



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JAN 11 2013

OFFICE: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on November 22, 2010. In the Form I-129 visa petition, the petitioner describes itself as a full service information technology solutions provider and reseller of computer and general merchandise established in 1992. In order to employ the beneficiary in what it designates as an internal auditor/logistics 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 on January 21, 2011, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, the petitioner and counsel submitted a brief and additional evidence.

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 and supporting documentation. 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's decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

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

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as an internal auditor/logistics to work on a full-time basis at salary of \$20.87 per hour.² In a support letter dated November 15, 2010, the petitioner provided a job description of the proffered position. The petitioner also stated that "the position requires a Bachelor of Science in Business

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

² On the Form I-129 petition, the petitioner stated on page 3 that the beneficiary would be paid \$834.80 per week and on page 13 that the beneficiary would be paid \$43,409.60 per year. The petitioner stated on the LCA that the beneficiary would be paid \$20.87 per hour.

Administration with concentration in Business Management with two years of related experience in Audit operations."

Further, the petitioner submitted an LCA in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Accountants and Auditors" – SOC (ONET/OES Code) 13-2011, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on December 6, 2010. The director outlined the evidence to be submitted. The AAO notes that the director specifically requested the petitioner submit probative evidence to establish that the proffered position is a specialty occupation. In the RFE, the director acknowledged that the petitioner had submitted a job description, but notified the petitioner that it was not persuasive in establishing that the proffered position is a specialty occupation. The petitioner was asked to provide a more detailed description of the work to be performed by the beneficiary for the entire period requested, including the specific job duties, the percentage of time to be spent on each duty, level of responsibility, etc.

The petitioner and counsel responded to the RFE on January 14, 2011, and provided additional evidence in support of the H-1B petition. Counsel resubmitted the description of the job duties of the proffered position that was submitted with the initial petition as follows:

- Create an audit trail and advise company staff responsible for logistics about security requirements;
- Analyze and coordinate the logistical functions of the company to check mismanagement, waste, or fraud in products and to maintain inventory level of products, and to ensure availability of products for guaranteed delivery;
- Devise systems to track and report the entire life cycle of products, including inventory control, quality control, acquisition (including bidding and purchasing), distribution, allocation, cost analysis, delivery, and final disposal of resources;
- Analyze market or delivery schedules;
- Alert management or budget deviations and perform problems of vendors and suppliers;
- Compile data to facilitate requests for competing bidders;
- Protect and control proprietary products;
- Review logistics performance with customers against targets, benchmark and service agreements;
- Develop an understanding of customers' needs and take actions to ensure that such needs are met by applying cost benefit analysis techniques;
- Develop systems for logistic support. Determine logistic support and time phasing, problems arising from location of operational area, and other factors, such as environmental and human factors affecting equipment.

As mentioned, the same description of the job duties was submitted in response to the RFE as was

submitted with the initial petition. No explanation was provided. 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 detailed description of the duties the beneficiary would perform. Furthermore, in the instant case, the petitioner did not provide any 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, nor did it establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

Counsel also reiterated in the response that "the position of Internal Auditor/Logistics is a position that requires a candidate with a degree, and that a degree in Business Administration with a concentration in Management is appropriate for this particular job."

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 21, 2011. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.

Based upon a complete review of the record of proceeding, the AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

As a matter critically important in its determination of the merits of this appeal, the AAO finds that there are significant discrepancies in the record of proceeding with regard to the proffered position. The AAO will now highlight an aspect of the petition that undermines the petitioner's credibility with regard to the actual nature and requirements of the proffered position. This particular aspect is the discrepancy between what the petitioner and counsel claim about the occupational classification on the LCA submitted in support of the petition.

As mentioned, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational title of "Accountants and Auditors" - SOC (ONET/OES) code 13-2011.01. The petitioner stated in the LCA that the wage level for the proffered position was Level I (entry) and claimed that the prevailing wage in Los Angeles County (Torrance, CA) for the proffered position was \$20.87 per hour. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center (Online Wage Library - OWL).³ The LCA was certified on November 12, 2010 and signed by the petitioner on November 15, 2010.

³ 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 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/>.

