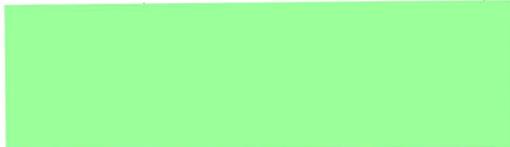




U.S. Citizenship
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Services

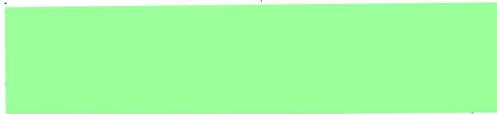
(b)(6)



DATE: FEB 04 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:

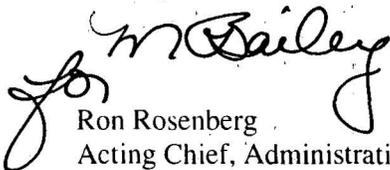


INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a Dutch warmblood horse breeding and training facility established in 2009. In order to employ the beneficiary in what it designates as an international trainer position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on December 30, 2011, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

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

Later in the decision, the AAO will also address two additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to establish that it would pay the beneficiary an adequate salary for his work if the petition were granted; and (2) failed to submit a Labor Condition Application (LCA) that complies with the applicable statutory and regulatory provisions. Thus, the petition cannot be approved for these reasons as well, with each ground considered as an independent and alternative basis for denial.

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as an international trainer to work on a full-time basis.¹ The petitioner submitted a job description with the petition which lists the duties of the position as follows:

¹ The petitioner and counsel provided inconsistent information as to the salary to be paid to the beneficiary. On the Form I-129 petition on page 5, the petitioner stated that the beneficiary would be paid **\$40,000** per year. However, on the Form I-129 petition on page 17, the petitioner reported that the beneficiary would be paid **\$38,771** per year. In the LCA, the petitioner reported the wage rate for the proffered position as **\$40,000 to \$100,000**. In the letter of support dated August 17, 2011, the petitioner claimed that the beneficiary would receive "an annual salary of **\$40,000** with performance bonuses of **up to \$100,000.00** annually." In the appeal brief, counsel asserted that the beneficiary's "total offered compensation (salary and bonuses) of **\$100,000 to \$150,000**" and referenced the beneficiary's "six figure compensation package."

The petitioner refers to "performance bonuses" in connection with the beneficiary's compensation but fails to

Scope of Responsibilities

- Assess the raw potential of 3-4 year old horses and channel them to the proper training program and final objective (e.g., junior amateur hunter horse, advanced amateur hunter or jumper, professional jumper, etc.)
- Work with farm management to design individualized training programs for the young horses that address any unique developmental issues (e.g. rushing jumps, rearing, inability to handle specialized jumps, unbalanced movement, lack of suppleness, insensitive to commands/aids; etc.)
- Oversee the assignment of horses to trainers to assure that horses received the type of training needed
- Develop the skills of junior trainers to ride and train the horses properly
- Supervise daily training, conditioning and health care of horses
 - Provide daily direction to trainers/riders on the methods to improve:
 - Physical fitness and endurance (e.g. hill work or road work to strengthen muscles or tendons)
 - Jumping skills of horses (e.g., beginning jumps vs complex jumps for 7 & 8 year old horses)
 - Supervise and monitor the health care of the horse
 - Grooming and tacking horses properly to assure their health and safety
 - Check for any injuries or lameness issues and identify treatment alternatives, including vet assistance
 - Administer any advanced treatments where possible (e.g. injections, wound bandaging, etc.) to minimize vet visits and expense
- Regularly evaluate the progress of each horse and recommend revisions and enhancements to the training, health care and feeding of each horse
- Ride more advanced horses on the flat & through jumps to test and refine their skills and improve their balance and confidence
- Assist with developing the competition show plans for each horse and the overall plan for the farm each year to achieve the maximum market visibility and horse development, in an economical fashion
- Assist with sale of horses
 - Participate in decisions on horses to be sold and to what trainers/professionals
 - Participate in pricing of horses
 - Supervise pre-sale grooming and strategy for properly showing the horses

provide any further details. Notably, payment to the beneficiary by the petitioner must be assured (i.e., not conditional or contingent on some event) in order to meet its wage obligations under the applicable provisions. See 20 C.F.R. § 655.731(c) regarding an H-1B petitioner's wage obligations. No such evidence was provided regarding the "performance bonuses."

