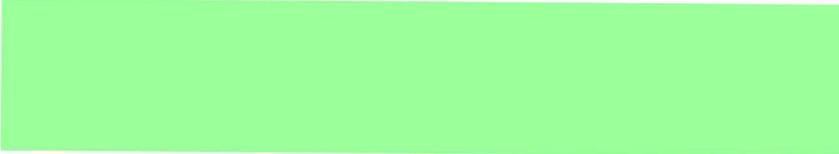
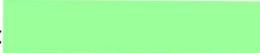


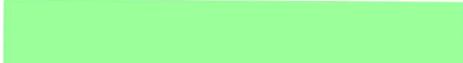


U.S. Citizenship  
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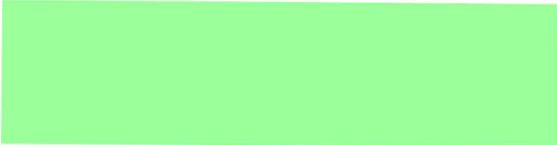
DATE: **JAN 09 2013** OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner: 

Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,



Ron Rosenberg,  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, (“the director”) denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

The petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that it is a retail liquor business established in 2009 with two employees and a gross annual income of approximately \$686,219 and an undisclosed net annual income. The petitioner seeks to employ the beneficiary as a business analyst and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on December 19, 2011, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner contends that the director’s basis for denial of the petition was erroneous.

The record of proceeding before the AAO contains: (1) the petitioner’s Form I-129 and supporting documentation; (2) the director’s request for evidence (RFE); (3) the response to the RFE; (4) the director’s denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, with counsel’s brief. The AAO reviewed the record in its entirety before issuing its decision.

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

As a preliminary matter, the AAO notes that even if the petitioner overcame the basis for the director’s denial of the petition (which it has not), the petition must still be denied.<sup>1</sup> Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to submit a Labor Condition Application (LCA) that corresponds to the petition. For this additional reason, which is considered as an independent and alternative basis for the denial of the petition, the petition may not be approved.

In this matter, the petitioner stated that it seeks the beneficiary’s services as a business analyst. In an April 7, 2011 letter appended to the Form I-129, the petitioner provided a broad and repetitive overview of the duties of the position, indicating that the beneficiary would:

- Analyze operating procedures to devise efficient methods for accomplishing work, and plans [sic] study of work problems and procedures such as information flow, inventory control, and cost analysis;

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<sup>1</sup> The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). It was in this review that the AAO observed additional grounds for denial of the petition, which, although not noted by the director, nevertheless precludes approval of this petition.

- Gather and organize information and consider available solutions or alternate methods and recommend for implementation of new systems, procedures and organizational changes;
- Analyze accounts and monitor the accuracy of invoices and provide progress reports and suggestions, and will ensure smooth transactions of billings and invoices, and provide precise budgeting forecasts and reports;
- Prepare regular and special budget reports so that [the petitioner] can better track its expenses and maintain its profitability;
- Analyze accounting reports to maintain control of expenditures;
- Examine budget estimates and submit recommendations for the approval or disapproval of funds requests;
- Review the operating budget to analyze trends affecting budget needs and ensure that appropriate budget adjustments are made;
- Compile and analyze accounting records and other financial data, monitoring the accuracy of invoices, and performing cost-benefit analyses; and
- Ensure smooth invoice transitions, and as part of his accounting reports analysis duties, analyze A/P and A/R, cash, ledger, and time and expense payroll as a basis for improving bottom line profitability and reporting profits and losses to management.

[Bullets added.]

The petitioner indicated that the beneficiary's primary duties would fall into certain categories and provided an estimated percentage of time that would be devoted to each function as follows:

- Analyze operating procedures to devise efficient methods for accomplishing work, planning study of work problems and procedures such as information flow, inventory control and cost analysis – 30 percent;
- Gather and organize information and consider available solutions or alternate methods and recommendations for implementation of new systems, procedures and organizational changes – 10 percent;
- Analyze accounts and monitor the accuracy of invoices and provide progress reports and suggestions – 30 percent;
- Ensure smooth transactions of billings and invoices, and provide precise budgeting forecasts and reports – 30 percent.

