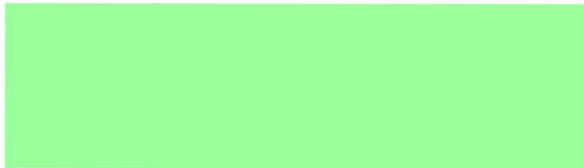




U.S. Citizenship  
and Immigration  
Services

(b)(6)



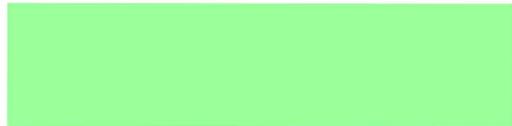
DATE: **FEB 25 2013**

OFFICE: VERMONT SERVICE CENTER



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:

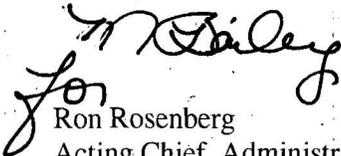
SELF-REPRESENTED

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  
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 turnkey office space, office management solutions, and business center established in 2005. In order to employ the beneficiary in what it designates as a business development manager position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, 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, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

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

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

The primary issue for consideration is whether the petitioner's proffered position qualifies as 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 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.

In the petition signed on October 28, 2011, the petitioner indicates that it is seeking the beneficiary's services as a business-development manager on a full-time basis at the rate of pay of \$65,187 per year. In the October 20, 2011 letter of support, the petitioner states the following:

As Business Development Manager at [the petitioning company], [the beneficiary] will be based out of [the petitioner's] beautiful [redacted] location in [redacted]. [The beneficiary's] duties and responsibilities will include, but are not be [sic] limited to: generating new business leads for both the business center and co-working components of [the petitioning] company; networking with commercial property agents and community groups to ensure high quality leads; contacting clients and hospitality and relocation managers in corporate America and the International sector to sell the company's portfolio of services; overseeing a new international division of the company related to investor relations; putting into place an enhanced Virtual Client Program catering to international clients; working directly with the CEO on international business development; managing operations of the 65,000 sq. feet office space; and developing a high level of awareness of the company/services among Fortune 500 and 100 global companies.

In addition, the petitioner states, "The position of Business Development Manager is a specialty occupation that requires at least a Bachelor's Degree in Hospitality or Event Management or Marketing and a minimum of one year of experience in the Hospitality Industry as the minimum requirements."

With the Form I-129 petition, the petitioner submitted a document entitled "Business Development Manager." The document states the duties and qualifications of the proffered position as follows:

As a Business Development Manager[, the beneficiary] is responsible for generating new business. Specifically, this involves networking with commercial property agents, community groups and developing relationships with them to ensure the highest possible level of leads and new business is generated, not only in the business center component, but in the coworking environment as well. The Business Development Manager will also create business opportunities directly by contacting existing and new clients, as well as hospitality and relocation managers of corporate America and the international sector, in order to sell the company's portfolio of services. Part of this role involves selling to clients face to face; therefore a consultative approach in hospitality and event management will be required.

Essential Duties and Responsibilities:

- Oversee new division of company – related to investor relations in the international sector (international experience required).
- Put in place an enhanced Virtual Client Program catering to International based corporations primarily from Spanish, Portuguese and French speaking countries.
- Work directly with owner in business development of new international markets within the European Union doing business in the United States.
- Work directly with owner in managing operations of 64,000 square feet of office space yielding over \$250K monthly revenue.
- Acquiring and developing a portfolio of international key accounts[.]
- Growing business from existing customers as well as creating the international pipeline.
- Reporting on sales activity[.]
- Development of a high level of awareness and the advancement of workspace as a service to fortune [sic] 500 & 100 global companies.

\* \* \*

#### Qualifications:

To perform this position successfully, an individual must be able to perform each essential duty satisfactorily. The requirements listed below are representative of the knowledge, skill, and or ability required.

- Minimum of one year [of] experience in the Hospitality Industry, preferably international.
- Bachelor's degree in Hospitality or Event Management or Marketing.
- Ability to read and interpret documents such as safety rules, operating and maintenance instructions, and procedure manuals. Ability to write routine reports and correspondence. Ability to speak effectively before groups of clients or employees of organizations. (French, English, Portuguese and Spanish preferred)[.]
- To perform this job successfully, an individual should be fluent in computer literacy in the following MS Office Suite, Website design and iWorks (others a plus).