- Meet regularly with farm owners to discuss:
 - Horses progress, training needs, health issues, readiness for marketing or competitions
 - Trainer assignments and developmental issues
 - Scheduling of vets and farriers as well as assessing their quality of work
 - Competition schedules
 - Marketing activities
 - Major purchases of supplies & equipment

Further, the petitioner listed the following as the skills and experience required for the proffered position:

Skills and Experience Required

- 10 or more years of competing horses at the major international show jumping events
 - Grand Prix events with prizes of \$50,000 or more
 - National and Regional Finals of Young Jumper Championships for 5-8 year old horses
- 10-15 years of experience in starting and developing upper level young horses to be winners at international show jumping events
- 5-10 years of supervising and developing the skills of a horse training staff with at least 2-3 trainers
- 5-10 years of overseeing a training barn with at least 20-30 horses in training

In its letter of support dated August 17, 2011, the petitioner reiterated the above skills and experience required for the proffered position. The petitioner did not indicate in the job description or in its letter of support that a baccalaureate (or higher degree) in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The petitioner emphasized the importance of a candidate possessing experience performing various tasks but did not state or suggest that the position requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent.

Furthermore, in the support letter, the petitioner referred to the beneficiary as "an H-1B Non-Immigrant of distinguished merit and ability." Based upon the petitioner's statement, it is not clear that it understands the applicable statutory and regulatory provisions for H-1B classification. More specifically, prior to April 1, 1992, the H-1B category applied to persons of "distinguished merit and ability." The standard of "distinguished merit and ability" was defined in the regulations as "one who is a member of the professions or who is prominent in his or her field." On October 1, 1991, the *Immigration Act of 1990* ("IMMACT 90") deleted the term "distinguished merit and ability" from the general H-1B description; however, the implementation of this change was delayed until April 1, 1992. The *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991* ("MTINA"), which was enacted on December 12, 1991, restored the standard of "distinguished merit and ability" to the H-1B category, but only as the qualifying standard for

fashion models. There is no evidence in the record of proceeding that the proffered position is for a fashion model.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Animal Trainers" – SOC (ONET/OES Code) 39-2011, at a Level IV (fully competent worker).

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on September 23, 2011. The petitioner was asked to submit documentation to establish that the proffered position is a specialty occupation position. Notably, the director stated that the duties of the proffered position can be found in part under the title Animal Care and Service Workers in the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, which does not require a baccalaureate level of education in a specific specialty. Moreover, the director requested that the petitioner provide additional evidence to establish that the proffered position is a specialty occupation position. Further, the petitioner was requested to provide evidence to establish that the beneficiary is qualified to perform services in the claimed specialty occupation. The director outlined the specific evidence to be submitted.

The petitioner and counsel responded to the RFE by submitting additional evidence. Notably, the new evidence refers to the proffered position as "head trainer" instead of "international trainer."

With the RFE response, the petitioner resubmitted the same job description that it provided with the initial petition. However, the petitioner slightly revised the job description by changing the job title (as mentioned above) from "International Trainer" to "Head Trainer." Additionally, the petitioner added an entry under the section "Skills and Experience Required." Specifically, the petitioner now claimed that the proffered position requires "a bachelor[']s degree in one or more of the following fields: equine management, training and physiology, stable management, agricultural business/economics." The petitioner did not acknowledge or provide an explanation for the revision in the job title and the new academic requirements for the proffered position.

In addition, the petitioner provided the following information regarding the duties of the proffered position:

Weekly Activities and hours required per week (60-65)

Task	Weekly Hours	% of total hours
Assess raw potential of 3-4 year old horses	1	1.5%
Design/update training programs for young horses	2	3.1%
Oversee assignment of horses to trainers	2	3.1%

Training sessions for junior trainers to develop their skills	5	7.7%
Supervise daily training		
Provide daily direction to trainers	6	9.2%
Supervise and monitor health care and nutrition	6	9.2%
Regularly evaluate the progress of each horse and make revisions	3	4.6%
Ride more advanced horses on the flat & over jumps	30	46.2%
Assist with developing the competition show plans -semiannually		0.0%
Assist with horse sales (pricing, contacting trainers, making videos showing the horse)	3	4.6%
Meet daily with farm owners	3	4.6%
Attend shows on weekends-two days every month	4	6.2%
Total	65	100.0%

The AAO observes that the petitioner indicated that the beneficiary would be employed 60 to 65 hours per week.² In addition, the petitioner stated the following:

² On the LCA, the petitioner reported the prevailing wage for the occupational category "Animal Trainers" as \$38,771 per year. According to the regulation at 20 C.F.R. § 655.731(c)(7) regarding employer wage obligations for H-1B personnel, a full-time week is generally based upon 40 hours per week. In response to the RFE, the petitioner stated that the beneficiary would be working **60 to 65** hours per week. Thus, the petitioner's offered salary of \$38,771 per year (as stated on page 17 of the petition) for a **60 to 65** hour week is below the prevailing wage for the occupation.