The petitioner noted that a bachelor's degree in business administration, management or a closely related field is the minimum educational requirement for the proffered position. The petitioner also submitted a certified 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 "Budget Analysts" - SOC (ONET/OES Code) 13-2031 and was certified for a validity period of 18-months from September 26, 2011 until April 1, 2013.<sup>2</sup> The LCA notes that the wage level for the proffered position is at a Level 1 (entry level) wage.

<sup>2</sup> Counsel and the petitioner refer to the proffered position as that of a business analyst, an occupation that includes different duties than that of a budget analyst. USCIS, however, examines the actual employment requirements and, on the basis of that examination, determines whether the position qualifies

Upon review of the submitted documentation, the director found the evidence insufficient to establish eligibility for the benefit sought and issued an RFE on June 13, 2011. With the RFE, the director notified the petitioner that additional documentation was required to establish that the proffered petition met the criteria for H-1B classification. The AAO finds that, in the context of the record of proceeding as it existed at the time the RFE was issued, the request for additional evidence was appropriate, not only on the basis that it was seeking required initial evidence, but also on the basis that it was material in that it addressed the petitioner's failure to submit documentary evidence establishing the proffered position as a specialty occupation.

In the petitioner's July 27, 2011 letter in response to the RFE, the petitioner repeated the initially described duties of the proffered position, added a phrase "make recommendations, oversee implementation for improvements to [the petitioner's] system," to several of the listed duties and provided an estimate of the time devoted to each of the duties as follows:

- Analyze operating procedures to devise efficient methods for accomplishing work, and planning study of work problems and procedures such as information flow, inventory control, and cost analysis - 25 percent;
- Gather and organize information and consider available solutions or alternate methods and recommend for implementation of new systems, procedures and organizational changes – 10 percent;
- Analyze accounts and monitor the accuracy of invoices and provide progress reports and suggestions, and will ensure smooth transactions of billings and invoices, and provide precise budgeting forecasts and reports – 25 percent;
- Prepare regular and special budget reports to better track company expenses and maintain its profitability, oversee implementation for improvements to [the petitioner's] system – 5 percent;
- Analyze accounting reports to maintain control of expenditures and oversee implementation for improvements to [the petitioner's] system – 5 percent;
- Examine budget estimates and submit recommendations for the approval or disapproval of funds requests – 5 percent;
- Review the operating budget to analyze trends affecting budget needs and ensure that appropriate budget adjustments are made – 5 percent;
- Compile and analyze accounting records and other financial data, monitoring the accuracy of invoices, and performing cost-benefit analyses, make recommendations and oversee implementations for [the petitioner's] system – 5 percent;
- Ensure smooth invoice transitions, and as part of his accounting reports analysis duties, analyze A/P and A/R, cash, ledger, and time and expense payroll as a basis for improving bottom line profitability and reporting profits and losses to management, make recommendations and oversee implementation for improvements to [the petitioner's] system – 5 percent;

The petitioner also added a marketing duty indicating that the beneficiary would spend 10 percent of his time "Analyze[ing] market competition and mak[ing] recommendations to acquire

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as a specialty occupation. *See generally* *Defensor v. Meissner*, 201 F.3d 384 (5<sup>th</sup> Cir. 2000). In this pursuit, the critical element is not the title of the position but the actual duties of the position.

or open new stores.” The petitioner provided a copy of its business plan and indicated that it needed the beneficiary’s expertise and business systems analysis and recommendations to closely monitor its budget and expenditures to ensure systems enhancement and improved profitability. The petitioner noted that it had used the services of an accountant in the past but that the accountant does not provide business analysis services and that the estimated costs of hiring an outside firm for such analysis and service is more expensive than hiring a part-time business analyst for approximately 18 months. The petitioner added that hiring a business analyst would also free up the owner’s time to grow the business and expand its market share. The petitioner also provided a copy of the employment offer made to the beneficiary, which provided an almost verbatim description of the expected duties of the proffered position as the petitioner had initially stated when providing the initial breakdown of duties by function and the allocation of time associated with each function.

On appeal, counsel for the petitioner asserts that the petitioner’s owners “planned to hire a temporary, part-time Business Analyst to oversee improvements to the company’s computer business systems, to perform market research, and to analyze market conditions, operating procedures, budgets, and accounts in connection with the proposed expansion of Petitioner’s operations.”

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. To make this determination, the AAO turns to the record of proceeding. To ascertain the intent of a petitioner, United States Citizenship and Immigration Services (USCIS) must look 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. 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.”

