organization may have several managers who oversee activities that meet the needs of multiple departments, such as mail, printing and copying, recordkeeping, security, building maintenance, and recycling.

The work of administrative services managers can make a difference in employees' productivity and satisfaction. For example, an administrative services manager might be responsible for making sure the organization has the supplies and services it needs. Also, an administrative services manager who is responsible for coordinating

space allocation might take into account employee morale and available funds when determining the best way to arrange a given physical space.

Administrative services managers also ensure that the organization honors its contracts and follows government regulations and safety standards.

Administrative services managers may examine energy consumption patterns, technology usage, and office equipment. For example, managers may recommend buying new or different equipment or supplies to lower energy costs or improve indoor air quality.

They also plan for maintenance and the future replacement of equipment, such as computers. A timely replacement of equipment can help save money for the organization, because eventually the cost of upgrading and maintaining equipment becomes higher than the cost of buying new equipment.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Administrative Services Managers, on the Internet at <http://www.bls.gov/ooh/management/administrative-services-managers.htm#tab-2> (last visited April 25, 2013).

The subchapter of the *Handbook* entitled "How to Become an Administrative Services Manager" states the following about this occupation:

Educational requirements vary by the type of organization and the work they do. They must have related work experience.

Education

A high school diploma or a General Educational Development (GED) diploma is typically required for someone to become an administrative services manager. However, some administrative services managers need at least a bachelor's degree. Those with a bachelor's degree typically study business, engineering, or facility management.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Administrative Services Managers, on the Internet at <http://www.bls.gov/ooh/management/administrative-services-managers.htm#tab-4> (last visited April 25, 2013).

The *Handbook* does not state that at least a bachelor's degree in a specific specialty is normally required for this occupational category. The *Handbook* indicates that the educational requirements for the occupational category vary by the type of organization and the work performed. According to this passage of the *Handbook*, employees in this occupation must have related work experience. The *Handbook* clearly indicates that a high school diploma or a General Educational Development (GED) diploma is typically required for this occupation. While the *Handbook* states that some

administrative services managers need at least a bachelor's degree, the *Handbook's* statement does not indicate that normally the minimum requirement for entry into these positions is at least a bachelor's degree in a specific specialty, or its equivalent.

Further, when reviewing the *Handbook*, the AAO must note again that the petitioner designated the proffered position as a Level I position on 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 and will perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

In support of the assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted a letter from [REDACTED] Professor Emeritus in the School of Business Administration at [REDACTED]. The letter is dated October 28, 2009. The AAO reviewed the letter in its entirety. However, as discussed below, the letter from [REDACTED] is not persuasive in establishing the proffered position as qualifying as a specialty occupation position.

[REDACTED] submitted his curriculum vitae, along with documentation from a dean at [REDACTED] confirming the professor's employment at the university. [REDACTED] did not provide any further supporting documentation to establish his credentials as a recognized authority on the relevant educational requirement for the proffered position.

[REDACTED] curriculum vitae indicates that he has served in various positions at [REDACTED] from 1978 to the present (professor emeritus since 2003; associate dean and director of international programs, school of business from 1999 to the present; and professor of business from 1978 to the present). Based upon the information provided, the vast majority of [REDACTED] experience, including his current work, is in the academic setting. In addition, the professor states that he has authored articles, which have been published in the journals regularly read by professionals in this industry. According to his curriculum vitae, [REDACTED] most recent "publication or other creative achievement" was in 1995 when he contributed a chapter to a book regarding academic initiatives. His most recent presentation at a professional conference was in 1993. His most recent honor was in 1997 for teaching.⁶

[REDACTED] claims that he has considerable professional experience in the field of food services and restaurant management. The professor states that he has served in Switzerland and Malaysia on the faculty of the [REDACTED]

[REDACTED] He also claims that he regularly consulted for [REDACTED] on matters related to workflow and process reengineering within their food service

[REDACTED] submitted an eleven page curriculum vitae. Aside from his current employment with [REDACTED] there are three entries that are dated within five years of the advisory opinion, including a semester at sea voyage during the spring of 2006; serving as an adjunct professor in France during the summers until 2007; and serving as a faculty consultant for a foundation until 2007. The vast majority of entries on [REDACTED] curriculum vitae are from the 1980's and early 1990's.