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) of the Act, 8 U.S.C. 1182(n). The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence.

As previously discussed, the petitioner refers to "performance bonuses" in connection with the beneficiary's compensation but fails to provide any further details. In the instant case, the petitioner has not established that such bonuses are assured (i.e., not conditional or contingent on some event). See 20 C.F.R. § 655.731(c) regarding an H-1B petitioner's wage obligations.

A college degree is essential to running a top level horse farm that is selling most of horses for more than \$50,000 and a significant share over \$100,000. Our business should consistently be selling or leasing 8-12 horses per year.

- The successful job applicant must stay current with the latest methods in horse training, horse medicine, horse nutrition. This involves being able to interact with many leading advisors on nutrition and medicine to identify improvements in farm practices. Additionally, we have a major equine university visit our farm each year with graduate students and evaluate our operation.
- Most of our customers (trainers or riders) are well educated in horse care and training, as well as being well educated in general. To effectively communicate with our customers and provide them with credible and valuable technical information on the horses [sic] abilities and health, our trainer has to have an advanced level of knowledge.

Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on December 30, 2011. Counsel submitted an appeal of the denial of the H-1B petition.

The AAO reviewed the record of proceeding in its entirety, and finds that the petitioner has not provided sufficient evidence to establish eligibility for the benefit sought under the applicable statutory and regulatory provisions. The AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

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

As noted above, the AAO observes that, in response to the RFE, the petitioner added an additional requirement of a bachelor's degree in one of various fields. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot

offer a new position to the beneficiary, or materially change a position's title, its job requirements, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. That is, if a petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. The information provided in response to the director's request for further evidence did not clarify or provide more specificity to the original requirements for the position, but rather added a new requirement to the position in an attempt to meet the statutory and regulatory requirements for a specialty occupation position.

Moreover, the record of proceeding contains discrepancies between what the petitioner and counsel claim about the occupational category and level of responsibility inherent in the proffered position set against the stated occupational category and level of responsibility conveyed by the petitioner in the LCA submitted in support of petition.

With respect to the LCA, DOL provides clear guidance for selecting the most relevant Occupational Information Network (O*NET) classification code. 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 SWA 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 SWA 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/Policy_Nonag_Progs.pdf.

As previously noted, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational category of "Animal Trainers" - SOC (ONET/OES) code 39-2011. The petitioner stated in the LCA that the wage level for the proffered position was a Level IV (fully competent) position, with a prevailing wage of \$38,771 per year. The LCA was certified on August 4, 2011 and signed by the petitioner on August 17, 2011.

On appeal, counsel claims that "USCIS incorrectly classified this position as an animal trainer." Counsel alleges that "USCIS falsely assumes-creating the essential premise for its denial-that the position is most analogous, based upon 'some of the duties' to that of the Animal Care and Service Workers" in the *Handbook*." Counsel emphasizes that the *Handbook* states that animal care and service workers "feed, water, groom, bathe, and exercise pets and other nonfarm animals" and states that "the assumption that this uniquely specialized position is most analogous to Animal Care and Service Workers shows a generalization of title and a complete disregard or, at best, lack of understanding of the unique position and petitioner's niche business." Counsel further states "in no place in the job description does the specialized position simply state that [the beneficiary] will in his unique position, 'feed, water, groom, bathe, and exercise pets or other nonfarm animals.'" Counsel further claims that "the position offered is analogous to that of a hybrid between an Athletic Trainer and Market Research Analyst" and that both positions require a college degree. The AAO notes that there is no evidence to indicate that counsel's assertion (that the proffered position is most akin to an athletic trainer and a market research analyst) is endorsed by the petitioner.

Moreover, the AAO notes that a search of the Foreign Labor Certification Data Center Online Wage Library reveals that the prevailing wage for "Athletic Trainers" – SOC (O*NET/OES) Code 29-9091 for [REDACTED] is \$51,980.³ The prevailing wage for "Market Research Analysts" – SOC (O*NET/OES) Code 19-3021 for [REDACTED] is \$57,325.⁴ Thus, if the petitioner believed its position was a combination of occupations, then according to DOL guidance the petitioner should have chosen the relevant occupational code for *the highest paying* occupational category, in this case "Market Research Analyst." Instead, the petitioner chose the occupational code for *the lowest paying* occupational category.