When determining eligibility for H-1B classification, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers 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 petitioner stated that its budget analyst would analyze the petitioner’s operating procedures and systems, analyze accounts and accounting reports, examine budget estimates, and make recommendations and oversee the implementation of improvements to its systems.<sup>3</sup> However, the petitioner’s

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<sup>3</sup>The AAO observes that the petitioner impermissibly added a marketing duty in one of its descriptions of the proposed duties which was provided in response to the RFE and then allocated 10 percent of the beneficiary’s time to the claimed marketing duty. However, expanding the beneficiary’s duties, by adding a marketing duty, is a material change to the proposed duties of the proffered position. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, a petitioner cannot offer a new position to the beneficiary, or materially change a position’s title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin*

description of duties and the level of responsibility inherent within the description when set against the contrary level of responsibility conveyed by the wage level indicated on the LCA submitted in support of the petition undermines the petitioner's credibility with regard to the actual nature and requirements of the proffered position.

That is, the petitioner's assertions regarding the proffered position are questionable when reviewed in connection with the LCA submitted with the Form I-129 petition. As previously mentioned, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational title of "Budget Analysts" - SOC (ONET/OES Code) 13-2031, at a Level 1 (entry level) wage.

We observe that wage levels should be determined only after selecting the most relevant 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>4</sup> Prevailing wage determinations start with an entry level wage and progress to a wage that is commensurate with that of a Level 2 (qualified), Level 3 (experienced), or Level 4 (fully competent worker) 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>5</sup> The 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 "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of

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*Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's RFE did not clarify or provide more specificity to the original duties of the position, but rather added a new generic duty or duties to the job description. Accordingly, the analysis of the proffered position will be based on the job description submitted with the initial petition.

<sup>4</sup> See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. November 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>5</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.

the wage levels.<sup>6</sup> A Level 1 wage rate is described by DOL as follows:

**Level 1** (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.

The petitioner claims that the duties of the proffered position require the successful incumbent to exercise a high level of responsibility and expertise including providing analysis and recommendations; however, the AAO must question the level of complexity and independent judgment and understanding required for the position as the LCA is certified for a Level 1 entry-level position. The LCA's wage level indicates the position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands and level of responsibilities of the proffered position. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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

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<sup>6</sup> See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. November 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

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

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

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.

[Italics added]. 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 of the proffered position, that is, specifically, that corresponds to the level of work and responsibilities that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and responsibilities in accordance with the requirements of the pertinent LCA regulations. For this additional reason the petition may not be approved.

The AAO finds that, fully considered in the context of the entire record of proceedings, including the requisite LCA, the petitioner failed to provide a consistent characterization of the nature of the proffered position and in what capacity the petitioner actually intended to employ the beneficiary. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho, supra*.

It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below for dismissing the appeal.

Next, the AAO will address the issue of whether the petitioner established that the proffered position is a specialty occupation. Based upon a complete review of the record of proceeding, the AAO concurs with the director's ultimate decision and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

Preliminarily, we acknowledge counsel's assertion that the director erred in determining the proffered position was not a specialty occupation based on the petitioner's size; however, we do not find this assertion persuasive. The director's opinion that a business the petitioner's size would normally contract out for the services of a business analyst was unnecessary and accordingly, the opinion is withdrawn. However, we find no error in the director's ultimate determination that the proffered position as described does not constitute a specialty occupation. Counsel also contends that the director mistakenly believed that the petitioner had requested

H-1B classification for the beneficiary for three years rather than 18 months as set out in the LCA and the Form I-129. We observe that whether or not the director implied that the petitioner had requested the duration of the validity period to extend beyond 18 months is not the issue. The overarching reason for the denial of the petition is the failure to establish that the proffered position is a specialty occupation. As is discussed below, the petitioner has not established the proffered position is a specialty occupation regardless of the duration of the requested validity period. Counsel avers that the director also failed to consider the petitioner's growth and plans to open or acquire five new stores over the next five years. Although the director does not directly reference the petitioner's business plan, again the determination based upon the evidence of record including the petitioner's business plan does not establish that the proffered position constitutes a specialty occupation.

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

Section 214(i)(1) of the 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, supra*. 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), 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.

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position. The AAO recognizes the DOL’s *Occupational Outlook Handbook (Handbook)*<sup>7</sup> as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.