facilities. His curriculum vitae references teaching at [REDACTED] in Lausanne, Switzerland in July 1998 and in Kuala Lumpur, Malaysia in June 1997. Thus, it appears that such experience consisted of two one-month periods over a decade prior to the H-1B submission. There is no evidence that the subject matter is relevant to his claim of expertise in the matters upon which he here opines. Further, the professor's resume does not reflect consulting work at [REDACTED]. Also, it is not evident in the professor's letter or anywhere else in the record of proceeding that whatever experience he may have had at the [REDACTED] and consulting with [REDACTED] restaurants is relevant to, or equipped him with expert-level knowledge regarding, the recruiting, hiring, and educational requirements in the United States for the proffered position upon which he is opining.

In the letter, [REDACTED] provides his opinion on the educational requirements for the proffered position. [REDACTED] states that it "is widely regarded that the minimum requirements for being employed in a position such as Administrative Coordinator would be a bachelor's degree in economics or a closely related field." He further states that "the position of Administrative Coordinator, as described would be a specialty occupation requiring an in-depth theoretical and practical knowledge and require the attainment of a bachelor's degree or higher."

The AAO observes that [REDACTED] states in his letter that his "opinions are limited to the information that [he] received and [his] educational and professional experience and judgment." The documents he has reviewed included a "petition letter to the U.S. Citizenship and Immigration Services dated April 1, 2009 from [REDACTED] President [of the petitioning company]" and a "petition letter to the US Citizenship and Immigration Services dated Sept. 3, 2009 from [REDACTED] Attorney at Law." Upon review of [REDACTED] opinion letter, there is no indication that he possesses any knowledge of the petitioner's proffered position and its business operations beyond this information. [REDACTED] 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. Notably, Professor restated the duties provided in the petitioner's support letter. As previously discussed, the generalized description provided by the petitioner may be appropriate when defining the range of duties that may be performed within an occupational category, but it fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, provides insufficient details to be relied upon to establish the specific beneficiary's role and responsibilities for the duration of the period requested for H-1B employment.

Further, it must be noted that there is no indication that the petitioner and counsel advised [REDACTED] that the petitioner characterized the proffered position as a low, entry-level administrative coordinator position, for a beginning level employee who has only a basic understanding of the occupation (as indicated by the wage-level on the LCA). The wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and her work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. It appears that [REDACTED] would have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's

position and appropriately determine educational requirement based upon job duties and responsibilities.

Based upon the information provided, the evaluator has not established that his education, training, skills or experience have provided him with expertise or specialized knowledge of the current requirements in the industry for administrative coordinator positions (or parallel positions) among fast food restaurant and vending service companies that are similar to the petitioner. That is, there is no specific information in the record regarding [REDACTED] claimed expertise on the issue here, i.e., the hiring practices and recruitment of administrative coordinators (or parallel positions) with fast food restaurant and vending service companies (or similar organizations).

[REDACTED] asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement. Likewise, he does not provide a substantive, analytical basis for his opinion and ultimate conclusion. 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 educational requirements for the particular position here at issue. Accordingly, the very fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. There is no evidence that [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 has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty, or its equivalent. [REDACTED] does not provide sufficiently substantive and analytical bases for his opinion.

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letter 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 letter into each of the bases in this decision for dismissing the appeal.

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding and as stated 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 regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to

the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. Further, the petitioner did not submit documentation from the industry's professional association indicating that it has made a degree a minimum entry requirement. The AAO acknowledges that the petitioner submitted a letter from [REDACTED]. However, as discussed in detail, the letter is not probative evidence in establishing the proffered position as qualifying as a specialty occupation.

The AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or the equivalent, is common in the petitioner's industry for entry into 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.

As reflected in this decision's earlier comments and findings with regard to the general and generic level of description of the proffered position and the duties comprising it, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position so as to distinguish it from other positions in its occupation that can be performed by persons without 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 he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge

to solve unusual and complex problems."⁷

It is further noted that although the petitioner asserts that a bachelor's degree is required to perform the duties of the proffered position, the petitioner failed to sufficiently demonstrate how the duties require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. That is, the record of proceeding does not establish that the petitioner's requisite knowledge for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or its equivalent. The petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex or unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree, in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

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. That is, 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, or its equivalent. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. The petitioner has not credibly demonstrated that this position, which the petitioner characterized in the LCA as an entry-level position, is so complex or unique that it can be performed only by an individual with at least a baccalaureate degree in a specific specialty, or its equivalent. 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.