It must be noted that the record contains materially conflicting statements as to the nature of the proffered position. The petitioner designated the proffered position under the occupational category "Animal Trainers" on the LCA. In the RFE, the director specifically noted that the proffered position appeared to fall under the occupational category "Animal Care and Service Workers" (which includes Animal Trainers) in the *Handbook*. The petitioner and counsel did not state any objections to the classification of the proffered position under this occupational category in the response to the RFE. Then on appeal, counsel *for the first time* stated that the duties of the proffered position are similar to the occupational categories "Athletic Trainers" and "Market Research Analysts." However, this assertion is not supported by the occupational classification designated by the petitioner in the LCA. Furthermore, it is not supported by the petitioner's

³ For more information regarding the prevailing wage for Athletic Trainers in [REDACTED] see the All Industries Database for 7/2011 - 6/2012 for Athletic Trainers at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at [http://www.flcdatcenter.com/OesQuickResults.aspx?code=29-9091&\[REDACTED\]year=12&source=1](http://www.flcdatcenter.com/OesQuickResults.aspx?code=29-9091&[REDACTED]year=12&source=1) (visited January 23, 2013).

⁴ For more information regarding the prevailing wage for Market Research Analysts in [REDACTED] see the All Industries Database for 7/2011 - 6/2012 for Market Research Analysts at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at [http://www.flcdatcenter.com/OesQuickResults.aspx?code=13-1161&\[REDACTED\]year=12&source=1](http://www.flcdatcenter.com/OesQuickResults.aspx?code=13-1161&[REDACTED]year=12&source=1) (visited January 23, 2013).

description regarding the beneficiary's duties. The AAO finds it questionable that counsel waited until the appeal to make such an assertion regarding the occupational classification for a proffered position – rather than providing such a claim with the initial petition, and choosing the proper designation for the proffered position on the LCA in accordance with DOL guidance. Moreover, counsel fails to acknowledge that *the petitioner* chose the occupational category "Animal Trainers" for the proffered position on the LCA.⁵

As previously mentioned, 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's offered wage to the beneficiary of \$38,771 per year (as stated on page 17 of the petition) or \$40,000 per year (as stated on page 5 of the petition) is below the prevailing wage for the occupational classification of "Market Research Analysts" in the area of intended employment. The Level IV prevailing wage for the occupational category of "Market Research Analysts" in the area of intended employment was \$57,325 per year at the time the petition was filed in this matter. The difference in salary would over \$17,325 per year.⁶

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational classification 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

⁵ USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). As previously mentioned, the petitioner must establish that the position offered to the beneficiary when the petition was filed merits H-1B classification. *See generally Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner (or counsel) may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The regulations at 8 C.F.R. § 214.2(h)(2)(i)(E) state in pertinent part:

The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition.

Thus, because the LCA was certified and supports an "Animal Trainer" position, the request by the petitioner and counsel to consider the original petition as a petition for a different occupational classification is, therefore, rejected. Moreover, the AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

⁶ As previously discussed, the petitioner refers to "performance bonuses" in connection with the beneficiary's compensation but fails to provide any further details. Notably, payment to the beneficiary by the petitioner must be assured (i.e., not conditional or contingent on some event) in order to meet its wage obligations under the applicable provisions. *See* 20 C.F.R. § 655.731(c) regarding an H-1B petitioner's wage obligations.

212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupational category 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 would pay the beneficiary an adequate salary for his work, as required under the Act, if the petition were granted. Thus, for this reason as well, the H-1B cannot be approved.

Moreover, the general requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petitioner, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission. . . .

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. §§ 214.2(h)(4)(i)(B) and 214.2(h)(4)(iii)(B)(1). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with DOL when submitting the Form I-129.

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

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

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

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

The regulation at 20 C.F.R. § 655.705(b) therefore requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. In the instant case, the record establishes that, at the time of filing, the petitioner had not obtained a certified LCA for the proper occupational category and prevailing wage that applied at the time the petition was filed. Therefore, the petitioner has failed to comply with the filing requirements at 8 C.F.R. §§214.2(h)(4)(i)(B) and 214.2(h)(i)(2)(B) by providing a certified LCA that corresponds to the instant petition. For this reason also, the petition may not be approved.

The AAO will now specifically address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into the discussion below for dismissing the appeal.

