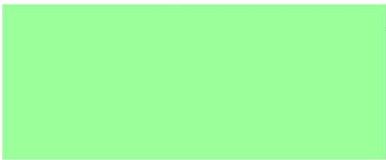


(b)(6)

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

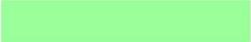


U.S. Citizenship  
and Immigration  
Services



DATE: DEC 13 2013

OFFICE: VERMONT SERVICE CENTER

FILE: 

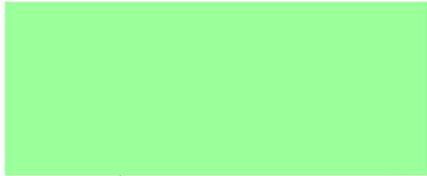
IN RE:

Petitioner: 

Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the 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,

*for*   
Ron Rosenberg  
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a five-employee distributor of consumer goods established in 2008. In order to employ the beneficiary in what it designates as an accountant position,<sup>1</sup> 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, concluding that the petitioner had failed to demonstrate that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

The AAO will now address its determination that the evidence in the record of proceeding fails to establish that the proffered position is a specialty occupation.

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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<sup>1</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O\*NET/OES) Code 13-2011, the associated Occupational Classification of "Accountants and Auditors," and a Level I (entry-level) prevailing wage rate.

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as 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), 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 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely upon a proffered position’s title. The specific duties of the 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 at 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 documents filed with the Form I-129 included a one-page sheet with the heading “Job Description – Accountant,” which listed the following 16 duties:

1. Record and analyze the financial information[.]
2. [Be] [r]esponsible for budgeting, performance evaluation, cost management, and asset management.
3. Analyze and interpret the financial information.
4. Prepare financial reports[.]
5. Handle responsibilities in the areas of financial analysis, planning and budgeting, and cost accounting.
6. Prepare Income Statement, Balance Sheet work sheets on a monthly basis[.] and annual basis.
7. Prepare Income Statement and Balance Sheet on a quarterly, semi-annual and annual basis.
8. Perform ratio analysis on financial statements[.]
9. Identify financial trends and prepare analytical reports for the management.

10. Participate in any special projects, assigned by the management of the company.
11. Maintain Company's books of accounts, and including General Ledger, Accounts Receivable & Payable Ledgers, and Cash Reconciliation Book etc [sic].
12. Maintain payroll accounts, time keeping & prepare payroll checks, make statutory deductions and deposit those with the US Treasury.
13. Prepare company's cash flow statement[.] (5% Time Commitment)
14. Pay invoices per trade terms and within allowable time[.] (5% Time Commitment)
15. Monitor Accounts Receivable and ensure timely invoicing and collection.
16. Participate in Company's tax returns, if outsourced.

The petitioner's response to the RFE, narrowed the list to ten "primarily charged . . . responsibilities." This was in response to a segment of the RFE which requested that the petitioner "[e]xplain the proposed duties and responsibilities." The amended list describes the proposed duties in ten parts, listed "a" through "j". That list reads as follows:

- a) Maintain Company's books of accounts, and including General Ledger, Accounts Receivable & Payable Ledgers, and Cash Reconciliation Book etc [sic]. (8% Time Commitment)
- b) Maintain payroll accounts, time keeping & prepare payroll checks, make statutory deductions and deposit those with the US Treasury. (7% Time Commitment)
- c) Prepare company's cash flow statement[.] (5% Time Commitment).
- d) Pay invoices per trade terms and within allowable time[.] (5% Time Commitment)
- e) Monitor Accounts Receivable and ensure timely invoicing and collection. (5% Time Commitment)
- f) Preparation of Income Statement, Balance Sheet work sheets on a monthly basis[.] (10% Time Commitment)
- g) Prepare Income Statement and Balance Sheet on a quarterly, semi-annual and annual basis. (15% Time Commitment)

