



U.S. Citizenship
and Immigration
Services

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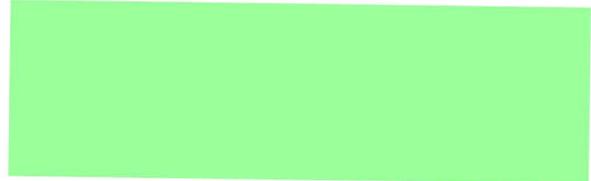
Date: **JUN 27 2013** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner describes itself as a wholesale provider of packaged foods, prepared food, and sundry goods. The petitioner states that it is a corporation newly established in 2011 which employs five personnel. In order to employ the beneficiary in what it designates as an accountant position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, determining that the petitioner failed to demonstrate that the position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains (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 denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, and counsel's supplemental brief. The AAO reviewed the record in its entirety before issuing its decision.

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.¹ Accordingly, the appeal will be dismissed, and the petition will remain denied.

The Law

The primary issue before the AAO is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

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

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 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 on a position's title. 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.

Facts and Procedural History

In a letter submitted in support of the petition, the petitioner described itself as a "wholesale provider of packaged foods, prepared foods, and sundry good, serving convenience stores throughout the northern part of Florida and southern Georgia." The petitioner noted that its initial operations began in July 2011 and that it anticipated continued growth in serving the convenience store market. The petitioner stated that in the position of accountant, the beneficiary will perform the following duties:

- Prepare, examine, and analyze accounting records, financial statements, and other financial reports;
- Establish tables of accounts, develop, implement, modify and document recordkeeping and accounting systems;
- Report to management regarding the finances of the Company;
- Apply accounting best practices principles to analyze the Company's financial information and prepare financial statements;
- Compile financial information to prepare entries to accounts to document business transactions;
- Analyze financial information to detail assets, liabilities, and capital;
- Assist the owner of the company with preparation of detailed financial plans and projections;
- Help in establishing investment objectives and finding ways to maximize the profitability;
- Conduct comprehensive quantitative analyses of financial information, which covers assets, liabilities, cash flow, insurance coverage, taxation, and other financial aspects;

- Ensure the compliance with financial and securities regulations, as well as verify correctness of records;
- Compute the Company's payroll taxes owed according to prescribed rates and applicable laws and regulations;
- Examine customer sales records and compute sales taxes; and
- Assist in the preparation of federal, state, and local tax returns.

[Bullets points added.]

The petitioner stated that "given the nature of the above-described duties, a university degree with coursework in Commerce or Accounting or a closely related field is required for this position, along with practical experience in store management.

The petitioner provided the required certified Labor Condition Application (LCA) which indicates that the occupational classification for the position is "Accountants and Auditors," SOC (ONET/OES) Code 13-2011.00, at a Level I (entry-level) wage.²

Upon review, the director requested further detail regarding the proposed position in an RFE. In response, the petitioner asserted that the proffered position of accountant is a professional specialty occupation requiring a bachelor's degree in a specific field of study. In support of this claim, the petitioner referenced the U.S. Department of Labor's Occupational Information Network Online (O*NET) Summary Report on accountants. The petitioner noted that the Summary Report listed typical duties for an accountant that closely matched the duties the petitioner had outlined in its initial letter in support of the petition. The petitioner also noted the O*NET's report that "[m]ost of these occupations require a four-year bachelor's degree."

The petitioner also asserted that in its industry, in comparably-sized companies, a baccalaureate degree is commonly required for an accountant position. The petitioner attached seven printouts from [REDACTED] and from the [REDACTED] in support of this assertion. The petitioner noted that the beneficiary had many years of experience in a very similar position for a company essentially identical to it and had been approved for an H-1B visa when employed at that company. The petitioner also averred that the specific duties of the proffered position are sufficiently specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. In support of this claim the petitioner indicated that it had grown steadily during the first year and a half of operations and that in less than seven months of operation the company's gross revenues exceeded \$1,739,580 and that it had projected its annual gross revenues will exceed \$5,243,680.