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

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words; this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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 make its determination whether the proffered position qualifies as a specialty occupation, the AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁷ As previously mentioned, the petitioner asserts in LCA that the proffered position falls under the occupational category "Animal Trainers."

The AAO reviewed the chapter of the *Handbook* entitled "Animal Care and Service Workers" (which includes "Animal Trainers"), including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that "Animal Care and Service Workers" 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 "What Animal Care and Service Workers Do" states, in pertinent part, the following about this occupational category:

Animal care and service workers care for the needs of animals. They feed, water, groom, bathe, and exercise pets and other nonfarm animals. Job tasks vary by position and place of work.

Duties

Animal care and service workers typically do the following:

- Feed and give water to animals
- Clean equipment and the living spaces of animals
- Monitor animals and record information such as their diet, physical condition, and behavior
- Examine animals for signs of illness or injury
- Exercise animals

⁷ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

- Bathe animals, trim nails, clip hair, and attend to other grooming needs
- Train animals to obey or to do specific behaviors

Animal care and service workers train, feed, groom, and exercise animals. They also clean, disinfect, and repair the animals' cages. They play with the animals, provide companionship, and observe behavioral changes that could indicate illness or injury. Boarding kennels, pet stores, animal shelters, rescue leagues, veterinary hospitals and clinics, stables, laboratories, aquariums and natural aquatic habitats, and zoological parks all house animals and employ animal care and service workers.

Nonfarm animal caretakers typically work with cats and dogs in animal shelters or rescue leagues. All caretakers attend to the basic needs of animals, but experienced caretakers may have more responsibilities, such as helping to vaccinate or euthanize animals under the direction of a veterinarian. Caretakers also may have administrative duties, such as keeping records on the animals, answering questions from the public, educating visitors about pet health, or screening people who want to adopt an animal.

Animal trainers train animals for riding, security, performance, obedience, or assisting people with disabilities. They familiarize animals with human voices and contact, and they teach animals to respond to commands. Most animal trainers work with dogs and horses, but some work with marine mammals, such as dolphins. Trainers teach a variety of skills. For example, some may train dogs to guide people with disabilities; others teach animals to cooperate with veterinarians or train animals for a competition or show.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Animal Care and Service Workers, on the Internet at <http://www.bls.gov/ooh/personal-care-and-service/animal-care-and-service-workers.htm#tab-2> (last visited January 23, 2013).

The subchapter of the *Handbook* entitled "How to Become an Animal Care and Service Worker" states the following about this occupational category:

Education

Most animal care and service worker positions do not require formal education, but many animal care facilities require at least a high school diploma or the equivalent.

Although pet groomers typically learn by working under the guidance of an experienced groomer, they can also attend one of 50 state-licensed grooming schools. The length of each program varies with the school and the number of advanced skills taught.

Most zoos require keepers to have a bachelor's degree in biology, animal science, or a related field.

Animal trainers usually need a high school diploma or the equivalent, although some positions may require a bachelor's degree. For example, marine mammal trainers usually need a bachelor's degree in marine biology, animal science, biology, or a related field.

Dog trainers and horse trainers typically qualify by taking courses at community colleges or vocational and private training schools.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Animal Care and Service Workers, on the Internet at <http://www.bls.gov/ooh/personal-care-and-service/animal-care-and-service-workers.htm#tab-4> (last visited January 23, 2013).

The *Handbook* does not state that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. This passage of the *Handbook* reports that most animal care and service worker positions do not require formal education, but that many facilities require at least a high school diploma or the equivalent. The *Handbook* states that animal trainers usually need a high school diploma or the equivalent, although some positions may require a bachelor's degree. However, this statement does not establish that a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

In response to the RFE, the petitioner claimed that "[o]f the over two hundred trainers listed in the US Hunter Jumper Association directory, over 55% have bachelors degrees." The petitioner further claimed that it had "attached a sheet that summarized [its] finding after review [sic] the first 100 certified trainers on the U.S. Hunter Jumper Association list." However, upon a complete review of the record of proceeding the AAO finds that the documentation was not provided.⁸ 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*

⁸ Further, according to the *Handbook's* detailed statistics on animal care and service workers, there were approximately 234,900 persons employed in this occupation in 2010. *Handbook*, 2012-13 ed., available at <http://www.bls.gov/ooh/personal-care-and-service/animal-care-and-service-workers.htm#tab-1> (last accessed January 23, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from 100 listings with regard to the common educational requirements for entry into parallel positions. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the listings were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the listings supported the finding that the position of animal trainer required a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that such a limited number of listings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

of *Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Furthermore, the assertion that 55% of the trainers listed in the directory have bachelor's degrees is insufficient to establish the proffered position qualifies as a specialty occupation. A normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

