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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 0 2 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

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 April 30, 2012. In the Form I-129 visa petition, the petitioner describes itself as a travel wholesaler – Pacific and Hawaiian Islands, established in 2008. In order to employ the beneficiary in a position to which it assigned the job title, "Sales and Marketing Manager," 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, finding that the petitioner (1) failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions; and (2) failed to complete the Form I-129, that is, by failing to provide a signature required at page 12 of the Form I-129 Supplement H.

On appeal, counsel asserts that the director's bases for denial of the petition were erroneous, and counsel contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submits a brief and additional evidence.

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

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

In addition, the AAO will also address an additional, independent ground for denial of the petition, 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 corresponds to the petition. For this reason also, the petition must be denied.

At the outset, the AAO notes that even if the petitioner were to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions (which it has not), it could not be found eligible for the benefit sought. That is because, as correctly found by the director – who specified this aspect as a ground for denying the petition – the petitioner failed to complete the Form I-129 Supplement H by providing a signature required in a particular section of that form.

The AAO will here address that particular basis for the director's denial of the petition. Upon review of the record, the AAO finds that the Form I-129 was not completed by the petitioner as

required by that form for H petitions. More specifically, the petitioner failed to certify, by providing its signature at the specified point in the Form I-129 H Supplement, that, in the words of that certification section, "the employer will be liable for the reasonable costs of return transportation of the alien abroad if the beneficiary is dismissed from employment by the employer before the end of the period of authorized stay."

The AAO acknowledges that the petitioner submitted with the initial petition an April 6, 2012 document entitled, "Petitioner's Statement," which is signed by the petitioner's president and general manager. The pertinent parts of this document read as follows:

> I [name redacted by the AAO] hereby certify under penalty of perjury under the laws of the State of Hawaii and the United States that:
>
> * * *
>
> 6. The Petitioner shall pay for the Beneficiary's return transportation costs if the beneficiary is dismissed from her employment before the end of the period of authorized admission as an H-1B Temporary Worker permitted by the USCIS.

However, the record of proceeding shows that no representative of the petitioner signed the following certification at Section 1 of the Form I-129 Supplement H (at page 12):

> *Statement for H-1B specialty occupations and U.S. Department of Defense projects:*
>
> As an authorized official of the employer, I certify that the employer will be liable for the reasonable costs of return transportation of the alien abroad if the beneficiary is dismissed from employment by the employer before the end of the period of authorized stay.

That an authorized official of the employer filing for the H-1B petition was required to sign this certification is clear from the heading of this section of the form, which reads:

**Section 1. Complete This Section If Filing for H-1B Classification**

Further, the pertinent part of the RFE requested the petitioner to remedy this defect, stating:

- **Form I-129 Supplement H:** Form I-129, Page 12, Section 1 is not properly signed and dated. Therefore, submit completed page 12 of Form I-129.

In response, the petitioner submitted page 12 of Form I-129, but with only the first required signature block on that page signed and dated (as it had done in the initial petition), but devoid of a signature (on the second signature block) certifying that the petitioner would be "liable for the reasonable costs of return transportation of the alien abroad" if the beneficiary is dismissed from employment prior to the end of her period of authorized stay.

The regulation at 8 C.F.R. § 103.2(a)(1) states, in pertinent part, the following:

> Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission.

The regulation at 8 C.F.R. § 103.2(b)(1) provides, in pertinent part, the following:

> An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions.

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. As clearly stated in the two regulations cited immediately above, a petitioner must also complete the required forms according to their terms.

In the instant case, the petitioner failed to comply with the above-discussed signature requirement. More specifically, the Form I-129 Supplement H (page 12) contains a signature block that is devoid of any signature from the petitioning employer. Again, this section of the form reads as follows:

> As an authorized official of the employer, I certify that the employer will be liable for the reasonable costs of return transportation of the alien abroad if the beneficiary is dismissed from employment by the employer before the end of the period of authorized stay.

By failing to sign this signature block at Supplement H of the Form I-129, the petitioner has failed to complete a material section of the petition, the section certifying the petitioner's "liabil[ity] for the reasonable costs of return transportation of the alien abroad if the beneficiary is dismissed from employment by the employer before the end of the period of authorized stay."