The petitioner indicated it will "rely on [its] Accountant to constantly analyze [its] business operations, trends, costs, revenues, financial commitments and obligations, as well as to manage [its] pricing vis-à-vis [its] competitors pricing such that [it] maintain[s] a competitive price structure while maximizing profits." The petitioner added that its inventory of more than 2,000

² See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. November 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

items "requires sophisticated cost-accounting responsibilities including financial market-basket analysis undertaken on an almost daily basis." The petitioner noted that its accountant will also "contribute to [its] viability and growth by developing, implementing, modifying and documenting [its] recordkeeping and accounting systems, and by applying basic operating statistics and financial data to regular, periodic financial reports." The petitioner further indicated that its accountant "will handle straightforward accounting duties such as profit/loss analysis, monthly and quarterly financial close and balance sheet reconciliation, and monthly operations reporting."

The petitioner stated that it had not employed an individual in this position in the past and that its accounting duties had been handled by an outside accountant previously. The petitioner noted, however, that it believed that hiring a dedicated in-house accountant to facilitate its varied accounting, tax, financial and forecasting needs would be more cost effective and efficient. The petitioner provided its financial and staffing projections, an organizational chart for detailing the company's current and projected staffing, and its most recent Internal Revenue Service (IRS) Forms 941, Employer's Quarterly Tax Return.

The petitioner indicated that the beneficiary will spend: 60 percent of his time on cost accounting, inventory and financial management/analysis; 25 percent of his time on financial transactions; and 20 percent of his time on regulatory compliance, including "filing the company's quarterly and annual federal and state tax returns."

The petitioner asserted that as its accountant, the beneficiary will spend the preponderance of his time occupied with duties that require a directly related degree. The petitioner claimed that the academic training provided in a Bachelor of Commerce in Financial Accounting and Auditing and a Diploma in Business Management which had been evaluated to be equivalent to a U.S. bachelor's degree in business administration and accounting provided instruction in the exact areas required to successfully perform the proffered position.

Based upon the evidence of the record, the director determined that the proposed position did not qualify for classification as a specialty occupation. The director noted in the denial decision that it is not evident that the beneficiary would actually be carrying out the duties of an accountant on a full-time basis and that companies similar to the petitioner normally contracted out for the services of an accountant on an as-needed basis. The director also found that the seven job postings submitted did not establish that companies similar to the petitioner routinely employed full-time accountants. The director further found that the petitioner had not submitted probative evidence that it currently had sufficient H-1B level work for the beneficiary to perform. The director concluded that based on the evidence of record, the petitioner had not established that the proffered position qualifies as a specialty occupation.

On appeal, counsel for the petitioner asserts that the director improperly substituted his business determinations for the petitioner's business judgment with regard to hiring an accountant. Counsel asserted that the submitted job advertisements supported the petitioner's claim that businesses similar to the petitioner employed accountants. Counsel also emphasized the petitioner's determination that it required an accountant and referenced the petitioner's business plan demonstrating the petitioner's growth projections.

Analysis

In this matter, the petitioner seeks the beneficiary's services as an accountant SOC (ONET/OES) Code 13-2011.00, at a Level I (entry-level) wage for the specified period of three years.

The AAO recognizes the Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³ As will now be discussed, the *Handbook* does not indicate that accountants constitute an occupational group that categorically requires a specialty-occupation level of education, that is, at least a U.S. bachelor's degree, or the equivalent, in a specific specialty. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., available at <http://www.bls.gov/oco/ocos001.htm>.

The "Accountants and Auditors" chapter in the 2012-2013 edition of the *Handbook* indicates that not every accountant position requires at least a bachelor's degree level of knowledge in accounting or a related specialty. *Id.* The introduction to "How to Become an Accountant or Auditor" section of the *Handbook* states that "[m]ost accountants and auditors need at least a bachelor's degree in accounting, or a related field." *Id.* This, however, does not support the view that any accountant job qualifies as a specialty occupation. "Most" is not indicative that a particular position within the wide spectrum of accountant jobs normally requires at least a bachelor's degree, or its equivalent, in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I)), or that a particular accountant position is so specialized and complex as to require knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)).⁴

Further, the "Education" subsection of the aforementioned section of the *Handbook* includes this 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. In this context, 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

³ 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/>.

⁴ For instance, 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 accounting or a related field, 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.

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 that it proffers here would necessitate accounting services at a level requiring the theoretical and practical application of at least a bachelor's degree level of knowledge in accounting. This, the petitioner has failed to do.