- h) Perform ratio analysis on financial statements[.] (15% Time Commitment)
- i) Identify financial trends and prepare analytical reports for the management. (20% Time Commitment)
- j) Participate in any special projects, assigned by the management of the company. (10% Time Commitment)

The AAO finds that the petitioner provides only minimal information with regard to its business operations. On the Form I-129, the petitioner described itself as a "Distributor of Consumer Goods." In counsel's letter of reply to the RFE, counsel asserts:

Employer is engaged in retail trade which requires [a] large volume of inventory purchases and record keeping of [a] large volume of small amount transactions. Employer is required to maintain books of accounts and account for tax obligations. Accounting functions are required to be carried out According to Generally accepted Accounting Principles.

However, the petitioner's Form 1065, Return of Partnership Income, tax form indicates that the petitioner's business is a convenience store, and that the "consumer goods" which it "distributes" are "groceries, beer, etc."

The AAO further finds that the evidence in this record of proceeding does not disclose the substantive nature of the financial and accounting matters upon which the beneficiary would work. For instance, the evidence of record does not document the scope of the petitioner's actual financial matters in which the beneficiary would be involved, or, for that matter, the types and depths of "financial trends" which beneficiary would have to identify and report upon. Nor does the record develop the nature of those reports or reveal the types and level of accounting applications that their preparation would involve.

The above-quoted duty descriptions are no more than relatively abstract descriptions of general functions that can be ascribed to accounting work in general. As such, they do not provide any substantial information about the actual work that the beneficiary would perform, and about whatever academic level of accounting knowledge the beneficiary would have to apply to actually perform those generally described functions. The AAO finds that, for the vast majority of the duties described, this makes little difference, for comparison of them with the *Handbook's* pertinent information on Bookkeeping, Accounting, and Auditing clerks shows that they fall squarely within that occupational category. Still, to the extent that the petitioner claims that such duties as identifying financial trends, preparing analytical reports on them, and participating in unidentified special projects would require the application of at least a bachelor's degree level of knowledge in accounting or a closely related specialty, the AAO finds that the evidence of record lacks substantive details sufficient to support such a claim.

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Further, the record does not supplement the duty and position descriptions with substantive evidence regarding the actual work and associated educational requirements that would be required to perform the proffered position. Thus, the record of proceeding lacks an adequate factual basis for the AAO to capture what the beneficiary would actually do, and the nature and educational level of any accounting knowledge that the beneficiary would have to apply. The AAO finds the record's dearth of substantive evidence about the petitioner's operations, its actual financial and accounting matters which would engage the beneficiary leaves to speculation the actual nature and performance requirements of the proffered position. This, the AAO, finds is a fundamental failure to meet the petitioner's burden of proof which, in itself, precludes approval of this petition.

Further, the AAO finds that the lack of substantive information provided about the petitioner, its operations, the scope of its accounting needs, and the actual matters that would purportedly be the subject of the beneficiary's work undermines any claims that the proffered position or its constituent duties are so complex, specialized, and/or unique as to require the practical and theoretical application of at least a bachelor's degree level of knowledge in accounting or any other specialty. In this particular regard, we note counsel's claims about the advanced nature of the proffered position, but we discount them, as they are not supported by the evidentiary record before us. Likewise, counsel provides no documentary support for the suggestion that application of Generally Accepted Accounting Principles is indicative of a position that is usually associated with a bachelor's degree. Further, and in any event, as the evidence of record does not establish the substantive nature of the beneficiary's accounting work, it also does not establish the extent to which the beneficiary would have to apply Generally Accepted Accounting Principles. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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).

Also, the petitioner should note that the AAO hereby incorporates the above comments and findings into its analysis of each of the

The AAO will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

8 C.F.R. § 214.2(h)(4)(iii)(A)(I)

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>2</sup> Two portions of the *Handbook* are directly relevant to this proceeding: (1) the *Handbook's* discussion of the "Bookkeeping, Accounting, and Auditing Clerks" occupational classification; and (2) its discussion of the "Accountants and Auditors" occupational classification.