Also, the AAO notes that the language of this certification section is framed to precisely mirror the language of section 214(c)(5) of the Act and the language at 8 CFR § 214.2(h)(4)(iii)(E).

Section 214(c)(5) of the Act states:

> In the case of an alien who is provided nonimmigrant status under section 101(a)(15)(H)(i)(b) or 101(a)(15)(H)(ii)(b) and who is dismissed from employment by the employer before the end of the period of authorized admission, the employer shall be liable for the reasonable costs of return transportation of the alien abroad.

The regulation at 8 CFR § 214.2(h)(4)(iii)(E) states, in pertinent part:

> The employer will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to section 214(c)(5) of the Act. . . . Within the context of this paragraph, the term "abroad" refers to the alien's last place of foreign residence. =This provision applies to any employer whose offer of employment became the basis for an alien obtaining or continuing H–1B status.

So, aside from and in addition to the fact that the petitioner failed to sign the certification in question – which is sufficient itself to preclude approval of the petition, the AAO also finds that the pertinent sections of the "Petitioner's Statement," quoted earlier in this decision, do not mirror the language of section 214(c)(5) of the Act and 8 CFR § 214.2(h)(4)(iii)(E). For instance, the "Petitioner's Statement," contains no certification of liability and no certification that liability would be for "reasonable costs of return transportation." Nor does the language of the "Petitioner's Statement" commit the petitioner to paying for return transportation "of the alien abroad," which is a significant phrase in the unsigned certification section in light of the provision at 8 CFR § 214.2(h)(4)(iii)(E) that this phrase is to mean return to "the alien's last place of foreign residence." Therefore, the failure to sign the certification section in question also constitutes a material omission.

For all of the reasons discussed above, the director's decision to deny the petition for the petitioner's failure to complete the petition form as required was correct. Consequently, the appeal will be dismissed, and the petition will be denied.

The appeal must be dismissed, thus rendering the remaining issue in this proceeding moot. However, the AAO will note that, in any event it reviewed the record of proceeding and, based upon that review, hereby endorses the director's determination that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. That is, the AAO agrees with the director's 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. Accordingly, the petitioner's failure to establish the proffered position as a specialty occupation also precludes the AAO from sustaining this appeal and requires that the appeal be dismissed and the petition denied.

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a "Sales and Marketing Manager" on a full-time basis at a salary of $50,000 per year. In a document entitled, "Memorandum in Support of Petition for a Nonimmigrant H-1B Temporary Worker (I-129)" (hereinafter, Memorandum), dated April 16, 2012, counsel for the petitioner provided the following information regarding the duties of the proffered position:

> In her position as Sales and Marketing Manager, the Beneficiary will be responsible for the sales and marketing of the Petitioner's wholesale travel services and group packages. She will be reviewing hundreds of business proposals from vendors such

> as hotels, airlines, transportation companies, amusement & entertainment companies, and food & beverage service providers and preparing a budget analysis for the Petitioner's seasonal bulk procurement offers. The Beneficiary will also review historical sales records of existing retail customers and monitor their preferences and needs to determine seasonal demand and formulate a pricing structure and appropriate discounts for upper management's review and consideration. She must also review operational records and reports to project sales and forecast/determine profitability.
>
> In addition, the Beneficiary must also act as an Advertising/Public Relations Manager in that regard and handle other duties of the Operations Manager from time-to-time. More important to this particular job is the necessity for the Beneficiary to be able to communicate (read, write, and speak) in Mandarin Chinese and English as well as be conversant in the Cantonese dialect. This is necessary as a majority of the Petitioner's clientele is Chinese-speaking.
>
> Clearly, the offered job involves duties across multiple disciplines (i.e., sales, marketing, advertising, and operations management) due to the small size of the business operations. Thus, the Beneficiary must possess an appropriate yet specific set of knowledge and skills to successfully function and perform well in this job.

In the Memorandum, counsel stated that the beneficiary has a Bachelor's degree in Business Administration[1] from the National Formosa University in Taiwan and an Associate of Science degree in Hospitality and Tourism Management[2] from in Hawaii. Counsel also stated that the beneficiary qualifies for the proffered position because the position "require[s], at minimum, a bachelor's degree."