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<sup>7</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. Our references to the *Handbook* are from the 2012-13 edition available online.

Regarding the education and training for budget analysts, the *Handbook* states:

A bachelor's degree is typically required, although some employers prefer candidates with a master's degree.

The *Handbook* further reports:

Employers generally require budget analysts to have at least a bachelor's degree. However, some employers may require candidates to have a master's degree. Because developing a budget requires strong numerical and analytical skills, courses in statistics or accounting are helpful. For the federal government, a bachelor's degree in any field is enough for an entry-level budget analyst position. State and local governments have varying requirements but usually require a bachelor's degree in one of many areas, such as accounting, finance, business, public administration, economics, statistics, political science, or sociology.

Sometimes, budget-related or finance-related work experience can be substituted for formal education.

In this matter as observed above, the petitioner specifies only that it requires a bachelor's degree in business administration or management or a related field for the above position. The *Handbook* indicates that a disparate group of disciplines, varying from a generalized business administration degree to a degree in sociology, are acceptable for employment as a budget analyst. However, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question to establish a position as a specialty occupation. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). In that regard, the petitioner's specified acceptance of a general business administration degree to be employed in the proffered position is tantamount to an acknowledgement that the position is not a specialty occupation.

Moreover, as above footnoted, the petitioner's general description of the duties of the proffered position corresponds more closely to the *Handbook's* description of a business or management analyst. For example, the *Handbook* indicates that management analysts "propose ways to improve an organization's efficiency. They advise managers on how to make organizations more profitable through reduced costs and increased revenues." Some of the duties in the *Handbook's* chapter on management analysts that generally correspond to the petitioner's description of the proffered position are:

- Gather and organize information about the problem to be solved or the procedure to be improved;
- Analyze financial and other data, including revenue, expenditure, and employment reports, including, sometimes building and using sophisticated mathematical models;
- Develop solutions or alternative practices;

- Recommend new systems, procedures, or organizational changes;
- Make recommendations to management through presentations or written reports.

The *Handbook* indicates that a bachelor's degree is the typical entry-level requirement for a management analyst and that "many fields of study provide a suitable education because of the range of areas that management analysts address." The *Handbook* reports "common fields of study include business, management, accounting, marketing, economics, statistics, computer and information science, and engineering." Again, the variety of appropriate fields of study to become a business or management analyst demonstrates that such a position is not categorically a specialty occupation.

The petitioner's general description of the proffered position also includes elements similar to that of an accountant, as the *Handbook* reports accountants, among other things, perform the following duties:

- Organize and maintain financial records;
- Assess financial operations and make best-practices recommendations to management;
- Suggest ways to reduce costs, enhance revenues, and improve profits.

Although the *Handbook* reports: "Most accountant and auditor positions require at least a bachelor's degree in accounting or a related field," "most" is not indicative that a position normally requires at least a bachelor's degree, or its equivalent, in a specific specialty.<sup>8</sup>

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, 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. Although a general-purpose bachelor's degree, or a degree in a variety of fields, may be acceptable for a particular occupation, such a general requirement does not 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. Therefore, absent evidence of a direct relationship between the claimed degrees referenced in the *Handbook* as acceptable degrees for the various occupations that appear to relate to the duties and responsibilities of the proffered position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. We also reference and reiterate our earlier discussion that the LCA for the

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<sup>8</sup> The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "Greatest in number, quantity, size, or degree." As such, if merely 51% of the positions require at least a bachelor's degree in specific specialty, it could be said that "most" of the positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner.

proffered position indicates the proffered position is a low-level, entry position relative to others within the occupation and that based upon the wage level, the beneficiary is only required to have a basic understanding of the occupation. As the *Handbook* does not support the proposition that the proffered position is one that normally requires a minimum of a bachelor's degree, or the equivalent in a specific specialty, to satisfy this first alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue.

In this matter, the petitioner has not provided that evidence. Furthermore, the generic duties and requirements of the proffered position as described in the record of proceeding do not indicate that this position is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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.

Again, 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).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The petitioner does not submit letters from the industry's professional association or letters or affidavits from other firms or individuals in the industry. A review of the four job advertisements submitted also fails to demonstrate an industry-wide standard for the occupation of a business analyst performing duties parallel to the duties described in this matter in businesses that are similar to the petitioner.

