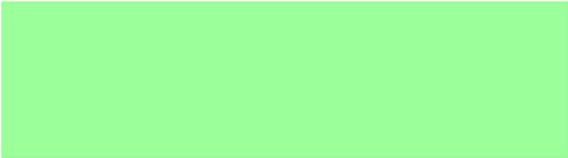




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: JUN 03 2013 OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:

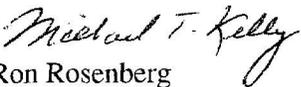


INSTRUCTIONS:

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

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

Thank you,

  
for Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a four-employee accounting business<sup>1</sup> established in 2008. In order to employ the beneficiary in what it designates as a staff accountant position,<sup>2</sup> the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of his determination that the petitioner failed to demonstrate that the proffered position qualifies for classification as a specialty occupation.

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

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

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

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

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 5412, "Accounting, Tax Preparation, Bookkeeping, and Payroll Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "5412 Accounting, Tax Preparation, Bookkeeping, and Payroll Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed May 8, 2013).

<sup>2</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O\*NET/OES) Code 13-2011, the associated Occupational Classification of "Accountants and Auditors," and a Level II (qualified) prevailing wage rate.

- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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

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

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

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

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

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

In its June 12, 2012 letter, the petitioner claimed that the beneficiary would allocate her time as follows: she would spend 35 percent of her time on “Write-up and Bookkeeping Services”; another 35 percent of her time on “Taxation”; 20 percent of her time preparing financial statements; and ten percent of her time on budgeting and planning.

In a separate letter also dated June 12, 2012, the petitioner proposed the following specific duties for the beneficiary:

- Compiling financial information and assisting in the preparation of reports;
- Recording, classifying, and summarizing financial transactions and events in accordance with generally accepted accounting principles;
- Keeping abreast of laws and regulations that apply to a particular staff function or field of professional expertise to maintain up-to-date compliance;
- Initiating and processing journal entries into various accounts;
- Reconciling sub-ledgers to the general ledger and resolving differences;

- Using various software applications, such as spreadsheets, relational databases, statistical packages, and graphics packages to assemble, manipulate, and/or format data and/or reports;
- Applying a working knowledge of applicable laws and regulations;
- Verifying documents for completeness and compliance with company, state, and federal regulations;
- Preparing and distributing monthly financial statements on a timely basis;
- Ensuring proper cut-offs for revenue recognition and physical inventories;
- Providing required financial data to management; and
- Assuming responsibility for the tagging, recording, and tracking of fixed assets and respective depreciation entries.

In his June 19, 2012 letter, counsel indicated that licensure as a certified public accountant (CPA) is not required to perform the duties of the proffered position. In support of this claim, counsel submitted a printout from the website of the Texas Board of Public Accountancy<sup>3</sup> and, quoting from that document, stated the following:

[A] person may work on “professional accounting services or professional accounting work” as long as this person works “under the director supervision of a licensed CPA.”

In its July 24, 2012 letter, the petitioner’s managing partner stated that the beneficiary would “[r]eview the financial documents under my supervision.”

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

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The AAO recognizes the U.S. Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide

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<sup>3</sup> The website of the Texas Board of Public Accountancy is available at <http://www.tsba.state.tx.us>.

variety of occupations it addresses.<sup>4</sup> Two portions of the *Handbook* are directly relevant to this proceeding: (1) the *Handbook's* discussion of the "Bookkeeping, Accounting, and Auditing Clerks" occupational classification; and (2) its discussion of the "Accountants and Auditors" occupational classification.

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

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

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

\* \* \*

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Bookkeeping, Accounting, and Auditing Clerks," <http://www.bls.gov/ooh/office-and-administrative-support/bookkeeping-accounting-and-auditing-clerks.htm#tab-2> (accessed May 8, 2013).

As noted above, the petitioner stated in its June 12, 2012 letter that the beneficiary would spend 35 percent of her time performing "write-up or bookkeeping services" and 20 percent of her time preparing financial statements (or, in the words of the *Handbook*, "producing" them). Thus,

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<sup>4</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

according to the petitioner, 55 percent – a majority – of the beneficiary's time would be spent performing tasks which, according to the *Handbook*, fall within those normally performed by bookkeepers.