The petitioner also submitted a copy of the beneficiary's Bachelor of Arts degree in Hospitality Management and Events Management and transcript from [REDACTED] in [REDACTED] awarded in June 2010.

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Marketing Managers" - SOC (ONET/OES Code) 11-2021, at a Level I (entry level) wage.

The petitioner also provided evidence in support of the petition, including, the following: (1) an excerpt entitled "Summary Report for: 11-2021.00 – Marketing Managers" from the Occupational Information Network (O\*NET); (2) an excerpt entitled "Advertising, Marketing, Promotions, Public Relations, and Sales Managers" from the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*); and (3) documentation regarding the petitioner's business operations and services; (4) financial documents for the petitioner; and (5) marketing materials promoting the petitioner's services.

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on November 10, 2011. The petitioner was asked to submit documentation (1) to establish that a specialty occupation position exists for the beneficiary; and (2) to establish the beneficiary qualifies for a specialty occupation. The director outlined the specific evidence to be submitted. The AAO notes that the director specifically requested the petitioner submit a detailed statement to: explain the beneficiary's proposed duties and responsibilities; indicate the percentage to time devoted to each duty; and state the educational requirements for these duties.

On January 9, 2012, the petitioner and counsel responded to the director's RFE. Specifically, the petitioner and counsel submitted, in part, (1) a letter from [REDACTED] (2) a letter from [REDACTED] (3) a document with excerpts from various university websites;<sup>1</sup> (4) a printout from [REDACTED] website regarding career opportunities available for graduates in the hospitality industry; (5) a document that lists a few courses studied by the beneficiary that the petitioner and counsel claim are relevant to the proffered position; (6) a printout that describes the term "Hoteling"; and (7) documentation regarding the petitioner's center manager, front desk coordinator, and client services coordinator.

In addition, the petitioner submitted an undated letter. In the letter, the petitioner provides the following about the beneficiary's duties in the proffered position:

[The beneficiary's] main focus will be in Business Development, with the South American and European Markets for [the petitioner's] new centers, as well as, supporting myself and my partner in the consulting aspects of [the petitioner's] Business, when it comes to development of new markets in that arena as well.

The AAO observes that despite the director's finding that the petitioner's description of the proposed duties was nonspecific, the petitioner elected not to provide a more detailed description of the duties the beneficiary would perform. Consequently, in the instant case, the petitioner did not provide any specific information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position, moreover, it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at

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<sup>1</sup> It must be noted for the record that one of the university websites indicates that the university is located in the United Kingdom and, therefore, it is irrelevant to the instant case.

irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position. No explanation for failing to submit this information was provided.

In addition, in the undated letter, the petitioner states that "it has become common practice and even a requirement in the industry for candidates to the position of business development manager to possess a minimum of a bachelor in hospitality and events management as well as international experience and language skills." However, as previously noted, in the October 20, 2011 letter of support and document entitled "Business Development Manager," the petitioner indicates that the proffered position requires a bachelor's degree in hospitality, event management, or marketing, and a minimum of one year of experience in the hospitality industry. No explanation for the variance was provided.<sup>2</sup>

The director reviewed the information provided by the petitioner and counsel to determine whether the petitioner had established eligibility for the benefit sought. 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 January 19, 2012. The petitioner submitted an appeal of the denial of the H-1B petition. With the appeal, the petitioner submitted additional evidence.<sup>3</sup>

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

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<sup>2</sup> The petitioner has provided inconsistent information as to the educational requirement for the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

<sup>3</sup> With regard to documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted for the first time on appeal.

(b)(6)

regulatory framework to the proffered position as described in the record of proceeding.

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

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

The AAO notes that it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's business is relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in or its equivalent in a specific specialty. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties.

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. 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). 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).