The AAO finds that the *Handbook's* entries for the "Bookkeeping, Accounting, and Auditing Clerks" and "Accountants and Auditors" occupational classifications both contain aspects of the proposed duties, and that both occupations require some understanding of accounting principles. However, the question to be addressed in this proceeding is not whether the proffered position requires some knowledge of accounting principles, but whether it is one that normally requires the level of knowledge of a body of highly specialized knowledge in accounting that is signified by at least a bachelor's degree, or its equivalent, in accounting or a closely-related specialty.

As discussed in the *Handbook*, bookkeeping, auditing, and auditing clerks do not comprise an occupational category that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. In pertinent part, the *Handbook* states the following with regard to this occupational classification:

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

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

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

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<sup>2</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

- Reconcile or note and report any differences they find in the records

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

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

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

As organizations continue to computerize their financial records, many bookkeeping, accounting, and auditing clerks use specialized accounting software, spreadsheets, and databases. Most clerks now enter information from receipts or bills into computers, and the information is then stored electronically. They must be comfortable using computers to record and calculate data.

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

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

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

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

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

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Bookkeeping, Accounting, and Auditing Clerks," <http://www.bls.gov/ooh/office-and-administrative-support/bookkeeping-accounting-and-auditing-clerks.htm#tab-2> (accessed October 22, 2013).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this occupational category:

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

*Id.* at <http://www.bls.gov/ooh/office-and-administrative-support/bookkeeping-accounting-and-auditing-clerks.htm#tab-4>.

These statements do not support a conclusion that a bachelor's degree in a specific specialty, or its equivalent, is normally required for employment as a bookkeeping, accounting, or auditing clerk. Accordingly, the proposed duties that comport with the Bookkeeping, Accounting, and Auditing Clerk occupational category are not indicative of a position for which at least a bachelor's degree, or the equivalent, in a specific specialty is the normal minimum entry requirement.

As already noted, some of the duties proposed by the petitioner for the beneficiary are generally similar to those described in the *Handbook* as normally performed by accountants.

In pertinent part, the *Handbook* states the following with regard to the Accountants occupational classification:

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

Accountants and auditors typically do the following:

- Examine financial statements to be sure that they are accurate and comply with laws and regulations
- Compute taxes owed, prepare tax returns, and ensure that taxes are paid properly and on time

- Inspect account books and accounting systems for efficiency and use of accepted accounting procedures
- Organize and maintain financial records
- Assess financial operations and make best-practices recommendations to management
- Suggest ways to reduce costs, enhance revenues, and improve profits

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

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

\* \* \*

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Accountants and Auditors," <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-2> (accessed December 5, 2013).

With regard to the educational requirements necessary for entry into this occupational classification, the *Handbook* states that "[m]ost accountants and auditors need at least a bachelor's degree in accounting or a related field." *Handbook* at <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-4>. However, "most" does not indicate that an accountant position normally requires at least a bachelor's degree, or its equivalent, in a specific specialty. The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of accountant positions require at least a bachelor's degree in a specific specialty, it could be said that "most" accountant positions require such a degree. It cannot be found, therefore,

that a particular degree requirement for “most” positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part “attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.” Section 214(i)(1) of the Act.

Furthermore, the *Handbook* includes the following statement:

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

*Id.* Thus, the *Handbook* does not indicate that a minimum of a bachelor’s degree in a specific specialty, or its equivalent, is normally required for this occupational category. Instead, this occupational category accommodates a wide spectrum of educational credentials, and that spectrum includes credentials that fall short of a bachelor’s degree.

As clear from the statements from the *Handbook* excerpted above, the fact that a person may be employed in a position designated as that of an accountant and may apply accounting principles in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. Thus, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position being proffered would involve accounting services at a level requiring the theoretical and practical application of at least a bachelor’s-degree level of a body of highly specialized knowledge in accounting. To make this determination, the AAO turns to the record for information regarding the duties and nature of the petitioner’s business operations.