In a letter in response to the RFE, dated November 19, 2012, the petitioner stated "that the [proffered position] is a position that requires a bachelor's degree in Business Administration and

---

[1] Upon review of the beneficiary's transcript, the AAO notes that the beneficiary's foreign degree is a two-year degree.

[2] Upon review of the beneficiary's Associate of Science degree from and the associated transcript, the AAO notes that the beneficiary's Associate of Science degree from is actually in "Hotel/Restaurant Operations," and not in Hospitality and Tourism Management as claimed by counsel in the Memorandum, and by the beneficiary in her resume. It is noted that in response to the RFE, counsel stated that ' also offers degrees in a sub-specialty called Hospitality and Tourism (HOST) with a concentration in Hospitality Operations Management, an associate's degree that the Beneficiary holds. . . . [and] that this particular concentration was re-named from Food Service & Hospitality Education to Hospitality Operations Management." However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

preferably with an emphasis in Travel Industry Management."

In its letter in response to the RFE, dated November 27, 2012, counsel states that "[t]he proffered position . . . requires specialized knowledge . . . obtained from a curriculum leading to a bachelor's degree in Business Administration or a more specialized area such as Travel Industry Management, the sub-specialty of a typical undergraduate curriculum in Business Administration."

The petitioner submitted a credential evaluation by which states that the beneficiary's two-year foreign education degree is equivalent to a U.S. Bachelor of Science degree in business administration. However, the foreign degree does not even purport to be a four-year degree, and, therefore, on its face fails to comport with the U.S. baccalaureate degree four-year standard. Thus, the AAO accords no evidentiary weight to the evaluation.

The AAO may, in its discretion, use an evaluation of a person's foreign education as an advisory opinion. However, where an opinion is not in accord with other information or is in any way questionable, the AAO may discount or give less weight to that evaluation. *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988).

The petitioner also submitted an LCA in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Sales Managers" – SOC (ONET/OES Code) 11-2022.00, at a Level I wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought and issued an RFE on September 11, 2012. The petitioner was asked to submit, *inter alia*, documentation to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted.

The petitioner and counsel responded by providing further information regarding the proffered position and additional evidence. The petitioner and counsel submitted a document entitled "Detailed Job Description" for the proffered position. More specifically, this document stated that the beneficiary would perform the following duties:

| DUTY | % OF TIME SPENT | LEVEL OF RESPONSI-BILITY | HOURS PER WEEK PERFORMING DUTY | MINIMUM EDUCATION, TRAINING AND EXPERIENCE REQUIRED |
|---|---|---|---|---|
| Daily meetings with General Manager to discuss work priorities for | 4.17% | High<br><br>(Need to pay attention!) | 2.5 | General Administrative duty that is required no matter what level of degree |

| | | | | |
|---|---|---|---|---|
| the day. | | | | one has. Ability to execute assigned work priorities is more critical. |
| Identify, address and solve problems, conflicts, and disputes, if any[,] with customer in English. Oral and written communi-cation required. | 4.17% | Very High | 2.5 | Bachelor's Degree in Business Administration with specialty in Travel Industry Management. |
| Identify, address and solve problems, conflicts, and disputes, if any[,] with customer in Chinese. Oral and written communi-cation required. | 4.17% | Very High | 2.5 | Bachelor's Degree in Business Administration with specialty in Travel Industry Management. |
| Track daily sales of various tour packages to retail agents on US mainland and Asia. | 4.17% | High | 2.5 | Bachelor's Degree in Business Administration. |
| Coordinate and work with Finance Manager on daily, weekly, | 4.17% | High | 2.5 | Bachelor's Degree in Business Administration. |