Upon review of the record of proceeding, the AAO notes that the petitioner's claimed entry requirement of at least a bachelor's degree in "Hospitality or Event Management or Marketing" for the proffered position, without more, is inadequate to establish that the proposed position qualifies

as a specialty occupation. 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. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," 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. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Again, the petitioner claims that the duties of the proffered position can be performed by an individual with a bachelor's degree in hospitality, event management, or marketing. The issue here is that it is not readily apparent that these fields of study are closely related or that all of the fields are directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, simply fails to establish either (1) that hospitality, event management, and marketing are closely related fields, or (2) that all of the fields are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty*, or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion. Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree.

As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal*

*Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).<sup>4</sup>

Furthermore, based upon a review of the record of proceeding, the AAO finds that there are additional discrepancies and inconsistencies with regard to the proffered position that preclude the approval of the petition. For instance, there are discrepancies between what the petitioner claims about the occupational classification and level of responsibility inherent in the proffered position set against the contrary occupational classification and level of responsibility conveyed by the wage level indicated on the LCA submitted in support of the petition.

As previously discussed, the petitioner submitted an LCA in support of the petition that designated the proffered position to the corresponding occupational category of "Marketing Managers" - SOC (ONET/OES) code 11-2021. The wage level for the proffered position in the LCA corresponds to a Level I (entry) position. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.<sup>5</sup> The LCA was certified on October 19, 2011. The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (O\*NET) occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.<sup>6</sup>

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<sup>4</sup> Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

*Id.*

<sup>5</sup> The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

<sup>6</sup> For additional information regarding prevailing wage determinations, see U.S. Department of Labor,

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) position, after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.<sup>7</sup> DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

In the October 20, 2011 letter of support, the petitioner states that the proffered position "requires at least a Bachelor's Degree in Hospitality or Event Management or Marketing and a minimum of one year of experience in the Hospitality Industry." In addition, the petitioner claims that the beneficiary's duties and responsibilities will include "overseeing a new international division of the company related to investor relations" and "managing operations of the 64,000 sq. feet office

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Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

<sup>7</sup> A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

space." In the document entitled "Business Development Manager," the petitioner states that "international experience [is] required" for the proffered position. In addition, the document includes the entries "Managing Staff" and "Project Management," which contain tasks such as "[t]akes responsibility for staffs' activities"; "[p]rovides regular performance"; "[d]evelops staffs' skills"; "[c]ontinuously works to improve supervisory skills"; "develops project plans"; and "[m]anages and coordinates team activities." Moreover, the petitioner claims that "French, English, Portuguese and Spanish preferred." In an undated letter submitted in response to the RFE, the petitioner asserts that it requires someone with "business savvy in adjusting to the various requirements, based on experience, command of foreign languages and well rounded global activities." According to the petitioner, it seeks "someone with property management experience, again fluent in at least two languages and able to give direction and work independently."<sup>8</sup> The petitioner further asserts that it is "a requirement in the industry for candidates to [sic] the position of business development manager to possess a minimum of a bachelor [degree] in hospitality and events management as well as international experience and language skills."

The AAO notes that this characterization of the position and the claimed duties, responsibilities and requirements conflict with the wage-rate element of the LCA, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. As noted above, a job offer for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

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

The AAO notes that the prevailing wage of \$65,187 per year on the LCA corresponds to a Level I for the occupational category of "Marketing Managers" for [REDACTED]. The petitioner stated in the Form I-129 petition and LCA that the offered salary for the proffered

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<sup>8</sup> The AAO notes that a language requirement other than English in a job offer generally is considered a special skill for all occupations (with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers) and must be reflected in the wage-level for the position.

<sup>9</sup> For additional information regarding the prevailing wage for marketing managers in [REDACTED] see the All Industries Database for 7/2011 - 6/2012 for Marketing Managers at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?code=11-2021&area=33124&year=12&source=1> (last visited February 13, 2013).

position was \$65,187 per year. Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$90,875 per year for a Level II position, \$116,563 per year for a Level III position, and \$142,251 per year for a Level IV position.

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

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

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

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

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

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

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

The statements regarding the claimed level of complexity, independent judgment and knowledge required for the proffered position, along with the petitioner's claimed requirements, are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

For the foregoing reasons, a review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial, the petition could still not be approved for this reason.

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. For efficiency's sake, the AAO hereby incorporates the above discussion and analysis into the record of proceeding regarding the beneficiary's proposed employment.

In the instant case, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation the AAO will now discuss in detail the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria

at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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. 1095, 1102 (S.D.N.Y. 1989)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>10</sup> As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Marketing Managers."