In the instant matter, the AAO finds that those job duties listed by the petitioner that do generally fall within those described in the *Handbook* as normally performed by accountants (as opposed to the duties which align with those of bookkeepers and accounting clerks) are generalized descriptions of functions generic to accounting positions. As such, they do not establish that their performance requires the theoretical and practical application of at least a bachelor’s-degree level of a body of highly specialized knowledge in a specific specialty.

The AAO’s determination that the evidence in the record of proceeding does not establish that the accounting duties proposed for the beneficiary would involve accounting services at a level requiring the theoretical and practical application of at least a bachelor’s-degree level of a body of highly specialized knowledge in accounting is bolstered by the wage-level designated by the petitioner on the LCA. As indicated by the *Prevailing Wage Determination Policy Guidance* cited above, both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner’s designation of an LCA wage-level I is indicative of duties of relatively low complexity.

Next, the materials from DOL's Occupational Information Network (O\*NET OnLine) do not establish that the proffered position qualifies as a specialty occupation under the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. O\*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as O\*NET OnLine's JobZone designations make no mention of the specific field of study from which a degree must come. As was noted previously, the AAO 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 proposed position. Also, the Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. For all of these reasons, the O\*NET OnLine excerpt submitted by counsel is of little evidentiary value to the issue presented on appeal.

Accordingly, the evidence of record does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). First, it appears as though nearly two-thirds of the duties of the position fall within the "Bookkeeping, Accounting, and Auditing Clerks" occupational classification which, the *Handbook* indicates, does not normally require a bachelor's degree, or the equivalent, in a specific specialty. Second, with regard to the proposed duties which generally align with those of the "Accountants and Auditors" occupational classification, the evidence of record failed to establish that the beneficiary's actual work in that capacity would require at least a bachelor's degree, or the equivalent, in a specific specialty.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in either of these occupational categories is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The two alternative prongs at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2)

Next, the AAO finds that the petitioner has not satisfied 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 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

Nor are the six job-vacancy announcements submitted into the record probative evidence towards satisfying the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As earlier noted, this prong would be satisfied by evidence establishing that the petitioner's asserted requirement for a degree in a specific specialty is, in the language of the provision, "common to the industry in parallel positions among similar organizations." Accordingly, to merit consideration under this prong, the petitioner must show that the evidence in question relates to positions that are (1) parallel to the proffered position, (2) within organizations that are similar to the petitioner, and also (3) within the same industry as the petitioner.

At the appropriate block at page 5 of the Form I-129, the petitioner identified its Type of Business as "Distributor of Consumer Goods."

Page 17 of the Form I-129 H-1B Data Collection Supplement required the petitioner to identify its industry by entering at the appropriate space its NAICS (North American Industry Classification System) code.<sup>3</sup> There the petitioner entered "611110" as its industry code – which is the NAICS

<sup>3</sup> The North American Industry Classification System, with its search utilities for identifying industries in the United States, is available on the Internet at <http://www.census.gov/eos/www/naics/>. This resource focuses exclusively on identifying the types of business establishments that comprise each of our country's industries. The System's Internet Home page includes this introductory information:

#### **Introduction to NAICS**

The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy.

NAICS was developed under the auspices of the Office of Management and Budget (OMB), and adopted in 1997 to replace the Standard Industrial Classification (SIC) system. . . .

This official U.S. Government Web site provides the latest information on plans for NAICS revisions, as well as access to various NAICS reference files and tools.

Code for Elementary and Secondary Schools. The AAO notes that the entry appears to be a clerical error. The AAO further notes that the Form I-129 and counsel's statements only identify the petitioner's industry in broad terms. Illustrative and fairly representative of this fact is this earlier quoted statement in counsel's letter of reply to the RFE:

Employer is engaged in retail trade which requires [a] large volume of inventory purchases and record keeping of [a] large volume of small amount transactions. . . .

