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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE:

MAY 01 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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on November 12, 2010. In the Form I-129 visa petition, the petitioner describes itself as a distributor and manufacturer of welding and industrial supplies established in 1985. In order to employ the beneficiary in what it designates as a business development manager (exports) 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 on January 4, 2011, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; (5) the Form I-290B and supporting materials; (6) the AAO's RFE; and (7) the response to the AAO's RFE. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.¹

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

¹ The AAO notes that when a petitioner pays a filing fee for an application or petition, it is seeking a decision from U.S. Citizenship and Immigration Services (USCIS) regarding eligibility for the benefit(s) being sought. In general, USCIS does not refund a fee regardless of the decision on the application or petition. There are only a few exceptions to this rule, such as when an incorrect fee was collected or when USCIS made an error which resulted in the application or petition being filed inappropriately. Here, the petitioner has not established eligibility for the benefit sought. Thus, counsel has not established that the petitioner is entitled to a refund of the fee.

² The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a business development manager (exports) to work on a full-time basis. With the Form I-129 petition, the petitioner provided a job description which included the following description of the duties of the proffered position:

1. Develop and capitalize on new business ventures and revenue possibilities and direct efforts of the company to further penetrate assigned accounts and target new opportunities abroad;
2. Direct and coordinate new business development activities;
3. Identify and qualify prospective client opportunities as well as prepare and present business development presentations and proposals;
4. Review market analyses to determine customer needs, volume potential, price schedules and discount rates;
5. Develop pricing strategies with the goal of maximizing profits while ensuring customer satisfaction;
6. Monitor new developments and trends in the industry that indicate the opportunity and need for new products and services;
7. Evaluate and quantify markets for potential sales of new and expanded products, examine and analyze data to forecast future trends, and report results to senior management;
8. Establish and monitor sales goals and provide reports tracking attainment of established goals.

The AAO observes that the petitioner states in its job description that the minimum requirement for the proffered position is a "Bachelor's degree (or equivalent) in Business Administration, Management, or a closely related field, with applicable experience."³ The petitioner submitted a letter from Professor [REDACTED] who found that the beneficiary's professional experience is equivalent to a Bachelor of Business Administration Degree with a concentration in Industrial Management.⁴

³ The petitioner does not provide any specific information as to what would qualify as "applicable experience."

⁴ The AAO notes that the petitioner stated that the beneficiary founded a company and "is currently employed as the CEO, performing duties similar to those required of [the] proffered position." The AAO observes that the petitioner classified the proffered position in the LCA under the occupational category

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

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on November 19, 2010. The petitioner was asked to submit documentation to establish that a specialty occupation position exists including a detailed statement of the beneficiary's proposed duties and responsibilities, including the percentage of time devoted to each duty. The director outlined the specific evidence to be submitted.

In response to the RFE, counsel submitted a brief and additional evidence. Specifically, counsel for the petitioner submitted the following documents: (1) an opinion letter from [REDACTED] and (2) several job postings. In addition, counsel submitted a document entitled "Job Description, Business Development Manager (Export)," which provided a revised description of the proposed duties as follows:

Sales & Marketing (50%) – these duties require the Bachelor's degree equivalent in Business Administration, Marketing, Management, or a related field because knowledge of advanced concepts related to analysis of past sales patterns to predict future demand. Advanced knowledge of marketing concepts and principles is also required to develop marketing plans/campaigns. This education is also required to properly evaluate data to develop a pricing scheme for products (taking into consideration fluctuating currency values, tariffs, and transportation costs) to ensure the goal of increased profitability. The advanced knowledge to be able to establish realistic (and therefore useful) budgets is also required; this knowledge likewise comes from obtaining the required bachelor's degree. Finally, advanced negotiation skills are also required, which are normally developed in a bachelor's degree program focusing on Business Administration, Management, Marketing or a closely related field.

1. Analyze and review sales records, orders, and invoices of former accounts and develop contact, sales, and pricing strategy to engage former clients and reestablish business relationships; potential annual volume for these former accounts exceed \$1,000,000[;]
2. On existing accounts, increase sales by reviewing historic sales records and plan introduction of new product lines and expanding existing product lines; potential incremental volume on existing accounts is in excess of \$1,500,000;

"Marketing Managers." The petitioner did not classify the proffered position under the occupational category "Chief Executives" – SOC (ONET/OES) code 11-1011. Notably, the prevailing wage for "Chief Executives" is significantly higher than the prevailing wage for "Marketing Managers."