The petitioner contends that the O*NET's Summary Report for accountants in this occupational classification listed typical duties for an accountant that closely matched the duties the petitioner outlined in its description of duties for the proffered position. The petitioner contends further that the O*NET indicates that most accountants require a four-year bachelor's degree. However, as discussed above, "most" is not indicative of a specialty occupation position. In addition, a designation of Job Zone 4 -- Education and Training Code: 5 only indicates that a position requires considerable preparation. It does not demonstrate that a bachelor's degree in any specific specialty is required, and does not, therefore, demonstrate that a position so designated is in a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). More specifically, the FLC Data Center's Online Wage Library (OWL) statement is a condensed version of what the O*NET actually states about its Job Zone 4 designation. See O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 4, which explains that this Zone signifies only that most but not all of the occupations within it require a bachelor's degree. Further, the Help Center's discussion confirms that Job Zone 4 does not indicate any requirements for particular majors or academic concentrations. Therefore, the OWL and O*NET information is not probative of the proffered position qualifying as a specialty occupation.

Counsel, on appeal, takes issue with the director's conclusion that the nature of the petitioner's business does not require an accountant on a full-time basis. While we agree that the director may not substitute his business judgment for the petitioner's business judgment on its employment requirements, the petitioner must still establish that the actual proffered position is a specialty occupation. In this matter, the record does not include sufficient probative evidence to establish this essential element of the H-1B visa classification.

Turning to the specific position proffered by the petitioner, the AAO will first review the record of proceeding in relation to 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). To satisfy this criterion, the evidence must establish 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 proposed duties described in this matter when viewed in the context of the *Handbook's* information about accountants, fail to establish that any accounting duties to be performed by the beneficiary would require the practical and theoretical application of highly specialized accounting knowledge attained by at least a bachelor's degree, or the equivalent, in accounting, as required by the Act and its implementing regulations regarding a position's qualification as an H-1B specialty occupation.

The AAO notes that, as reflected in the job descriptions quoted above in this decision, the petitioner describes the duties of the proffered position in terms of generalized and generic functions which, the AAO finds, do not convey either the substantive nature of either the specific matters upon which the beneficiary would focus or the practical and theoretical level of

accounting knowledge that the beneficiary would need to apply to those matters. For example, the petitioner's initial description of the beneficiary's duties provided a perfunctory list of "accounting duties" that included broadly stated duties as varied as preparing, examining, and analyzing accounting records, establishing tables of accounts, developing and implementing recordkeeping and accounting systems as well as modifying and documenting recordkeeping and accounting systems to duties such as compiling financial information for entry into the accounting systems and computing the company's payroll taxes and sales taxes. These duties, as described, do not include probative information regarding the actual daily functions that the beneficiary will perform in accomplishing "accounting" tasks. Moreover, the basic function of computing the company's payroll and sales tax as well as preparing information for entry into the petitioner's accounting systems are general duties that do not require advanced knowledge of accounting. Further describing the beneficiary's responsibility to "apply accounting best practices principles to analyze the Company's financial information and prepare financial statements" is an over broad description of a task that is applicable to any accounting position from that of an accounting clerk to that of a certified public accountant. The general statement does not include sufficient information to ascertain whether a basic understanding of accounting principles is sufficient or whether advanced and specialized knowledge of accounting is necessary to perform the generalized task.

Upon review of the petitioner's organizational chart and listed employees, the petitioner does not employ a bookkeeper or accounting clerk. As the petitioner does not employ a bookkeeper or accounting clerk and as there is no evidence that the beneficiary would be relieved from performing the company's general financial record keeping such as recording the petitioner's financial transactions, updating statements, and checking financial records for accuracy (all duties of a bookkeeper and/or accounting clerk), it appears more likely than not that the beneficiary is being hired to perform, at least in substantive part, these duties.⁵

Moreover, the petitioner's second iteration of the beneficiary's responsibilities listed in the RFE expanded the beneficiary's scope of duties regarding regulatory compliance. The petitioner initially indicated that the beneficiary will "assist in the preparation of federal, state, and local tax returns." However, in response to the RFE, the petitioner noted that the beneficiary will spend 20 percent of his time on regulatory compliance including preparing the company's quarterly and annual federal and state tax returns. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the

⁵ The *Handbook* identifies the typical duties of a bookkeeping, accounting, and auditing clerk as: using bookkeeping software; posting financial transactions; receiving and recording cash, checks, and vouchers; producing reports and income statements; and checking figures, reports and postings for accuracy and reconciling discrepancies. The *Handbook* notes that these workers have a wide range of tasks and some maintain an entire organization's books. The *Handbook* reports that most bookkeeping, accounting and auditing clerks need a high school diploma although some employers prefer candidates who have some postsecondary education, particularly coursework in accounting. See Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., available at <http://www.bls.gov/oco/ocos001.htm>.

organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). The petitioner's expansion of the beneficiary's duties to not just assist the outside accountant but to prepare the returns instead is a material change to the duties of the proffered position.