The AAO reviewed the chapter of the *Handbook* entitled "Advertising, Promotions, and Marketing Managers," including the sections regarding the typical duties and requirements for this occupational category.<sup>11</sup> However, the *Handbook* does not indicate that "Advertising, Promotions, and Marketing Managers" comprise an occupational group that requires at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation.

The subchapter of the *Handbook* entitled "How to Become an Advertising, Promotions, or Marketing Manager" states, in part, the following about this occupation:

#### **Education**

A bachelor's degree is required for most advertising, promotions, and marketing management positions. For advertising management positions, some employers prefer a bachelor's degree in advertising or journalism. A relevant course of study might include classes in marketing, consumer behavior, market research, sales, communication methods and technology, visual arts, art history, and photography.

Most marketing managers have a bachelor's degree. Courses in business law,

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<sup>10</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

<sup>11</sup> For additional information regarding the occupational category "Advertising, Promotions, and Marketing Managers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Advertising, Promotions, and Marketing Managers, on the Internet at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-1> (last visited February 13, 2013).

management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, completing an internship while in school is highly recommended.

### **Work Experience**

Advertising, promotional, and marketing managers typically have work experience in advertising, marketing, promotions, or sales. For example, many managers are former sales representatives; purchasing agents; buyers; or product, advertising, promotions, or public relations specialists.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Advertising, Promotions, and Marketing Managers, available on the Internet at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-4> (last visited February 13, 2013).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the wage level of the proffered position as a Level I position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results.

The *Handbook* does not support the assertion that a baccalaureate or higher degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry into the occupation. The *Handbook* states that for advertising management positions, some employers prefer a bachelor's degree in advertising or journalism. Clearly, a preference by *some employers* is not an occupational, entry requirement. The *Handbook* further states that a relevant course of study for these positions might include classes in marketing, consumer behavior, market research, sales, communication methods and technology, visual arts, art history, and photography. Thus, a range of courses of study are considered relevant for advertising management positions. The passage of the *Handbook* also states that most marketing managers have a bachelor's degree, but it does not indicate that any specific specialty is normally required for these positions.<sup>12</sup> The *Handbook*

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<sup>12</sup> Moreover, 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 these positions have a bachelor's degree, it could be said that "most" advertising, promotions, and marketing managers possess such a degree. It cannot be found, therefore, that the statement in the *Handbook* that a "[m]ost marketing managers have a bachelor's degree [in no specific specialty]" would equate to establishing that a baccalaureate or higher degree *in a specific specialty*, or its equivalent, is the normal minimum entry requirement for this occupation, much less for the particular position proffered by the petitioner (which as has been designated by the petitioner in the LCA as a Level I position). 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

indicates that courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous for marketing managers. The AAO notes that the courses that the *Handbook* indicates are advantages for marketing managers are in a wide-variety of disparate fields.<sup>13</sup> The *Handbook* does not conclude that normally the minimum requirement for entry into these positions is at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the *Handbook* does not support the assertion that the proffered position falls under 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 AAO reiterates that the *Handbook* does not denote that at least a bachelor's degree is normally the minimum requirement for entry into the occupation. However, assuming *arguendo* that the *Handbook* stated such a requirement (which it does not), the AAO reiterates that 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. As previously discussed, in such a case, the required "body of highly specialized knowledge" would essentially be the same. Again, 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. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," 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. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). 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.

Here, although the *Handbook* states that a bachelor's degree is required for most advertising, promotions, and marketing management positions, it also indicates that "[a] relevant course of study might include classes in marketing, consumer behavior, market research, sales, communication methods and technology, visual arts, art history, and photography" for advertising management positions. The *Handbook* further indicates that "[c]ourses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous" are advantageous for marketing managers. Thus, courses of study in a wide-range of disparate fields are considered relevant and/or

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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.

<sup>13</sup> The *Handbook* does not state that a degree in "hospitality and events management" is normally the minimum requirement for entry into the occupation.

advantageous for entry into the occupation. Notably, these dissimilar courses of study fail to delineate a specific specialty. Thus, the *Handbook's* narrative does not support the assertion that positions in this occupation normally require at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation.