First, for the petitioner to establish that an advertising organization is similar, it must demonstrate that the 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). As the director determined, the petitioner has not established that the organizations advertising for the position of business analyst are similar to the petitioner. Second, 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 the advertisements are only solicitations for hire, they are not evidence of the employers' actual hiring practices. Moreover, upon review of

the documents, the AAO finds that they do not establish that requiring a bachelor's degree, in a specific specialty, is common to the petitioner's industry in similar organizations for parallel positions. Only one of the four advertisements references fields of study as required and that advertisement lists a bachelor's degree in the disparate fields of business analysis, mathematics, finance, computer science or a related field as acceptable, rather than a bachelor's degree in a specific discipline. The other three advertisements list a general bachelor's degree as the required credential with no requirement of a specific field of study.

Moreover, it must be noted that even if all of the job postings indicated that 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 these few 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). 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 position required a bachelor's or higher degree in a specific specialty or its equivalent for organizations that are similar to the petitioner, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

Accordingly, based upon a complete review of the record, the petitioner has not established that at least a bachelor's degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and (2) located in organizations 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 petitioner has also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree is not required in a specific specialty. The petitioner has not provided evidence to distinguish the proffered position as unique from or more complex than other business/budget analyst positions, such as those described in the *Handbook*, which can be performed by persons without a specialty degree or its equivalent. The AAO has reviewed the petitioner's business plan and acknowledges its intent to grow and expand its business. However, the petitioner in its July 27, 2011, letter indicated: "the hiring of a Business Analyst will free up [the owner's] time to concentrate on other duties as Owner[,] to grow [the petitioner's] business and expand market share." Accordingly, it appears that the petitioner intended that its owner would assume the

duties of growing and expanding the business leaving the beneficiary to perform the routine non-qualifying duties of the proffered position.

In that regard, we again hereby incorporate by reference and reiterate the earlier discussion that the LCA for the proffered position indicates the proffered position is a low-level, entry position relative to others within the occupation. Based upon the wage level, the beneficiary is only required to have a basic understanding of the occupation. Furthermore, based upon that LCA wage level, the beneficiary is expected to perform routine tasks that require limited, if any, exercise of independent judgment. The record does not sufficiently demonstrate how the duties of the proffered position require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them.

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

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) -- the employer normally requires a degree 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 when considering this criterion.

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 a specific specialty, in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. While a petitioner may believe or otherwise assert that a proffered position requires a 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 employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner, supra*. In other words, if a petitioner's degree requirement is only symbolic and 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").

In the instant matter, the petitioner has not provided evidence that it previously hired someone to occupy the proffered position. Accordingly the petitioner has not established that it normally requires at least a bachelor's degree, or the equivalent, in a specific specialty for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. To the extent that they are depicted in the record, the generic duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Moreover, the AAO again incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position on the LCA as a low, entry-level position relative to others within the occupation. The petitioner designated the position as a Level 1 position (out of four possible wage-levels), which DOL indicates is appropriate for “beginning level employees who have only a basic understanding of the occupation.”<sup>9</sup> Without further evidence, it is simply not credible that the petitioner’s proffered position is one with specialized and/or complex duties as such a position would likely be classified at a higher-level, requiring a significantly higher prevailing wage.

We also find that the petitioner’s designation of the proffered position as a budget analyst on the LCA and as a business analyst in the documentary evidence submitted in support of the petition further compromises the actual nature of the proffered position. It is noted that, if the petitioner seeks to employ the beneficiary in two distinct occupations, the petitioner should file two separate petitions, requesting concurrent, part-time employment for each occupation. While it is not the case here, if a petitioner does not file two separate petitions and if only one aspect of a combined position qualifies as a specialty occupation, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. *See generally* 8 C.F.R. § 214.2(h). Furthermore and as is the case here, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation and the payment of wages commensurate with the higher paying occupation. *See generally* 8 C.F.R. § 214.2(h); DOL, *Employment and Training Administration's Prevailing Wage Determination Policy Guidance (Revised Nov. 2009)*. Thus, filing separate petitions would help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion with regard to the proper classification of the position being offered.

Upon review of the complete record, the petitioner has not provided sufficient probative evidence to establish that the nature of the specific duties outlined is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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<sup>9</sup> See DOL, *Employment and Training Administration's Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. November 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the additional, supplement requirements 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. Thus, the appeal will be dismissed and the petition denied for this reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, (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. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has not been met.

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