| | | | | |
|---|---|---|---|---|
| monthly, quarterly, and annual sales reports. | | | | |
| Assess demand for tour packages, product and services for subsequent month, assess demand and project sales from information given by retail agents. | 4.17% | Very High | 2.5 | Bachelor's Degree in Business Administration with emphasis in Marketing and specialty in Travel Industry Management. |
| Review and analyze proposals and contracts of service providers and determine amount, time and offer of bulk price in light of seasonal demands. Prepare monthly budgets for budget expenditures. | 25% | Very High | 15.0 | Bachelor's Degree in Business Administration with emphasis in Marketing and specialty in Travel Industry Management. |
| Evaluate, review and assess sales leads from community programs, organizations, and other promotional events | 8.33% | High | 5.0 | Bachelor's Degree in Business Administration with emphasis in Marketing and specialty in Travel Industry Management. |

| | | | | |
|---|---|---|---|---|
| employer can participate in to maximize sales and marketing opportunities. | | | | |
| Prepare content in English and Chinese for new "Sunshine Activities" website. Train and work with intern. | 16.66% | Very High | 10.0 | Bachelor's Degree in Business Administration with emphasis in Marketing and specialty in Travel Industry Management. |
| Formulate marketing plan for Taiwan FIT traveler market. Coordinate and discuss with IT web developer advertising, logo, photo placement. | 8.33% | Very High | 5.0 | Bachelor's Degree in Business Administration with emphasis in Marketing and specialty in Travel Industry Management. |
| Research, locate, identify prospective government agencies, corporations, and enterprises in China for Meetings, Incentives, Conferencing, and Expositions | 8.33% | Very High | 5.0 | Bachelor's Degree in Business Administration with emphasis in Marketing and specialty in Travel Industry Management. |

| | | | | |
|---|---|---|---|---|
| business. Train and work with intern. | | | | |
| Other assistance of company managers and retail side employees. | 8.33% | High | 5.0 | Utility purpose but need quick problem-solving and team work skills. |
| TOTAL | 100% | Very High | 60 | |

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 (and, as previously discussed, that the petitioner failed to completely fill out and sign the H Supplement to the Form I-129). The director denied the petition on January 3, 2013. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.

The AAO will now discuss whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

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

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry

requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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 that is the subject of the petition.

The petitioner stated that the beneficiary would be employed in a sales and marketing manager position. 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.

As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Sales Managers." The AAO reviewed the information in the U.S. Department of Labor's *Occupational Outlook Handbook* (*Handbook)* regarding the occupational category, "Sales Managers." However, the *Handbook* does not indicate that sales manager positions 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.

The subchapter of the *Handbook* entitled "How to Become a Sales Manager" states the following about this occupational category:

> Most sales managers have a bachelor's degree and work experience as a sales representative.
>
> **Education**
>
> Most sales managers have a bachelor's degree, although some have a master's degree. Educational requirements are less strict for job candidates who have significant experience as a sales representative. Courses in business law, management, economics, accounting, finance, mathematics, marketing, and statistics are advantageous.

**Work Experience**

Work experience is typically required for someone to become a sales manager. The preferred duration varies, but employers usually seek candidates who have at least 1 to 5 years of experience.

Sales managers typically enter the occupation from other sales and related occupations, such as sales representatives or purchasing agents. In small organizations, the number of sales manager positions is often limited, so advancement for sales workers usually comes slowly. In large organizations, promotion may occur more quickly.

**Important Qualities**

***Analytical skills.*** Sales managers must collect and interpret complex data to target the most promising areas and determine the most effective sales strategies.

***Communication skills.*** Sales managers need to work with people in other departments and with customers, so they must be able to communicate clearly.

***Customer-service skills.*** When helping to make a sale, sales managers must listen and respond to the customer's needs.

***Managerial skills***. Sales managers must be able to evaluate how sales staff perform and develop ways for struggling members to improve.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Sales Managers, available on the Internet at http://www.bls.gov/ooh/management/sales-managers.htm#tab-4 (last visited July 18, 2013).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the prevailing wage for the proffered position as wage for a Level I (entry level) position on the LCA.[3]

---

[3] Wage levels should be determined only after selecting the most relevant Occupational Information Network (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.

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. 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.

This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.[4] That is, in accordance with the relevant DOL explanatory information on wage levels, this Level I wage-rate is only appropriate for a position in which the beneficiary is only required to have a basic understanding of the occupation and would be expected to perform routine tasks that require limited, if any, exercise of judgment. This wage rate also indicates that the beneficiary would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results.