While the petitioner has filed the LCA under the occupational category "Accountants and Auditors," the petitioner has titled the proffered position as an internal auditor/logistics. More importantly, the AAO notes that the petitioner has described the duties of the beneficiary's employment in the same general terms as those used by another occupational classification, specifically, "Logisticians" Code 13-1081 as stated in the Occupational Information Network (O*NET) OnLine.

For example, the occupational category "Logisticians" is described in O*NET, in part, as follows:

Analyze and coordinate the logistical functions of a firm or organization. Responsible for the entire life cycle of a product, including acquisition, distribution, internal allocation, delivery, and final disposal of resources.

Tasks

- Direct availability and allocation of materials, supplies, and finished products.
- **Develop an understanding of customers' needs and take actions to ensure that such needs are met.**
- **Protect and control proprietary materials.**
- **Review logistics performance with customers against targets, benchmarks and service agreements.**

(Emphasis added.)

The duties stated above closely resemble the following description of the beneficiary's duties:

- **Analyze and coordinate the logistical functions of the company** to check mismanagement, waste or fraud in products and to maintain inventory level of products, and to ensure availability of products for guaranteed delivery;
- Devise systems to track and report **the entire life cycle of products, including** inventory control, quality control, **acquisition** (including bidding and purchasing), **distribution, allocation, cost analysis, delivery, and final disposal of resources;**
- **Protect and control proprietary materials;**
- **Review logistics performance with customers against targets, benchmarks and service agreements;**
- **Develop an understanding of customers' needs and take actions to ensure that such needs are met** by applying cost benefit analysis techniques[.]

(Emphasis added.)

The petitioner did not provide the percentage of time that the beneficiary would spend performing each of the duties. Consequently, it is not clear how much, if any, of the beneficiary's duties involve those of an "Auditor." However, many of the duties of the proffered position are taken

virtually verbatim by the petitioner from the description for the occupational category "Logisticians."⁴

With respect to the LCA, the U.S. Department of Labor (DOL) provides clear guidance for selecting the most relevant O*NET classification code.⁵ The "Prevailing Wage Determination Policy Guidance" states the following:

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

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

⁴ This type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but it fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. The overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations.

⁵ It must be noted that, where a petitioner seeks to employ a beneficiary in two distinct occupations, it may be appropriate for the petitioner to file two separate petitions; requesting concurrent, part-time employment for each occupation. 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, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation, such as the provision of certified LCAs for each occupation and the payment of wages commensurate with the hours worked in each occupation. Thus, filing separate petitions may help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion for the petitioner with regard to the proper classification of the position being offered.

Thus, if the petitioner believed its position was described as a combination of O*NET occupations, then according to DOL guidance the petitioner should have chosen the relevant occupational code for the highest paying occupation.⁶

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

The petitioner's offered wage to the beneficiary of \$20.87 per hour (\$43,409.60 per year, as stated on the Form I-129 petition) is below the prevailing wage for the occupational classification of "Logisticians" in the area of intended employment. The Level I prevailing wage for the occupational category of "Logisticians" in the area of intended employment was \$24.00 per hour totaling \$49,920 per year at the time the petition was filed in this matter, a difference of over \$6,510 per year.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational classification in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupational category at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted. Thus, for this reason as well, the H-1B cannot be approved.

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

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

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a

⁶ The prevailing wage for "Accountants and Auditors" SOC (ONET/OES) code 13-2011 at a Level I is \$20.87 per hour (\$43,410 per year), see the All Industries Database for 7/2010 - 6/2011 for Accountants and Auditors at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?code=13-2011&area=31084&year=11&source=1> (visited January 9, 2013). The prevailing wage for "Logisticians" SOC (ONET/OES) code 13-1081 at a Level I is \$24.00 per hour (\$49,920 per year), see the All Industries Database for 7/2010 - 6/2011 for Logisticians at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?code=13-1081&area=31084&year=11&source=1> (visited January 9, 2013).

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

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

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

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

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

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

The AAO will now 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 that the evidence fails to establish that the position as described constitutes a specialty occupation. It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below for dismissing the appeal.

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

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction

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

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position.

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

The AAO recognizes DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁷ As discussed, while the petitioner asserted in the LCA that the proffered position falls under the occupational category "Accountants and Auditors." However, as previously noted, many of the job duties of the proffered position are taken virtually verbatim from the occupational category "Logisticians."