However, as also previously noted, the petitioner's Form 1065, Return of Partnership Income, tax form indicates that the petitioner's business is a convenience store, and that the consumer goods which it retails are "groceries, beer, etc."

Against this background of the minimal level of information that the petitioner has provided about itself and its retailing operations, the AAO will first survey the job-vacancy advertisements to see if they were issued by organizations in the petitioner's industry.

Among the documents filed with the Form I-129 were copies of three job-vacancy announcements that had been posted on the Internet for accountant jobs. The [redacted] advertisement for [redacted] is outside the scope of this criterion, as the advertised position is in the Insurance industry and involves reconciliation and accounting "for multiple derivative instrument types," and on a seasonal/temporary basis, for an unknown client. The evidence is insufficient to establish that this advertised position should be classified as being in the same industry as the petitioner.

The relevancy of the [redacted] has not been established, as the advertisement does not identify the industry in which the advertised job belongs. So, too, the [redacted] is outside the zone of consideration of this alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the advertisement does not indicate that the job is in the same industry as the petitioner.

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The official 2012 U.S. NAICS Manual includes definitions for each industry, background information, tables showing changes between 2007 and 2012, and a comprehensive index. The official 2012 U.S. NAICS Manual is available in print and on CD-ROM from the National Technical Information Service (NTIS) at (800) 553-6847 or (703) 605-6000, or through the NTIS Web site. Previous versions of the NAICS Manual are available.

Additional information on the background and development of NAICS is available in the History section of this Web site.

For the reasons discussed above, the AAO finds that the three advertisements that we have just discussed have no probative value towards satisfying the criterion at hand, as they have not been shown to relate to jobs within the petitioner's industry.

Additionally, neither the content of the advertisements nor any other evidence in the record of proceeding demonstrates that the job advertisements were placed by companies "similar" to the petitioner in size, scope and scale of operations, business efforts, expenditures, or other fundamental organizational dimensions. We further note that the wording of their respective advertisements indicate that [REDACTED] organizations – nationwide chains seeking employees for their headquarters - are not organizationally similar to the petitioner in any substantial sense. Likewise, the [REDACTED] advertisement describes that company as a "small restaurant chain"; and nothing in the record of proceeding indicates that the petitioner is a similar organization. While the [REDACTED] advertisements indicate that this advertiser is at least partially engaged in convenience-store operations, those advertisements also indicate that this advertiser is organized as a convenience store/gas station holding company; and there is no evidence that the petitioner is a similar organization.

Further, the petitioner has not established that any of the advertised positions are "parallel" to the proffered position. Both the evidence of record regarding the proffered position and also the advertisements' information regarding the job vacancies describe the duties of the respective positions in terms of broad generalized functions, without any supplemental information conveying the substantive nature of the accounting matters that would engage the position-holder in the particular context of the employer's particular business operations. As such, the evidence of record does not provide an adequate factual basis for the AAO to reasonably determine that the proffered position and those advertised are in fact parallel.

Additionally, the petitioner does not submit any evidence establishing how representative these advertisements are of the related firms' actual hiring practices with regard to the type of positions advertised. Simply 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)).<sup>4</sup>

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<sup>4</sup> Furthermore, according to the *Handbook* there were approximately 1,898,300 persons employed as bookkeeping, accounting, and auditing clerks in 2010. *Handbook* at <http://www.bls.gov/ooh/office-and-administrative-support/bookkeeping-accounting-and-auditing-clerks.htm#tab-6> (last accessed December 5, 2013). There were 1,216,900 persons employed as accountants in 2010. *Handbook* at <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-6>. Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the six submitted vacancy announcement with regard to determining the common educational requirements for entry into parallel positions in similar organizations. As such, even if these six job-vacancy announcements established that the employers that issued them routinely recruited and hired for the advertised positions only persons with at least a bachelor's degree in a specific specialty closely related to the positions, it cannot be found that these six job-vacancy announcements which appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as 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.

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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."