With the initial petition, the petitioner submitted an O\*NET OnLine Summary Report for the occupational category "11-2021.00 - Marketing Managers" to support the assertion that the proffered position is a specialty occupation. The AAO reviewed the O\*NET OnLine Summary Report in its entirety. However, upon review of the of the Summary Report, the AAO finds that it is insufficient to establish that the position qualifies as a specialty occupation normally requiring at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation. The Summary Report for marketing managers has a designation of Job Zone 4. This indicates that a position requires considerable preparation. It does not, however, demonstrate that a bachelor's degree in any *specific specialty* is required, and does not, therefore, demonstrate that a position so designated is a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). The O\*NET OnLine Help Center provides a discussion of the Job Zone 4 designation and explains that this zone signifies only that most, but not all of the occupations within it, require a bachelor's degree. See O\*NET OnLine Help Center at <http://www.onetonline.org/help/online/zones>. Further, the Help Center discussion confirms that a designation of Job Zone 4 does not indicate any requirements for particular majors or academic concentrations.

In addition, the AAO notes that the petitioner highlighted the "SVP [Specialized Vocational Preparation] Range (7.0 to < 8.0)" in the Summary Report. It must be noted that an SVP rating of 7.0 to < 8.0 is not indicative of a specialty occupation. This is obvious upon reading Section II of the *Dictionary of Occupational Titles* (hereinafter the *DOT*) – Appendix C, Components of the Definition Trailer, which addresses the SVP rating system.<sup>14</sup> The section reads:

## II. SPECIFIC VOCATIONAL PREPARATION (SVP)

Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

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<sup>14</sup> Section II of the *DOT's* Appendix C, Components of the Definition Trailer, can be found on the Internet at the website [http://www.occupationalinfo.org/appendxc\\_1.html#II](http://www.occupationalinfo.org/appendxc_1.html#II).

- a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);
- b. Apprenticeship training (for apprenticeable jobs only);
- c. In-plant training (organized classroom study provided by an employer);
- d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);
- e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years

Note: The levels of this scale are mutually exclusive and do not overlap.

Thus, an SVP rating of 7.0 to < 8.0 does not indicate that at least a four-year bachelor's degree is required, or more importantly, that such a degree must be in a specific specialty directly related to the duties and responsibilities of that occupation. Therefore, despite the petitioner's assertion to the contrary, the O\*NET Summary Report is also not probative evidence that the proffered position qualifies as a specialty occupation.

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding 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)(I).

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

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

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

In the Form I-129 and supporting documents, the petitioner stated that it is a turnkey office space, office management solutions, and business center established in 2005. The petitioner further stated that it has three employees and a gross annual income of \$625,000. The petitioner indicated that its net annual income is \$220,000. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 561110.<sup>15</sup> The AAO notes that this NAICS code is designated for "Office Administrative Services." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments primarily engaged in providing a range of day-to-day office administrative services, such as financial planning; billing and recordkeeping; personnel; and physical distribution and logistics for others on a contract or fee basis. These establishments do not provide operating staff to carry out the complete operations of a business.

U.S. Dep't of Commerce, U.S. Census Bureau, 2007 NAICS Definition, 561110 – Office Administrative Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 13, 2013).

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

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<sup>15</sup> According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited February 13, 2013).

petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). Notably, it is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

In response to the RFE, the petitioner and counsel submitted a letter from [REDACTED] in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. The letter is dated December 9, 2011. The AAO reviewed the document in its entirety. Notably, the letter does not provide any information regarding the association, (e.g., primary function, size of association, requirements for membership).<sup>16</sup> Moreover, [REDACTED] did not provide any documentation to establish his credentials as a recognized authority on the relevant industry-hiring standards. [REDACTED] did not identify the specific elements of his knowledge and experience that he may have applied in reaching his conclusions here. [REDACTED] does not indicate that he relied on any authoritative sources to support his assertions. He 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. Thus, this prong of the regulations has not been established by the letter from [REDACTED]

In addition, in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner and counsel submitted a letter from [REDACTED] in response to the RFE. The AAO reviewed the letter and observes that the letter lacks sufficient information regarding the organization to conduct a meaningfully substantive comparison of the [REDACTED] business operations to the petitioner. The letter does not provide information regarding which specific aspects or traits (if any) it shares with the petitioner. Notably, the petitioner failed to provide any supplemental information to establish that the organization is similar to the petitioner. Thus, from the onset, this prong of the regulations has not been established by [REDACTED] ("the writer").