The AAO reviewed the record of proceeding, but is not persuaded by the petitioner's claim that the proffered position falls under the occupational category for "Accountants and Auditors." The duties of the proffered position, to the extent that they are depicted in the record of proceeding, indicate that the beneficiary may perform a few general tasks in common with this occupational group, but not that the beneficiary's duties would constitute an accountant and auditor position, and not that they would require the range of specialized knowledge that characterizes this occupational category. It must be noted that the petitioner failed to provide documentary evidence to substantiate its claim that the beneficiary will primarily, or substantially, perform the same or similar duties, tasks and/or work activities that characterize the occupation of accountants and auditors. The totality of the evidence in this proceeding, including information and documentation regarding the proposed duties, the petitioner's business operations, and the petitioner's organizational structure, does not establish that the duties of the proposed position are substantially comparable to those of accountants and auditors. Upon review of the job description of the proffered position, the AAO finds that the duties of the position most closely resemble the duties of "Logisticians."

The AAO reviewed the chapter of the *Handbook* entitled "Logisticians" including the sections regarding the typical duties and requirements for this occupational category.⁸ However, the *Handbook* does not indicate that "Logisticians" comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "How to Become a Logistician" states the following about this occupation:

Education

Logisticians can qualify for positions with an associate's degree in business or engineering or by taking courses on logistics. However, as logistics becomes increasingly complex, more companies prefer to hire workers who have at least a bachelor's degree. Many logisticians have a bachelor's or master's degree in business, finance, industrial engineering, or supply chain management.

* * *

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

⁸ For additional information on the occupational category "Logisticians," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Logisticians, on the Internet at <http://www.bls.gov/ooh/business-and-financial/logisticians.htm#tab-1> (last visited January 9, 2013).

Work Experience

Logisticians typically need work experience in a field related to logistics or business. Because military operations require a large amount of logistical work, some logisticians gain work experience while serving in the military. Some firms allow applicants to substitute several years of work experience for a degree.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Logisticians, on the Internet at <http://www.bls.gov/ooh/business-and-financial/logisticians.htm#tab-4> (last visited January 9, 2013).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the proffered position as a Level I (entry level) position on the LCA.⁹ This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.¹⁰ That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of

⁹ Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

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

¹⁰ 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.

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 indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Rather, the occupation accommodates other paths for entry, including less than a bachelor's degree in a specific specialty. The *Handbook* specifically states that logisticians can qualify for positions with an associate's degree in business or engineering or by taking courses on logistics. According to the *Handbook*, some firms allow applicants to substitute several years of work experience for a degree. The *Handbook* does not report that the years of work experience must be the equivalent of a bachelor's degree in a specific specialty. The *Handbook* indicates that some companies prefer to hire workers who have at least a bachelor's degree. Obviously a *preference* for a degreed individual is not an indication that at least a bachelor's degree in a specific specialty is normally a minimum *requirement* for entry. Moreover, while the *Handbook* indicates many logisticians have a bachelor's or master's degrees, the *Handbook* identifies degrees in divergent fields such as business, finance, industrial engineering or supply chain management as acceptable for this occupation. The *Handbook* does not conclude that normally the minimum requirement for entry into logistician positions is a baccalaureate (or higher degree) in a specific specialty, or its equivalent.

On appeal, counsel provided a copy of *Residential Finance Corporation v. USCIS*, Case No. 2:12-cv-00008 (S.D. Ohio 2012), an unpublished federal district court decision. The AAO reviewed the submission, but notes that in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising not within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

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

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

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

In this matter, the petitioner has not demonstrated that the position requires the theoretical and practical application of a body of highly specialized knowledge. The fact that a person may be employed in a position designated as that of an internal auditor/logistician and may apply related principles in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. Thus, it is incumbent on the petitioner to provide sufficient evidence to establish that its particular position would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of knowledge in a specific specialty. This, the petitioner has failed to do.

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 by the petitioner do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

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

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. The record of proceeding does not contain any evidence from an industry professional association to indicate that a degree is a minimum entry requirement.