As earlier noted, we here incorporate into this analysis this decision's earlier comments and findings with regard to the lack of substantive evidence regarding the duties that are said to comprise the particular position that is the subject of this petition.

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform that position. Rather, the AAO finds that the petitioner has not distinguished either the proposed duties, or the position that they comprise, from generic bookkeeping or accounting work, neither of which, the *Handbook* indicates, necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty. For this reason alone, the evidence of record fails to satisfy this particular criterion.

Furthermore, according to the LCA submitted by the petitioner in support of the instant position specifies the occupational classification for the position as "Accountants and Auditors," SOC (O\*NET/OES) Code 13-2011, at a Level I (entry-level) wage. The *Prevailing Wage Determination Policy Guidance*<sup>5</sup> issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates (italics added):

**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.

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Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

<sup>5</sup> On the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

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 [emphasis in original].

As noted above, the LCA submitted by the petitioner in support of the instant position specifies the occupational classification for the position as "Accountants and Auditors," SOC (O\*NET/OES) Code 13-2011, at a Level I (entry-level) wage.

The LCA's wage level (Level I, the lowest of the four that can be designated) is only appropriate for a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels quoted above, this wage rate is appropriate for positions in which the beneficiary is only required to have a basic understanding of the occupation; will be expected to perform routine tasks requiring limited, if any, exercise of judgment; will be closely supervised and her work closely monitored and reviewed for accuracy; and will receive specific instructions on required tasks and expected results.

It should be noted that the claims of counsel and the petitioner related to this criterion are not substantiated by corroborating evidence. Again, 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 at 165.

The evidence of record therefore does not establish that the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor's degree, or the equivalent, in a specific specialty.

The AAO finds further that, even outside the context of the *Handbook*, the petitioner has simply not established relative complexity or uniqueness as attributes of the nature of the proffered position, let alone as being so elevated as to require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Consequently, as it has not been shown that the particular position for which this petition was filed is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

8 C.F.R. § 214.2(h)(4)(iii)(A)(3)

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. 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 the performance requirements of the proffered position.<sup>6</sup> In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

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 employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position 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 at 387. 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 a 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 proposed 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.

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<sup>6</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within its occupation.

That all being said, the decisive factor is that the evidence in the record of this proceeding does not establish a history of recruiting and hiring only individuals with a bachelor's degree, or the equivalent, in a specific specialty for the proffered position. Consequently, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

8 C.F.R. § 214.2(h)(4)(iii)(A)(4)

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty.

As earlier noted, we incorporate into our analysis of this criterion this decision's earlier comments and findings regarding the nature of the specific duties that the beneficiary would perform within the particular context of the petitioner's particular business operations.

The AAO also finds that the record of proceeding contains no evidence that establishes the nature of the proposed duties as being so specialized and complex. Rather, to the extent that they are described in the record, the AAO finds that the petitioner has not distinguished the proposed duties from generic bookkeeping and accounting duties, which, the *Handbook* indicates, do not necessarily require an individual with a bachelor's degree in a specific specialty, or the equivalent.

Further, there is the countervailing weight of the wage-level of the LCA. Both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level I is indicative of duties of relatively low complexity.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

**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 [emphasis in original].

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

**Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited

judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only “moderately complex tasks that require limited judgment.” The fact that this higher-than-here-assigned, Level II wage-rate itself indicates performance of only “moderately complex tasks that require limited judgment,” is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

**Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer’s job offer is for an experienced worker. . . .

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

**Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment’s procedures and expectations. They generally have management and/or supervisory responsibilities.

Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner’s submission of an LCA certified for the lowest assignable wage-level. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL’s

instructive comments about the next higher level (Level II), the proffered position did not even involve “moderately complex tasks that require limited judgment” (the level of complexity noted for the next higher wage-level, Level II). The AAO also finds that, separate and apart from the petitioner’s submission of an LCA with a wage-level I designation, the petitioner has also failed to provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved 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.

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

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

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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