Upon review of the record of proceeding, the AAO finds that the petitioner has 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. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To satisfy this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance

⁷ 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.

requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

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 seven employees and that it was established in 1997 (approximately twelve years prior to the H-1B submission). In response to the RFE, [REDACTED] the petitioner's founder/president, stated that he is the only person who has performed the duties of the proffered position. He further claimed that he had over 20 years of experience prior to his experience with the petitioning company. The petitioner submitted a work experience evaluation from [REDACTED] which states [REDACTED] professional work experience is equivalent to the U.S. Bachelor of Business Administration."⁸

⁸ The petitioner submitted an evaluation of [REDACTED] work experience. The evaluator claims that [REDACTED] professional work experience is equivalent to the U.S. degree of Bachelor of Business

In the instant case, the president of the petitioning company is also the *founder* of the business. Thus, it appears that the president/founder of the company (who has been performing other functions in addition to the duties of the proffered position from 1997 to the present) happens to possess a significant amount of experience (which he claims is equivalent to a bachelor's degree in business administration). However, the petitioner has not submitted any probative evidence to establish that it *normally requires* at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position.

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

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

Administration." Notably, the evaluation fails to designate any specific business specialty. The AAO notes that although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. The petitioner must establish that the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field. *Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm'r 1968).

Furthermore, the evaluator claims that he "review[s] transcripts and other academic documentation of applicants to [REDACTED] ... [and has] advisory authority to grant college-level credit for training and/or experience in the field of business administration." However, neither the petitioner nor the evaluator provided any independent evidence from appropriate officials, such as deans or provosts at [REDACTED] to establish that, at the time that he authored the evaluation, the evaluator was, in the language of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), "an official [with] authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience." Further, the AAO observes that no evidence was submitted that [REDACTED] has a program for granting credit based on an individual's training and/or work experience.

Moreover, the evaluator claims to be a "recognized authority." A recognized authority's opinion must include the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii). In the instant case, the AAO observes that the evaluator claims that he relied upon [REDACTED] "work history, curriculum vitae, corporation record and affidavit detailing his job responsibilities." Notably, none of this documentation accompanied the evaluation. 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).

Upon review of the record of proceeding, the AAO finds that the petitioner did not submit sufficient information about its business operations or the proffered position to establish that the nature of the specific duties of the proffered position is so specialized and complex that the knowledge required to perform them is usually associated with a bachelor's degree or higher in a specific specialty, or its equivalent. That is, relative specialization and complexity have not been developed by the petitioner as an aspect of the proffered position. In the instant case, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

The AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupation. The petitioner designated the position as a Level I position (the lowest of four assignable wage levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV position, requiring a significantly higher prevailing wage. 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 AAO acknowledges that the petitioner submitted an opinion letter from [REDACTED]. However, as previously stated, the AAO incorporates by reference and reiterates its earlier discussion and analysis that the opinion letter does not establish the proffered position as qualifying as a specialty occupation.

On the Form I-129 petition, the petitioner reported its gross annual income and its net annual income as "Varies." No further explanation was provided. In response to the RFE, the petitioner submitted a printout indicating that the company's status is "Active/Compliance." In addition, the petitioner submitted Internet printouts indicating that the founder/president previously served as mayor. The petitioner and counsel also repeatedly claim that the petitioning company is expanding, and that therefore, the petitioner requires the beneficiary's services. On appeal, counsel claims that the petitioner "is currently in midst of its expansion phase" and it "is critical that [the petitioner] hires an [a]dministrator [c]oordinator to be able to assist to keep track of all the logistics and as well as assisting in creating [the petitioner's] expansion plans." However, the AAO notes that with the initial petition and in response to the RFE, the petitioner did not submit documentation to support the assertions, such as a business plan or other documentation that outlines expansion phases, business development steps or any other probative evidence of new customers or contracts.

Moreover, the AAO notes that 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 (Reg. Comm'r 1978). 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.⁹

Upon review of the record of proceeding, the AAO finds that the petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. The petitioner has not established that the nature of the specific duties of the position is 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. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

As previously mentioned, 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 1043, *aff'd*, 345 F.3d 683; see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the

⁹ The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

(b)(6)

benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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