In the Form I-129, the petitioner stated that it is a full-service information technology solutions provider and reseller of computer and general merchandise company established in 1992. The petitioner further stated that it has 11 employees and gross sales of \$20.7 million and a net income of approximately \$195,000. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 423430.¹¹ The AAO notes that this code is

¹¹ 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

designated for "Computer and Computer Peripheral Equipment and Software Merchant Wholesalers." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments primarily engaged in the merchant wholesale distribution of computers, computer peripheral equipment, loaded computer boards, and/or computer software.

See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 423430 – Computer and Computer Peripheral Equipment and Software Merchant Wholesalers, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed January 9, 2013).

The AAO notes that under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must establish that "the degree requirement is common to *the industry in parallel positions among similar organizations.*" [Emphasis added.] That is, this prong requires the petitioner to establish that a requirement of a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

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.

In response to the RFE, counsel provided a copy of the petition filed by the beneficiary's previous employer for the beneficiary as an auditor/logistics and claimed that "USCIS already acknowledged and approved the H-1B Petition of [previous employer] for [the beneficiary], specifically finding that the position of Internal Auditor/Logistics is a specialty occupation requiring a candidate with a college degree, and that a degree in Business Administration with a concentration in Management is an appropriate requirement for the job." Contrary to counsel's assertion, the job duties of the beneficiary's prior job are not identical to the duties of the proffered position. For example, the prior employer indicated that the beneficiary would train and supervise audit personnel.

classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last viewed January 9, 2013).

However, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous.¹² If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, it would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of a prior approval that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved a nonimmigrant petition on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

On appeal, counsel claims that the director erred in concluding that the petitioner submitted no evidence to demonstrate that a degree in a specific field of study is common to software and hardware sales industry in parallel positions among similar organizations. Counsel claims that the director "delimits the 'industry' within which the 'parallel positions' must be compared. Counsel further states that in that instant case, the "relevant 'industry' is 'retail sales and services'" because "[i]f a business needs to keep track of many thousands of items moving in and out, it is immaterial for the Internal Auditor/Logistics if the moving items are pieces of software, hardware, clothing, or canned foods." Counsel refers to the petition submitted by the beneficiary's prior employer and claims that it is relevant under this criterion of the regulations.

Further, the AAO notes that the previous employer indicated in the Form I-129 that it is a manufacturer and wholesaler of leather products established in 1989. The previous employer further stated that it has 30 employees in the United States and several hundreds of employees overseas. In addition, the former employer reported a gross annual income of \$23 million and a net income of approximately \$4 million. Additionally, the former employer stated that the retail value of its products was \$80 million per year. The prior employer designated its business operations under the NAICS code 316999. The AAO notes that this code is designated for "All Other Leather Good and Allied Product Manufacturing." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

¹² Notably, the wording of some aspects of the prior employer's support letter match the wording of petitioner's letter – virtually verbatim, including grammatical and punctuation errors. When affidavits are worded the same (and include identical errors), it indicates that the words are not necessarily those of the affiant and may cast some doubt on the validity of the affidavit.

This U.S. industry comprises establishments primarily engaged in manufacturing leather goods (except footwear, luggage, handbags, purses, and personal leather goods).

See U.S. Dept of Commerce, U.S Census Bureau, 2007 NAICS Definition, 316999 – All Other Leather Good and Allied Product Manufacturing, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed January 9, 2013).

The AAO finds that other than counsel's claim that the previous employer is allegedly in the same industry of "retail sales and services," the petitioner failed to supplement the record of proceeding to establish that the previous employer is similar to it. That is, the petitioner has not provided sufficient information regarding which aspects or traits (if any) it shares with the previous employer. As previously noted, it is not adequate 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.

Moreover, even if the petitioner established that the prior employer was an organization similar to it in the industry (which it has not), the petitioner fails to establish the relevancy of just one example to the issue here. That is, 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 one example with regard to 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 the example provided was not randomly selected, the validity of any such inferences could not be accurately determined. *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 copy of the previous petition supported the finding that a degree requirement in a specific specialty was common to the industry for the position (or parallel positions) among organizations similar to the petitioner (which it does not), it cannot be found that just one example that appears 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 require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

In support of the assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations, the petitioner submitted an opinion letter from Professor [REDACTED]. The letter is dated December 30, 2010. Professor [REDACTED] provided a summary of his education and experience and attached a copy of his curriculum vitae. Professor [REDACTED] described his qualifications, including his educational credentials, professional experience and information regarding his research interests, as well as a list of the publications he has written. He currently serves as a professor of marketing. According to his curriculum vitae, his most recent publication was in 2000 (approximately ten years prior to the submission of the H-1B petition). The AAO observes that under the sections entitled "Business and Consulting" and

"Organizations," Professor [REDACTED] has several entries. However, he does not provide detail as to how this experience relates to the issue here.