The *Handbook* does not indicate that a baccalaureate or higher degree, in a specific specialty, or its equivalent is normally the minimum requirement for entry into the proffered position. The above-quoted passage of the *Handbook* reports that most sales managers have bachelor's degrees, while some have master's degrees. The *Handbook* notes that educational requirements are less stringent for candidates with significant sales experience. The *Handbook* states that courses in business law, management, economics, accounting, finance, mathematics, marketing, and statistics are advantageous. Accordingly, as the *Handbook* indicates that working as a sales manager does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not support the proffered position as satisfying this first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook*'s support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. 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

---

*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/NPWHC_Guidance_Revised_11_2009.pdf.

[4] The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes 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.

*Id.*

. . . 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. 1998) (*citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Upon review of the totality of the evidence in the entire record of proceeding, the AAO concludes that the petitioner has not established that the proffered position falls within 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 required for entry. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

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

Here, as already 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 it previous discussion on the matter. The AAO also notes that the record of proceeding does not contain any submissions from professional associations or similar firms in the petitioner's industry attesting that a degree requirement is common to the industry for individuals employed in positions parallel to the proffered position.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, counsel for the petitioner submitted a letter, dated November 22, 2012, entitled, [redacted] In the letter, Mr. [redacted] opines as follows:

---

[5] The definition of "emeritus" in *Webster's New College Dictionary* 375 (Third Edition, Hough Mifflin Harcourt 2008) is "[r]etired but retaining an honorary title corresponding to that held immediately before retirement."

> [A] company about the size and specialization of [the petitioner] operating within today's travel business environment would find it 'routine' to fill its position in sales and marketing management . . . [and] recruit and employ an individual having the right combination of higher educational training, i.e., a bachelor's degree in Business or Travel Industry Management, along with other relevant industry experience, appropriate language and cultural skills, and demonstrated sales/marketing competence. . . .

The AAO finds, at the outset, that the above-stated opinion does not even address the relevant issue, which is whether or not it is common practice among organizations similar to the petitioner and in its industry to require at least a bachelor's degree in a specific specialty for jobs parallel to the one here proffered. Whether an organization would find requiring a particular type of Bachelor's degree "routine" is not relevant.

Mr. attached a copy of his curriculum vitae. He described his qualifications, including his professional experience, as well as provided a list of the publications he has written. Based upon a complete review of Mr. letter and curriculum vitae, the AAO notes that Mr. has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. Mr. claims that he is qualified to comment on the position of sales and marketing manager because of the position he formerly held at the However, without further clarification, it is unclear how his former position as dean of the would translate to expertise or specialized knowledge regarding the current recruiting and hiring practices of travel wholesalers similar to the petitioner for positions parallel to one here proffered.

Further, Mr. opinion letter and curriculum vitae do not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for *sales and marketing manager* (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. The opinion letter contains no evidence that it was based on scholarly research conducted by Mr. in the specific area upon which he is opining. Mr. provides no documentary support for his ultimate conclusion regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies). Mr asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for his pronouncement.

Upon review of the opinion letter, the AAO finds no indication that Mr. possesses any knowledge of the petitioner's proffered position beyond the name and relative size[6] of the petitioner, the job title, and the general nature of the petitioner's business. It is unclear whether Mr.

---

[6] The AAO notes that Mr. mistakenly refers to the petitioner as having "ten employees," whereas the petitioner only has five employees.

reviewed the job descriptions for the proffered position that were submitted into this record of proceeding. However, the fact that Mr. attributes a degree requirement to the proffered position, regarding which the petitioner provided such minimal information in this record of proceeding, undermines the credibility of his opinion. Further, there is no evidence that Mr. has visited the petitioner's business, observed the petitioner's operations, interviewed company officials or employees who would be knowledgeable about the substantive work to be performed in the proffered position, reviewed work products that would be representative of the nature of the work in which the beneficiary would be engaged, or otherwise documented the work to be performed and any correlation between such work and a requirement for at least a bachelor's level of knowledge in a specific specialty. In short, Mr. submission provides general conclusory statements regarding sales and marketing manager positions, but it does not provide a substantive, analytical basis for its findings and ultimate opinion. The AAO finds that submission is cursory, superficial, and conclusory.