On appeal, counsel claims that "USCIS has incorrectly classified this position as an animal trainer." In referring to the language from the *Handbook's* chapter on animal care and service workers, counsel states that "in no place in the job description does the specialized position simply states that [the beneficiary] will, in his unique position, 'feed, water, groom, bathe, and exercise pets or other nonfarm animals.'"⁹

Again, the AAO notes that the petitioner asserted in the LCA that the proffered position falls under the occupational category "Animal Trainers." Moreover, the director notified the petitioner and counsel in the RFE that the position appeared to fall under the occupational category "Animal Care and Service Workers." However, in response to the RFE, the petitioner and counsel did not state any objections to the classification of the proffered position under this occupation. While counsel asserted in the appeal that the proffered position is a combination of occupations, specifically market research analysts and athletic trainers, the AAO notes that there is no evidence that such assertion was endorsed by the petitioner. Further, the AAO incorporates its earlier discussion regarding the petitioner's failure to choose the occupational category with the highest paying wage. The AAO notes that 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.

The AAO reviewed the chapters of the *Handbook* entitled "Market Research Analysts" and "Athletic Trainers," including the sections regarding the typical duties and requirements for these occupational categories. However, the petitioner and counsel have not demonstrated that the primary and essential duties of the proffered position sufficiently resemble those of a market research analyst or athletic trainer. For example, the petitioner indicated that the beneficiary will spend 30 hours per week "[r]id[ing] more advanced horses on the flat & over jumps." This duty is not typically associated with market research analysts or athletic trainers. Without further evidence, the AAO is not persuaded by the assertion. Additionally, the AAO incorporates and reiterates by

⁹ Counsel provides some job duties for the general occupational category "Animal Care and Service Workers," but fails to acknowledge the job duties for the subcategory "Animal Trainers." The *Handbook* states the following about the occupational category:

Animal trainers train animals for riding, security, performance, obedience, or assisting people with disabilities. They familiarize animals with human voices and contact, and they teach animals to respond to commands. Most animal trainers work with dogs and horses, but some work with marine mammals, such as dolphins. Trainers teach a variety of skills. For example, some may train dogs to guide people with disabilities; others teach animals to cooperate with veterinarians or train animals for a competition or show.

reference its earlier comments in this decision regarding the inconsistencies and discrepancies in the record of proceeding with regard to the proffered position. Thus, further review of these occupations is not necessary. Moreover, even if the proffered position were determined to be a market research analyst or athletic trainer position, the wage rate offered to the beneficiary would preclude the approval of the petition.

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

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong requires a petitioner to establish that a requirement of a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

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

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, counsel submitted an affidavit from [redacted] Owner and Head Trainer of [redacted]. However, contrary to the purpose for which the affidavit was submitted, it does not establish the proffered position qualifies as a specialty occupation.

In the affidavit, [redacted] specifically states that the letter is "based on [his] own personal knowledge" and that he is the owner and head trainer of [redacted] which he claims is similar in its size and scope to that of the petitioner. However, the letter lacks sufficient information regarding [redacted] to conduct a meaningfully substantive comparison of the business operations to the petitioner. The petitioner and [redacted] failed to provide any supplemental information to establish that the organization is similar to the petitioner.

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and an organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner or [REDACTED] to claim that the organization is similar and in the same industry without providing a legitimate basis for such an assertion. Thus, from the onset, [REDACTED] has not met this prong of the regulations.

[REDACTED] asserts that "it is common in our niche industry for leading levels of competition and within our own operation to hire top talent trainers who are the products of four year college degree programs with equivalent experience and training in equine management." Further, [REDACTED] claims "hiring top trainers with a college level degree is critically important to the effective commercial operation of the business and the effective development of the horse." [REDACTED] also states that "a college level degree job candidate has been exposed to pragmatic and effective methods for developing and caring for high quality young horses, critical thinking, setting goals, has developed and demonstrated an aptitude to learn new concepts, and management skills to succeed in an intense and highly competitive environment."

The AAO notes that [REDACTED] did not identify the specific elements of his knowledge and experience that he may have applied in reaching his conclusions here. He did not indicate that he relied on any authoritative sources to support his assertions. [REDACTED] did not include the results of outside formal surveys, research, statistics, or any other objective quantifying information to substantiate his opinions. Notably, his opinions are not supported by independent objective evidence demonstrating the manner in which he reached such conclusions. [REDACTED] asserts a general industry educational standard without referencing any supporting authority or any empirical basis for the pronouncement.