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

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

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

These statements do not support a conclusion that a bachelor's degree in a specific specialty, or its equivalent, is normally required for employment as a bookkeeping, accounting, or auditing clerk. Given that a majority of the beneficiary's proposed duties fall within those described in the *Handbook* as normally performed by bookkeepers, an occupation which does not normally require a bachelor's degree, or the equivalent, in a specific specialty, the *Handbook* does not support a finding that the proffered position qualifies for classification as a specialty occupation under the first criterion.

The remainder of the duties proposed by the petitioner for the beneficiary, on which she would spend 45 percent of her time, are generally similar to those described in the *Handbook* as normally performed by accountants.

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

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

Accountants and auditors typically do the following:

- Examine financial statements to be sure that they are accurate and comply with laws and regulations
- Compute taxes owed, prepare tax returns, and ensure that taxes are paid properly and on time
- Inspect account books and accounting systems for efficiency and use of accepted accounting procedures

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

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

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

\* \* \*

**Public accountants** do a broad range of accounting, auditing, tax, and consulting tasks. Their clients include corporations, governments, and individuals.

They work with financial documents that clients are required by law to disclose. These include tax forms and balance sheet statements that corporations must provide potential investors. For example, some public accountants concentrate on tax matters, advising corporations about the tax advantages of certain business decisions or preparing individual income tax returns.

External auditors review clients' financial statements and inform investors and authorities that the statements have been correctly prepared and reported.

Public accountants, many of whom are Certified Public Accountants (CPAs), generally have their own businesses or work for public accounting firms.

Some public accountants specialize in forensic accounting, investigating financial crimes, such as securities fraud and embezzlement, bankruptcies and contract disputes, and other complex and possibly criminal financial transactions. Forensic accountants combine their knowledge of accounting and finance with law and investigative techniques to determine if an activity is illegal. Many forensic accountants work closely with law enforcement personnel and lawyers during investigations and often appear as expert witnesses during trials.

With regard to the educational requirements necessary for entry into this occupational classification, the *Handbook* states that “[m]ost accountants and auditors need at least a bachelor's degree in accounting or a related field.” *Handbook* at <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-4>. However, “most” does not indicate that an accountant position normally requires at least a bachelor’s degree, or its equivalent, in a specific specialty. The first definition of “most” in *Webster’s New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is “[g]reatest in number, quantity, size, or degree.” As such, if merely 51% of accountant positions require at least a bachelor’s degree in a specific specialty, it could be said that “most” accountant positions require such a degree. It cannot be found, therefore, that a particular degree requirement for “most” positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part “attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.” Section 214(i)(1) of the Act.

Furthermore, the *Handbook* includes the following statement:

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

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

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

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

The AAO's determination that the accounting duties proposed for the beneficiary would not involve accounting services at a level requiring the theoretical and practical application of at least a bachelor's-degree level of a body of highly specialized knowledge in accounting is bolstered by two additional factors. First, the AAO notes again that the petitioner claimed that the beneficiary would work under his direct supervision as opposed to working independently. Second, and on a related note, there is the countervailing weight of the wage-level designated by the petitioner on the LCA. Both on its own terms and also in comparison with the two higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level II is indicative of duties of, at best, only a moderate degree of complexity requiring the exercise of only a limited degree of judgment by the beneficiary.<sup>5</sup>

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

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

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

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

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<sup>5</sup> The *Prevailing Wage Determination Policy Guidance* (available at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf) (last accessed May 8, 2013)) issued by DOL states the following with regard to Level II wage rates:

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

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent.

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

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Nor does the petitioner submit any other evidence 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.

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

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

The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform that position. Rather, the AAO finds that the petitioner has not distinguished either the proposed duties, or the position that they comprise, from generic bookkeeping or accounting work, neither of which, the *Handbook* indicates, necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.<sup>6</sup>

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor's degree, or the equivalent, in a specific specialty.