Mr. claims that the proffered position is "critical to the company's success." However, it must be noted that there is no indication that the petitioner and counsel advised Mr. that the petitioner characterized the proffered position as a low, entry-level position (as indicated by the wage-level on the LCA). As previously discussed, the wage-rate indicates that the beneficiary 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. It appears that Mr. would have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that Mr. possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine similar positions based upon job duties and responsibilities.

In summary, for each and all of the reasons discussed above, the AAO concludes that the advisory opinion rendered by Mr. is not probative evidence that the proffered position qualifies as a specialty occupation. The conclusions reached by Mr. lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. There is an inadequate factual foundation established to support the opinion and the AAO finds that the opinion is not in accord with other information in the record.

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 Mr. opinion into each of the bases in this decision for dismissing the appeal.

Thus, based upon a complete review of the record, 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 in the petitioner's industry for 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.

Upon review of the record of proceeding, the AAO finds that the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. That is, 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.

More specifically, the petitioner failed to demonstrate that the sales and marketing manager duties as described in the record comprise a position so complex or unique as to require such theoretical and practical application of a body of highly specialized knowledge that only a person with a bachelor's or higher degree in a specific specialty, or its equivalent, could perform the position.

Aside from and in addition to the lack of supporting evidence, the AAO finds that the LCA's wage level is not consistent with the relative degree of uniqueness and complexity required to satisfy this criterion. Again, the LCA indicates a wage level based upon the occupational classification "Sales Managers" at a Level I (entry level) wage. This designation is appropriate for positions for which the petitioner expects the beneficiary to have a basic understanding of the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; 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.

Notably, a position classified at 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." Thus, the Level I wage-level certified in the the LCA which the petitioner submitted as supporting the petition is not consistent with claims that the proffered position would entail any particularly complex or unique duties or that the position itself would be so complex or unique that it can only be performed by a person a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The evidence of record does not establish that this position is significantly different from other positions in the Sales Managers occupational group such that it refutes the *Handbook's* findings that such positions do not require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

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

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 the equivalent, for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

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

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

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.

As previously discussed, the petitioner stated in the Form I-129 petition that it has five employees and that it was established in 2008. In response to the RFE, counsel contends that "[t]he Sales and Marketing Manager position was held by who holds a Bachelor's degree in Business Administration with a specialty in Travel Industry Management from " and provided a copy of this individual's degree.[7] Counsel also stated that this individual is "currently Petitioner's Operations and Human Resources Manager." However, there is no corroborating information, such as detailed job duties and pay records, that this individual was actually employed by the petitioner in the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, in its letter in response to the RFE, dated November 19, 2012, the petitioner indicates that is one of the "partners" in the petitioner's business, rather than an employee, and "initially started as a 'do-everything' person for the company in 2008. Her work involved sales, marketing, human resources, public relations, advertising and design, [and] communications work." In any event, the AAO finds that this one previous employment instance is not sufficient to establish the recruiting and hiring history required to satisfy this criterion.

Upon review of the record, then, the AAO concludes 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 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.

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided probative evidence to satisfy this criterion of the regulations.

The AAO acknowledges the petitioner's assertions that its proffered position involves specialized and complex duties, and that on appeal, counsel suggestion that the proffered position is specialized and/or complex because "the duties that the Beneficiary will be performing DO require the

---

[7] The AAO notes that counsel also submitted a letter from dated November 27, 2012, but did not state that this person was ever employed in the proffered position. In the letter, Ms. stated that she lost her original degree and claimed to attach a "Replacement of Diploma form" to the letter. However, the AAO notes that no such Replacement of Diploma form was provided.

attainment of a [B]achelor's degree in Business Administration and the specialty of Travel Industry Management over 95% of the time." However, the petitioner misapprehends its burden under this particular criterion.

To satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), the evidence of record must establish not merely that the nature of the proposed duties is complex and specialized, but that, in the language of the criterion, that "[T]he 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."

However, upon review of the record of proceeding, there is insufficient evidence to establish that the nature of the proposed duties is "so specialized and complex" that performance of those duties would require, again in the words of this criterion, "knowledge that is usually associated with the attainment of a baccalaureate or higher degree."