Furthermore, the writer failed to provide any specific job duties and day-to-day responsibilities for

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<sup>16</sup> On appeal, the petitioner submitted a letter from [REDACTED] dated February 14, 2012. The letter states that [REDACTED] is an "international trade association representing the spectrum of those who provide workspace-as-a-service." Notably, the document lacks such information as the size of association, requirements for membership, when it was established, etc.

[REDACTED] continues by stating that membership provides "an invaluable professional edge" but fails to provide any further details. He also claims that [REDACTED] "long-term goals are; [sic] (1) [REDACTED] will be the members' primary valued resource for knowledge exchange, professional growth and business support; and (2) [REDACTED] will be the recognized source of information about, and authority on, the workplace-as-a-service industry." [REDACTED] states that the long-term goal of the association is to be a recognized source and authority on the industry, but does claim, or provide any documentation to substantiate, that the association is currently an authoritative source or authority on any particular issues, including the educational requirements for business development managers.

its business development manager position. There is no information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, there is insufficient information regarding the duties and responsibilities of the position to determine whether it is the same or parallel to the proffered position. Moreover, the AAO observes that the writer did not provide any documentary evidence to corroborate that it currently or in the past employed individuals in parallel positions to the proffered position, nor did she provide any documentation to substantiate the claimed academic requirements. The writer has failed to submit any probative evidence of its recruitment and hiring practices. Thus, the letter does not establish that the proffered position qualifies as a specialty occupation.

On appeal, the petitioner submitted copies of several job advertisements. With regard to the advertisements, the AAO notes that this evidence was encompassed by the director's RFE but only submitted on appeal. It is, therefore, outside the scope of the appeal. As previously discussed, the regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764; *see also Matter of Obaigbena*, 19 I&N Dec. 533. If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted for the first time on appeal.

Nevertheless, the AAO reviewed the advertisements, however, the AAO finds that the petitioner's reliance upon the job vacancy advertisements is misplaced. Notably, the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documentation, the petitioner fails 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.

For instance, the advertisements include positions with Philips International (a company in the lighting industry), Therapy Direct (a company in the healthcare services industry), and Acclarent, Inc. (a medical device company). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. Furthermore, the petitioner submitted job postings placed by staffing firms (Ajilon Professional Staffing and Jobs In Sports.com) for which little or no

(b)(6)

information regarding the employers is provided. Consequently, the record is devoid of sufficient information regarding the advertising employers to conduct a legitimate comparison of the organizations to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

Moreover, some of the advertisements do not appear to be for parallel positions. For example, the petitioner submitted postings for the following: Servcorp Smart Office for a receptionist/executive assistant position and an administrative assistant position; Therapy Direct for a workers' compensation business development manager position; and Regus for an area director position, a head of portfolio management office position, and a head of business intelligence and reporting position. These positions do not appear to have similar duties to the proffered position. For these postings, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position. The fact that the petitioner and counsel submitted these job postings, and assert that these positions are relevant here (suggesting that they are similar or parallel to the proffered position) further undermines the credibility of the petitioner's statements regarding the nature of the proffered position and in what capacity the beneficiary will actually be employed.

Additionally, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, some of the postings state that a bachelor's degree is required, but they do not provide any further specification. These include the following advertisements: Ajilon; Therapy Direct; Jobs In Sports.com; Servcorp Smart Office; and two of the Regus positions. Thus, they do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required. The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the specialty occupation claimed in the petition. The AAO also notes that three of the advertisements (specifically, the postings for Ajilon, one of the Regus positions, and Acclarent) indicate that a general degree is only preferred. Clearly an employer's *preference* is not an indication of a minimum requirement. Furthermore, only part of the printout was provided for the position with Philips International, and the section of the advertisement submitted by the petitioner does not contain any educational requirements for the position. Notably, none of the advertisements indicates that at least a bachelor's degree in hospitality and/or event management or marketing is required.