Based upon a complete review of Professor [REDACTED]'s letter and curriculum vitae, the AAO notes that Professor [REDACTED] may, in fact, be a recognized authority on various topics; however, he has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. That is, he has not established his expertise pertinent to the hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. Without further clarification, it is unclear how his education, training, skills or experience would translate to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of full-service information technology solutions providers and resellers of computer and general merchandise (as designated by the petitioner in the Form I-129 and with the NAICS code) or similar organizations for internal auditor/logistics positions (or parallel positions). Professor [REDACTED]'s opinion letter does not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for internal auditor/logistics positions (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements.

Professor [REDACTED] states that he "reviewed an outline of the job duties required for the subject position" and that through his academic and professional experience, he believes that he is qualified to opine on the requirements for the proffered position and the beneficiary's ability to fulfill the requirements. However, the job description that Professor [REDACTED] relied upon appears to differ from the petitioner's job description submitted with the Form I-129. Professor [REDACTED] states the following regarding the job duties:

In a detailed breakdown of the position's duties, the employer specifies responsibility for studying existing workflows and business processes in the core area of inventory management and parts distribution; performance of in-depth analytical procedures, including internal as well as larger (external) market-driven analytics, in order to simulate, refine, and ultimately create optimal "to-be" methodologies for the management and distribution of inventory; creation of "audit trails" that enable the tracking of products across the life-cycle of acquisition, internal warehousing, distribution, and allocation; rendering of analytical conclusions via creation of functional new business processes that manifestly improve the firm's procedures of (and capabilities in) inventory management, supply chain management, and overall logistics; design of larger roadmaps to accommodate inventory-related auditing procedures on a long-term basis; formulation of complex and high-impact decisions as to inventory management; identification of business practices which lead to waste, mismanagement, and fraud (and analysis of these same problems in distributed products), and creation and implementation of process-or product improvements; creation of original systems used in inventory tracking and logistical support; and other advanced duties

Further, Professor [REDACTED] also states the following:

It is important to note that the position's advanced analytical procedures include such techniques as cost-benefit analysis (in providing a quantitative as well as qualitative framework for the study of inventory-related movements, financials, and budgetary requirements) and bench-marked inventory strategies (as modified in accord with the specifics of different industry targets, service agreements, or larger market fluctuations-thereby ensuring the creation of auditing tools, and logistical models that are of sufficient flexibility and adaptability to be modified in accord with different levels of supply and demand). These procedures are clearly of sufficient quantitative and analytical sophistication to be associated with a "specialty" occupation in the field of product/inventory analysis and supply-chain auditing.

(It should be noted that the employer's description includes significant detail regarding the individual technical, operational, quantitative, and analytical functions that must be performed pursuant to the fulfillment of each major area of positional responsibility-providing additional sub-categorical information with regard to the specific supply-chain phases for which the position is responsible, product areas in which the position will work, etc. However, to avoid undue redundancy, I have excerpted only the main areas of positional responsibility to serve as a basis for the discussion of this letter.)

The job duties that Professor [REDACTED] refers to appears to involve duties and responsibilities not previously attributed to the proffered position, as well as more advanced and complex analytics not described by the petitioner in the instant petition. Moreover, it must be noted that there is no indication that the petitioner and counsel advised Professor [REDACTED] that the petitioner characterized the proffered position as a low, entry-level internal auditor/logistics position, for a beginning employee who has only a basic understanding of the occupation (as indicated by the wage-level on the LCA). The wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. It appears that Professor [REDACTED] would have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that Professor [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

Professor [REDACTED] did not provide any documentation to establish his credentials as a recognized authority on the relevant industry-hiring standards. He claims to possess expertise in the field of marketing, business, management and related fields, but he did not identify the specific elements of his knowledge and experience that he may have applied in reaching his conclusions here. For example, the opinion letter contains no evidence that it was based on scholarly research conducted by Professor [REDACTED] in the specific area upon which he is opining. He claims that as an owner of his own consulting firm, "he has worked with a wide range of client companies, including companies which have undergone sharp and rapid change in the size and scope of business operations."