Furthermore, the AAO observes that [REDACTED] did not provide any documentary evidence to corroborate that he currently or in the past employed individuals in parallel positions to the proffered position, nor did he provide any documentation to substantiate the claimed academic requirements. He failed to submit any probative evidence of his recruitment and hiring practices.

[REDACTED] states that he serves as owner and head trainer. He claims that "a trainer's experience is also crucial and critically evaluated." He then describes his training experience under Olympic Gold Medalist. However, he does not provide any information regarding his own academic credentials as a "trainer."

Further, [REDACTED] affidavit does 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 "international trainer" 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 AAO further observes that the letter contains no evidence that it was based on scholarly research conducted by [REDACTED] in the specific area upon which he is opining. [REDACTED] makes general claims about the educational requirements for trainers but he does not provide a substantive, analytical basis for his opinion and ultimate conclusion.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the affidavit rendered by [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by [REDACTED] 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. As such, neither the findings nor the ultimate conclusions are worthy of any deference, and the opinion letter is not probative evidence towards satisfying any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the opinion letter into each of the bases in this decision for dismissing the appeal.

On appeal, counsel claims that "a district court rejected USCIS' argument that for a job to qualify as a specialty occupation there must be a single specific degree that qualifies an individual for the occupation." Counsel cited an unpublished decision, *Residential Finance Corporation v. USCIS*, Case No. 2:12-cv-00008 (S.D. Ohio 2012), but did not provide a copy of the decision.

When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, neither the director nor the AAO was required to request and/or obtain a copy of the unpublished decisions cited by counsel.

If a petitioner wishes to have unpublished decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself through its own legal research and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i). In the instant case, the petitioner failed to submit a copy of the unpublished decisions. As the record of proceeding does not contain any evidence of the unpublished decisions, there were no underlying

facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding.

Further, the AAO notes that in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising not within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

In addition, contrary to counsel's assertion, the cited case does not support that "a baccalaureate or higher degree in a 'specific academic discipline' is not required for [a] an H-1B position." Instead, the court stated the following:

The knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge. *See Tapis Int'l. v. I.N.S.*, 94 F. Supp. 2d 172, 175-76 (D. Mass 2000).

As shown, the case does not state that "a baccalaureate degree in a 'specific academic discipline' is not required," but instead the court placed emphasis on "highly specialized and a prospective employee who has attained the credentialing indicating possession of that knowledge."

Moreover, in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties.¹⁰ Section 214(i)(1)(B) of the Act (emphasis added).

¹⁰ Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Further, the AAO notes that in response to the RFE, the petitioner listed two colleges that offer bachelor's degrees in equestrian studies. However, the fact that there are bachelor level programs in equestrian studies does not establish that at least a bachelor's degree in a specific specialty, or the equivalent, is normally the minimum requirement for entry into the occupation.

In this matter, the petitioner has not demonstrated that the position requires the theoretical and practical application of a body of highly specialized knowledge. The fact that a person may be employed in a position designated as that of an international trainer and may apply related 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 its particular position would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of knowledge in a specific specialty. This, the petitioner has failed to do.

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

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

The AAO acknowledges that the petitioner claims 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. On appeal, counsel claims that USCIS "does not take into account the unique and specialized nature of the position offered nor the highly specialized niche market of petitioner's business." Counsel asserts that the "petitioner's business is a highly specialized niche that develops elite international jumper horses, specifically Dutch Warmbloods that in the proper development processes and targeted market segments sell for up to \$150,000.00." Counsel also states that "the unique position offered involves complex and highly specialized duties for a niche market of national and international competition." Further, counsel claims that the petitioner submitted "evidence that [its] position is so complex and unique that it can only be performed by an individual with a degree." According to counsel, the "totality of [the] petitioner's unique and complex position is demonstrably a specialty occupation involving the combined skills and understanding of the physical sciences and an acute business specialty."

In support of this assertion, the petitioner and counsel submitted an organizational chart and statements from the petitioner, as well as evidence regarding the beneficiary's credentials.¹¹ The AAO reviewed the record in its entirety. However, a review of the record indicates that the

¹¹ In addition, the AAO acknowledges that the petitioner submitted a letter from [REDACTED]. However, as previously discussed in detail, 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).

petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. The AAO finds that the petitioner has not provided sufficient probative evidence 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. That is, the petitioner fails to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or its equivalent.