In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of nature of the proposed duties. That is, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty.

In the above regard, the AAO finds that the petitioner has listed multiple duties for the proffered position, all of which are expressed in terms of generalized and generic functions, such as "Coordinat[ing] and work[ing] with Finance Manager on daily, weekly, monthly, quarterly, and annual sales reports"; "Assess[ing] demand for tour packages, product[s] and services"; "Formulat[ing] marketing plan for [the] traveler market"; and "Coordinat[ing] and discuss[ing] with IT web developer advertising, logo, [and] photo placement." The petitioner does not explain in any substantive and persuasive detail whatever relative level of complexity and specialization it claims for the nature of the proposed duties, nor does the petitioner so explain whatever aspects of the nature of the proposed duties elevate it above the level of complexity and specialization of the duties of other positions, in the pertinent occupational group, for which there is no usual association with attainment of at least a bachelor's degree in a specific specialty. Further, the petitioner has not supplemented its duty descriptions with probative evidence of the requisite association between the nature of the proffered position's duties and knowledge usually associated with at least a bachelor's degree, or the equivalent, in a specific specialty.

Also, the AAO here incorporates into this analysis its earlier comments and findings with regard to the implication of the Level I wage-rate designation (the lowest of four possible wage-levels) in the LCA. That is, that the proffered position's Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Sales Managers," and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." By comparison, as previously mentioned, a Level IV

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 nature of the duties of the position is so specialized and complex that 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*).

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.

Beyond the decision of the director, the AAO finds that the petitioner failed to submit an LCA that corresponds to the petition.

As previously discussed, the petitioner asserted in the LCA that the proffered position falls under the occupational category "Sales Managers." On appeal, counsel contends that the proffered position also includes the duties of a Marketing Manager and that "[a]ltogether, the Beneficiary is (and will be) performing tasks as a Marketing Manager over 42% of the time."

With respect to the LCA, DOL provides clear guidance for selecting the most relevant Occupational Information Network (O*NET) occupational code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

> In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification . . . . If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the NPWHC should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the NPWHC shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

*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/NPWHC_Guidance_Revised_11_2009.pdf.

In determining the nature of the job offer, DOL guidance indicates that the first step is to review the requirements of the petitioner's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the petitioner's job offer is used to identify the

appropriate occupational classification. If the petitioner believes that its position is described as a combination of O*NET occupations, then according to DOL guidance the petitioner should select the relevant occupational code for the highest paying occupation.

The Online Wage Library (OWL) lists the prevailing wage for "Sales Managers" as $49,774 per year at the time the petition was filed in this matter, for a Level I position in the area of intended employment. The prevailing wage for "Marketing Managers" is listed as $50,918 per year. The prevailing wage for "Marketing Managers" is higher than the prevailing wage for "Sales Managers." Thus, according to DOL guidance, if the petitioner believed its position fell under the occupational category "Marketing Managers" (or was a combination of the occupations "Sales Managers" and "Marketing Managers"), it should have chosen the relevant occupational code for the highest paying occupation – in this case "Marketing Managers." However, the petitioner selected the lower paying occupational category for the proffered position on the LCA.[8]

The AAO notes that 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 petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational category and 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 occupation at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it submitted a certified LCA that properly corresponds to the claimed occupation and duties of the proffered position and that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted. Thus, for this reason also, the H-1B petition cannot be approved.

Finally, the AAO notes that the petitioner submitted a letter, dated January 16, 2013, requesting an oral argument opportunity before the AAO. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, USCIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. Moreover, the written record of proceeding fully represents the facts and issues in this matter, and there is no explanation why any facts or issues in this matter, whether novel or not, have not and cannot be adequately addressed in writing. Consequently, the request for oral argument is denied.

---

[8] The AAO notes that the petitioner classified the position in the LCA as falling under the occupational category "Sales Managers."

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision.[9] In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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

---

[9] As previously discussed, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 145. However, as the appeal is dismissed for the reasons discussed above, the AAO will not further discuss the additional issues and deficiencies that it observes in the record of proceedings.