However, he does not provide documentary support for his claimed expertise and the basis for his ultimate conclusion regarding the education required for the position. There is no evidence that he relied on authoritative sources (i.e., statistical surveys, authoritative industry publications, or professional studies) to reach his conclusion.

Professor [REDACTED] asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement. Likewise, he does not provide a substantive, analytical basis for his opinion and ultimate conclusion. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. In fact, the job description he refers to is significantly different from the duties of the proffered position as provided to USCIS. Notably, there is no evidence that Professor [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. He has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty. Professor [REDACTED] does not provide sufficiently substantive and analytical bases for his opinion.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the advisory opinion rendered by Professor [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by Professor [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. There is an inadequate factual foundation established to support the opinion and the AAO finds that the opinion is not in accord with other information in the record. Therefore, the AAO finds that the letter from Professor [REDACTED] does not establish that the proffered position is a specialty occupation. As such, neither Professor [REDACTED] findings nor his ultimate conclusions are worthy of any deference, and his opinion letter is not probative evidence towards satisfying any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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.

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. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Accountants and Auditors" at a Level I (entry level) wage. The wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, 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."¹³ The petitioner reported the offered wage for the proffered position as \$20.87 per hour (which corresponds to a Level I wage rate). Notably, the prevailing wage for a Level IV position is significantly higher.

The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of internal auditor/logistics. More specifically, the petitioner failed to demonstrate how the duties of the internal auditor/logistics as described in the record 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. For instance, 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. While 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 particular position here. The petitioner has not credibly demonstrated that this position, which the petitioner characterized in the LCA as an entry-level position, is so complex or unique that it can be performed only by an individual with at least a baccalaureate degree in a specific specialty, or its equivalent.

The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Thus, the record lacks sufficient

¹³ 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.

probative evidence to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Consequently, as the evidence in the record of proceeding does not show that the proffered position is so complex or unique that it can be performed only by a person with at least a baccalaureate degree in a specific specialty or its equivalent, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

To satisfy this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

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

The petitioner stated in the Form I-129 petition that it has 11 employees and that it was established in 1992 (approximately eighteen 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. The record is devoid of information to satisfy this criterion of the regulations. The record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent. In fact, based on the statement made by the petitioner with regard to its own claimed educational requirements for the position (i.e., the acceptance of a degree in business administration), it is clear that a general bachelor's degree is sufficient to perform the duties.

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

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

On appeal, counsel claims that the director "ignore[d] all the evidence provided by the petitioner." Counsel refers to various documents, including documentation regarding the petitioner's business operations, including a lease, corporate income tax return, copies of accounts receivable and accounts payable, pictures of the petitioner's warehouse, a sampling of the petitioner's products, etc. While the AAO acknowledges that the petitioner and counsel submitted such documentation, the AAO observes that the petitioner and counsel failed to establish how such documents are relevant to establishing that the nature of the specific duties of the proffered position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.¹⁴ In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. 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.

Again, the AAO acknowledges that the record of proceeding contains an opinion letter from Professor [REDACTED]. However, as previously discussed, the AAO finds that the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

As reflected in this decision's earlier comments and findings with regard to the generalized level at which the proposed duties are described, the petitioner has not presented the proposed duties with sufficient specificity and substantive content to even establish relative specialization and complexity as distinguishing characteristics of those duties, let alone that they are at a level that would require

¹⁴ 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 a specific specialty, or its equivalent. 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. In the instant case, the petitioner stated on the Form I-129 petition that it has eleven employees.

knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, also, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge requiring attainment of at least a bachelor's degree in a specific specialty or its equivalent.

Moreover, the AAO also reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the proffered position's Level I wage designation is indicative of a low, entry-level position relative to others within the occupation, and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." 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 significantly higher prevailing wage. As previously mentioned, 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."

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.

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

(b)(6)

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.¹⁵ 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.

¹⁵ As previously discussed, the AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 145. However, as the appeal is dismissed for the reasons discussed above, the AAO will not further discuss the additional issues and deficiencies that it observes in the record of proceedings.