The AAO reviewed all of the advertisements submitted on appeal.<sup>17</sup> However, as discussed, 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 for parallel positions in organizations similar to the petitioner.

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<sup>17</sup> As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

It must be noted that even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.

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

As such, even if the job announcements supported the finding that the proffered position for organizations similar to the petitioner required a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the 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.

With the appeal, the petitioner also submitted a printout from TotalJobs.com, which provides a job description for a business development manager in the United Kingdom. The petitioner has not demonstrated its relevancy in establishing the academic requirements in the United States. Moreover, in the subsection entitled "Entry," the document states that "[t]here are no defined routes for business development managers. Personal qualities, particularly the ability to communicate, plus sales experience and market knowledge, are more important than formal qualifications." The printout further states that "[t]raining is essentially completed on the job." The printout is not probative evidence in establishing the proffered position qualifies as a specialty occupation.

Thus, based upon a complete review of the record, 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 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.

In the instant case, the petitioner submitted documentation regarding its business operations, including its articles of incorporation; office lease; various agreements and invoices; financial

documents (e.g., bank statement, tax returns); and marketing/promotional materials. Upon review of the record of proceeding, the AAO finds that the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of business development manager. That is, the AAO reviewed the record in its entirety and finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. The petitioner has not developed or established complexity or uniqueness as attributes of the proffered position that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent. Moreover, the petitioner does not assert 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.

In the instant case, the petitioner failed to demonstrate exactly what the beneficiary will do on a day-to-day basis such that relative complexity or uniqueness of the position can even be determined. Specifically, the petitioner failed to demonstrate that the proposed duties as described in the record of proceeding would constitute a position that would be so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge that could only be provided by a person with a bachelor's or higher degree in a specific specialty, or its equivalent.

Also, the AAO observes that 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 of the proffered position. The AAO notes that in response to the RFE, the petitioner and counsel submitted a document with excerpts from various university websites, a printout from Glion Institute of Higher Education's website regarding career opportunities available for graduates in the hospitality industry, and a document that lists a few courses studied by the beneficiary that they claim are relevant to the proffered position. However, while a few related courses may be beneficial, or even required, in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

Additionally, there is the aforementioned countervailing impact of the LCA's wage level. As noted earlier, the LCA indicates a wage level based upon the occupational classification "Marketing Managers" at a Level I (entry level) wage. This designation is appropriate for positions for which the petitioner expects the beneficiary to have a basic understanding of the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.<sup>18</sup> Notably, a position classified at a Level IV (fully competent) position is designated by DOL for

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<sup>18</sup> For additional information on wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." Thus, the wage level designated by the petitioner in the LCA for the proffered position is not consistent with claims that the position would entail any particularly complex or unique duties or that the position itself would be so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent.

The evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred courses acceptable for such positions, including coursework that may lead to degrees not in a specific specialty or not in a specific specialty directly related to the duties and responsibilities of the proffered position. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background and experience in the industry will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner and counsel do not sufficiently explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, 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. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

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

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

The petitioner stated in the Form I-129 petition that it has three employees and that it was established in 2005 (approximately six years prior to the H-1B submission). The petitioner did not provide the total number of people it has employed to serve in the proffered position. The petitioner also did not submit any documentation regarding employees who previously held the position. Moreover, the petitioner did not submit any documentation regarding its recruiting and hiring practices.

In the undated letter submitted in response to the RFE, the petitioner stated, "Please check out our Current Job Postings." However, the AAO reviewed the entire record of proceeding but finds that the petitioner's job postings were not submitted. However, the record contains job descriptions for several of the petitioner's positions, including the Center Manager, Front Desk Coordinator and Client Services Coordinator. The job descriptions indicate the petitioner does not have a degree requirement for these positions.

Upon review of the record, the petitioner has not provided probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. 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.

As previously mentioned, the petitioner provide documentation regarding its business operations, including its articles of incorporation; office lease; various agreements and invoices; financial documents (e.g., bank statement, tax returns); and marketing/promotional materials. Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided sufficient probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than positions that are not usually associated with a degree in a specific specialty. Moreover, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category of "Marketing Managers." The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation."

Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.

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).

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

A 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 petitioner has failed to establish that the proffered position requires a baccalaureate or higher degree in a specific specialty, or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

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 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's 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.