The petitioner in this matter also describes the beneficiary's duties as assisting with detailed financial plans and projections, helping establish investment objectives, finding ways to maximize profitability, as well as conducting comprehensive quantitative analyses of financial information. In response to the director's RFE, the petitioner noted that the beneficiary will advise management on marketing and promotional campaigns and will analyze business operations, trends, costs, revenues financial commitments and obligations. It is not possible to ascertain from these vaguely described responsibilities whether the petitioner expects the beneficiary to perform duties more closely related to that of a financial manager or financial analyst, rather than to perform duties more closely related to that of an accounting functionary.⁶

It is noted that, if the petitioner seeks to employ a beneficiary in two distinct occupations, the petitioner should file two separate petitions, requesting concurrent, part-time employment for each occupation. While it is not the case here, if a petitioner does not file two separate petitions and if only one aspect of a combined position qualifies as a specialty occupation, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. *See generally* 8 C.F.R. § 214.2(h). Furthermore and as is the case here, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation and the payment of wages commensurate with the higher paying occupation. *See generally* 8 C.F.R. § 214.2(h); U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009. Thus, filing separate petitions would help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion with regard to the proper classification and wage of the position being offered.

As noted above, the petitioner indicates generally that the individual in the proffered position will perform some duties that are generally similar to the duties of an accountant as outlined in the *Handbook*; however, the record lacks sufficient detailed and probative evidence to demonstrate that the beneficiary will primarily perform the duties of an accountant at a level requiring the theoretical and practical application of at least a bachelor's degree level of knowledge in accounting. Based on the above analysis of the evidence contained in the record, the AAO finds that the petitioner has failed to demonstrate that the proffered position normally requires the incumbent to possess a high level of specialized knowledge that may be obtained only through at least a baccalaureate degree in accounting or its equivalent for entry into that

⁶ For example, the *Handbook* reports that financial managers typically prepare financial statements, business activity reports, and forecasts, monitor financial details to ensure that legal requirements are met, review company financial reports and seek ways to reduce costs, analyze market trends to find opportunities for expansion, and help management make financial decisions.

particular position. Accordingly, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the petitioner has not satisfied the first of the two alternative prongs at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proposed 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. 1095, 1102 (S.D.N.Y. 1989)).

As discussed *supra*, the petitioner has not established that its proposed position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Nor has the petitioner submitted evidence that the industry's professional associations have made a degree in a specific specialty a minimum requirement for entry. The job vacancy announcements submitted by the petitioner also do not satisfy the first alternative prong described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The seven advertisements submitted included generic job descriptions for positions broadly identified as accountant, senior accountant, bilingual junior accountant, senior cost accountant, or cost accountant. The advertisements that listed a salary included salary ranges between \$35,000 per year and \$80,000 per year. The petitioner has not provided evidence that the jobs listed in the job advertisements are parallel to the proposed position. The petitioner also fails to submit any evidence of how representative these advertisements are of the advertisers usual recruiting and hiring practices. Simply 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).⁷

Thus, based upon a complete review of the record, the petitioner has not established that at least a bachelor's degree in a specific specialty is the norm for entry into positions that are (1) parallel

⁷ Furthermore, according to the *Handbook* there were approximately 1,216,900 persons employed as accountant and auditors in 2010. *Handbook* on the Internet at <http://www.bls.gov/ooh/business-and-financial/accountants-and-auditors.htm#tab 6>; (last accessed June 17, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the seven vacancy announcements it submits with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

to the proffered position; and, (2) located in organizations similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." In this matter, the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can be determined. Furthermore, the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of its accountant position.