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

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

The AAO observes that the petitioner has indicated that the beneficiary's educational background and extensive experience in the industry will assist him in carrying out the duties of the proffered position. However, the standard to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner and counsel have not established which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has failed to establish the proffered position as satisfying this prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To

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

To 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. 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 the 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").

The petitioner stated in the Form I-129 petition that it was established in 2009 (approximately three years prior to the submission of the H-1B petition) and that it has eight employees.¹² In response to the RFE, the petitioner provided the following information:

Since beginning our farm in 2000 we have employed nine trainers. Five of the trainers were junior trainers, and all but one had college degrees. Three were from a well know[n] [redacted] and brought with them some very good skills in nutrition and training young horses. This made their transition faster and their contribution greater to our business. Only two of our trainers did not have college degrees. Our first trainer was without a college degree, and we quickly realized that we had made a mistake. We currently have a junior trainer without a college degree who rides well, but lacks some of the basic training, nutrition and horse health skills that we need to teacher her. This creates an extra demand on us.

Notably, the petitioner provides a general claim regarding its trainers as having had "college degrees." However, the requirement of a bachelor's degree, without further specificity, is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must

¹² The AAO notes that in response to the RFE, the petitioner indicated that it began in 2000. No explanation was provided for the discrepancy in when the petitioner began its business operations.

demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree without further specification does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

In the instant case, the petitioner did not provide any further information regarding the academic credentials of its trainers, such as the level of education (e.g., associate's degree, baccalaureate) and the specific disciplines or fields of study. Moreover, in the RFE, the director requested the petitioner submit supporting documentation (transcripts, pay records, wage reports). However, the petitioner elected to not submit any documentation regarding the trainers who currently or in the past served in the proffered position.

Further, while the petitioner provided a general statement that it had previously employed individuals to serve as trainers, the petitioner failed to provide the job duties and day-to-day responsibilities of the positions that it claims are the same or similar as the proffered position. The petitioner did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, aside from the general job title "Trainer," it is unclear whether the duties and responsibilities of these individuals were the same or related to the proffered position.

The petitioner also submitted an organizational chart that lists the names of employees and their positions. It does not state the academic credentials of any of the employees. Furthermore, the AAO observes that the petitioner did not submit any documentation regarding its recruiting practices.

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

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

On appeal, counsel asserts that the "totality of Petitioner's unique and complex position is demonstrably a specialty occupation involving the combined skills and understanding of the physical sciences and an acute business specialty." Counsel also states that the petitioner's "business is a highly specialized niche that develops jumper horses, specifically Dutch Warmbloods that in the proper developmental processes and targeted market segments sell for up to \$150,000.00."

Upon review of the record of proceeding, the AAO finds that the petitioner did not submit sufficient information about its business operations or the proffered position to establish that the nature of the specific duties of the proffered position is so specialized and complex that the knowledge required to perform them is usually associated with a bachelor's degree or higher in a specific specialty, or its equivalent.¹³ That is, relative specialization and complexity have not been developed by the petitioner as an aspect of the proffered position. In the instant case, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. Moreover, the AAO here incorporates its earlier discussion regarding the inconsistencies and discrepancies in the record of proceeding with regard to 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 Obaighena*, 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).

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

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the AAO need not and will not address the beneficiary's qualifications further.¹⁴

¹³ Again, the AAO acknowledges that the petitioner provided an affidavit from [REDACTED]. However, as previously discussed in detail the AAO finds that the advisory opinion letter is not probative of any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

¹⁴ The AAO acknowledges that the petitioner submitted an affidavit from [REDACTED]. The affidavit states that [REDACTED] serves as a professor of large animal clinical sciences at [REDACTED]. The affidavit is not on university letterhead and does not appear to be endorsed by the university.

[REDACTED] briefly describes the [REDACTED] veterinary medical school program. She then provides a statement regarding the beneficiary's qualifications and claims that his education appears to be the equivalent to a "baccalaureate degree in education with a major in physical education." Notably, there is no

For the reasons related in the preceding discussion, the AAO finds that the beneficiary is not qualified to perform the duties of a specialty occupation requiring a bachelor's or higher degree in a specific specialty, or its equivalent. Thus, the appeal must be dismissed and the petition denied for this reason.

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

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

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

evidence to suggest that [REDACTED] meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(3) which states that an evaluation of education may be provided by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials. However, as the petitioner has not established that the proffered position qualifies as a specialty occupation, the AAO will not address the beneficiary's qualifications and/or [REDACTED] affidavit further.