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

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

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<sup>6</sup> Counsel's claim that the beneficiary would "directly deal with clients of the Petitioner" does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Many jobs which do not require a bachelor's degree in a specific specialty, or the equivalent, involve "dealing" with clients "directly." Furthermore, counsel's assertion is problematic for two reasons. First, the scope of this "direct dealing" has not been established, particularly in light of the petitioner's assertion that the beneficiary would work under the direct supervision of its managing partner. Second, the petitioner has not established the nature of this "direct dealing." Although counsel claims that the beneficiary would "deal with non-U.S. clients to convey sophisticated and complex accounting strategies," the record lacks adequate explanatory information regarding the types of sophisticated and complex accounting strategies that she would convey. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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

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

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

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 387. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proposed position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The record contains no evidence regarding any prior individuals employed by the petitioner in this position. Although the fact that a proffered position is a newly-created one is not in itself generally a basis for precluding a position from recognition as a specialty occupation, certainly an employer that has never recruited and hired for the position cannot satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

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

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

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

Further, there is the countervailing weight of the wage-level of the LCA. Both on its own terms and also in comparison with the two higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level II is indicative of duties of, at best, only a moderate degree of complexity requiring the exercise of only a limited degree of judgment by the beneficiary.

The *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level II wage rates:

**Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

The above descriptive summary indicates that this wage-level is appropriate for only "moderately complex tasks that require limited judgment."

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

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

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

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

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

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

By virtue of this submission the petitioner effectively attested that the proffered position requires that the beneficiary exercise only a "limited" degree of professional judgment, that the job duties proposed for him are merely "moderately complex," and that, as clear by comparison with DOL's instructive comments about the next higher level (Level III), the proffered position did not even involve "a sound understanding of the occupation" (the level of complexity noted for the next higher wage-level, Level III).

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

Nor does the AAO find persuasive counsel's argument with regard the beneficiary's prior grant of TN nonimmigrant status pursuant to section 214(e) of the Act, 8 U.S.C. § 1184(e). According to counsel, "it should be concluded that the description provided in the [beneficiary's] TN visa application was sufficient to prove that this is a specialty occupation." However, TN visas and H-1B visas are not interchangeable. They are separate visa categories governed by separate bodies of law, and TN visa applicants are not required to demonstrate that a proffered position meets the specialty occupation described above. Furthermore, if the AAO were to consider prior grants of TN

status binding upon later H-1B petitions, the H-1B adjudicatory process would be rendered meaningless.

Finally, the AAO is not persuaded by the caselaw cited by counsel on appeal. Counsel cites the following cases: (1) *Button Depot, Inc. v. U.S. Dept. of Homeland Sec.*, 386 F. Supp. 2d 1140 (C.D. Cal. 2005); (2) *Fred 26 Importers v. DHS*, 445 F. Supp. 2d 1174 (C.D. Cal. 2006); (3) *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v. U.S. Dept. of Homeland Sec.*, 467 F. Supp. 2d 728 (E.D. Mich. 2006); and (4) *Unico American Corp. v. Watson* \_\_\_ F. Supp. \_\_\_, CV No. 896958 (C.D. Cal. March 19, 1991).

It is noted 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 even within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district court 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.<sup>7</sup>

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

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.

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<sup>7</sup> Furthermore, the court in *Button Depot, Inc. v. U.S. Dept. of Homeland Sec.*, 386 F. Supp. 2d 1140 (C.D. Cal. 2005) addressed the issue of a beneficiary's qualifications to perform the duties of a proffered position, which is not at issue here. Nor does *Fred 26 Importers v. DHS* stand for the proposition that the size of a petitioner is irrelevant, as counsel argues. The issue in that case was whether USCIS had properly considered certain evidence submitted by the petitioner.

With regard to *Unico American Corp. v. Watson*, the AAO notes that this was an unpublished decision and, given that published decisions of the district courts are not binding on the AAO outside of that particular proceeding, an unpublished decision of a district court has even less persuasive value. In any event, the AAO is not running counter to the proposition for which counsel cites this decision, for the AAO bases its decision upon the totality of the evidence in the record of proceeding bearing upon the specialty-occupation issue, and without sole or excessive reliance upon the relevant information contained in the *Handbook*.