The AAO observes that the petitioner has indicated that the beneficiary's educational background and extensive experience in the industry as an "accountant" with a company of similar size in the same industry will assist him in carrying out the accounting duties of the proffered position. The petitioner takes particular note of the beneficiary's education and the evaluation indicating the beneficiary had obtained the equivalent of a U.S. bachelor's degree in business administration and accounting. First, the petitioner does not provide letters or affidavits from the beneficiary's former employer and the record does not include probative evidence substantiating the beneficiary's actual role with his former H-1B employer. Again, without supporting documentary evidence the petitioner has not met its burden of proof in these proceedings. *Matter of Soffici, Id.* Second, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the previous or proffered position were or will be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. 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 it claims are so complex and unique. While one or two courses in accounting may be beneficial in performing certain duties of an accounting 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 proffered.

Therefore, the evidence of record does not establish that this position is significantly different from other non-specialty degreed accounting positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of degrees, including degrees not in a specific specialty, acceptable for performing the accounting duties here so generally described. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than accounting functions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position of accountant is so complex or unique relative to other accounting positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be

concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the record of proceeding does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty. The petitioner noted in response to the director's RFE that the petitioner previously did not employ an internal accountant but rather used an outside accounting firm. Accordingly, the petitioner may not establish this criterion based on its normal hiring practices.

Moreover, while a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d 384, 387 (5th Cir. 2000). In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its 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. Here, the AAO incorporates by reference and reiterates its earlier discussions about the generalized nature of the petitioner's descriptions of the proposed duties. The petitioner has failed to establish that the duties of the proffered position are sufficiently specialized and complex that their performance would require knowledge of accounting at a level usually associated with at least a bachelor's degree, or the equivalent, in accounting or a related specialty. Insufficient evidence was provided to demonstrate that the proffered position reflects a higher degree of knowledge and skill than other types of employees, including those bearing the title "accountant," who engage in some accounting duties and employ some accounting principles, but not at a level of an accountant applying theoretical and practical knowledge of accounting that is usually associated with at least a bachelor's degree in accounting or a closely related specialty or its equivalent.

The AAO acknowledges the petitioner's indication that it has grown steadily during its first year and a half of operations and that it expects that it will continue to grow. The petitioner also references its most recent financial statements and its expansion of personnel; however, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). As such, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed and not based

on what were merely speculative facts not then in existence. Further, while the AAO concurs that USCIS should not limit its review to the size of a petitioner and must consider the actual responsibilities of the proffered position, it also notes that it is reasonable to assume that the size of an employer's business has or could have an impact on the claimed 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 actual duties of a particular position. In this matter, when the petition was filed, the petitioner provided limited evidence regarding its claimed employment of five individuals and limited evidence of its financial position. More importantly, the petitioner provided an overly broad job description. The record does not support that the proffered position is one with specialized and complex duties when the petition was filed. The AAO, therefore, concludes that the proffered position failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.

Beyond the decision of the director, we find additionally that the petitioner has failed to demonstrate that the petition is supported by a certified Labor Condition Application (LCA) which corresponds to it. For this additional reason the petition must be denied.

The record contains multiple claims regarding the responsibility of the proposed position as well as the level of complexity and specialization of the proposed position and the independent understanding required to perform the tasks of the proffered position. However, the LCA submitted by the petitioner in support of the instant position indicates that the occupational classification for the position is "Accountants and Auditors," SOC (ONET/OES) Code 13-2011.00, at a Level I (entry-level) wage.⁸ The *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

Level 1 (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

⁸ See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. November 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

Thus, the LCA's wage level is indicative of a position that is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the proposed position's demands and level of responsibilities. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) makes clear that certification of an LCA does not constitute a determination that a position qualifies for classification as 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, United States Citizenship and Immigration Services (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) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, it appears that the petitioner has failed to submit a valid LCA that corresponds to the claimed duties of the proposed position.

Specifically, it has failed to submit a valid LCA that corresponds to the level of work and responsibilities that the petitioner ascribes to the proposed position and to the wage-level corresponding to such a level of work and responsibilities in accordance with the requirements of the pertinent LCA regulations. Thus, based on the LCA submitted, the petitioner is unwilling to compensate the beneficiary at a level required to perform duties that involve the high responsibility it claims is involved in the position. Thus, even if it were determined that the petitioner had overcome the director's ground for denying this petition (which it has not), the petition could still not be approved due to the petitioner's failure to submit an LCA certified for the proper wage classification.

The director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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