3. In existing markets, oversee research and compilation of a list of accounts that have never purchased product from [the petitioner]; assess sales/volume potential and prioritize this list in terms of greatest potential volume; Manage process of establishing contact/relationships with these accounts;
4. Identify new markets to enter based on product need; quantify number of accounts and potential volume; prioritize by most volume/most likely to develop a business relationship develop a marketing plan to enter these markets;
5. Negotiate agreements with clients to ensure profitability based on pricing analysis, sales projections, and shipping costs;
6. Compile annual sales budgets; formulate monthly reporting to track results against budget;
7. Establish profitability goals by accounts; monitor actual profitability against target; adjust pricing and terms to attain profitability goals[.]

Product Knowledge (5%) – Baccalaureate-level knowledge in the related fields is required for these duties in order to effectively bring out the strengths of the company's products and the weaknesses of its competitors, while de-emphasizing any of its own weaknesses. This ability is critical for any effective marketing campaign, which in turn forms the basis for the management of the petitioner's business development efforts abroad.

1. Must have detailed and specific product knowledge to compare and contrast the strengths and benefits of our product line over our competitors;
2. Keep current on welding industry trends, new products, and product enhancements; make internal recommendations to purchasing department on what products to add to [the] assortment to meet [the] customer's needs;
3. Act as escalation to address and resolve any product performance issues with customer; maintain ultimate responsibility for customer satisfaction to ensure maintenance of accounts[.]

Credit and Collection (10%) – Advanced knowledge of risk analysis is required to perform these duties. Establishing and maintain foreign accounts are inherently riskier due to not just geographic distance but also different legal systems and different business customs. The knowledge equivalent to a Bachelor's degree in one of the related fields will provide the required knowledge of finance to allow the Business Development Manager (Exports) to perform these duties effectively and provide actionable information to confidently pursue business in new markets.

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1. Research and obtain financial information to review the credit worthiness of all new export accounts; compile a credit file that includes a complete and signed credit application, credit references, and, where necessary, review and evaluate credit worthiness and assign payment terms and credit limits accordingly;
2. Oversee the monitoring of the open accounts receivable balances for all export accounts; responsible to keep all accounts current in their payments and within the assigned credit limits; negotiate with clients to resolve any accounts with past due balances and/or are exceeding their credit limits[.]

Logistics (15%) – These duties require the Bachelor's degree equivalent in a related field to be able to gather information on all segments of global shipping/delivery chain and provide cost-benefit analysis of all available options for each segment. The beneficiary's baccalaureate-level experience matches perfectly with these duties as he has been performing similar duties for his own company. Should any shipment go awry at any particular link in the chain, the advanced negotiation skills are also required to pursue effective resolution to everyone's satisfaction.

1. Apply understanding of the complexity of international product shipping, including knowledge of freight forwarders, times frames for delivery, utilizing multiple forms of transportation to effect a single delivery, and packaging requirements to protect products from damage and to withstand lengthy and difficult transportation challenges;
2. Perform cost-benefit analysis of shipping options and negotiate agreements for all segments of the shipping and delivery of products in client countries throughout Latin America and South America;
3. Monitor the accuracy and completeness of all export orders being shipped from our various warehouse locations; the cost of inaccurate or incomplete orders is significant and could completely offset any profit margins on an order;
4. Track all shipments to ensure product is delivered to the correct location, within the promised time frames, with the product delivered in good condition;
5. Pursue claims for any product that is damaged or lost in transit and negotiate resolution as necessary; maintain contact with client to ensure customer is satisfied with the outcome of any shipment problems[.]

Management (20%) – These duties require the Bachelor's degree equivalent in Business Administration, Management, Marketing, or a closely related field as they involve advanced analytical skills concerning business-plans, goals, and profitability. Reports and presentations to provide complicated information in a useful format are also required. Additionally, the human resources/personnel related duties also

require the Bachelor's degree equivalent as they require advanced knowledge of talent evaluations, training, engagement, and retention. The beneficiary's decades of business experience have provided him with directly applicable baccalaureate-level experience required to perform these duties.

1. Effectively communicate with the President and officers of the company, the goals and opportunities of the export business, its challenges, and its profitability, prepare reports and presentations to upper management;
2. As the export business grows, identify candidates for employment who can assist in the management of the export process, including logistics, credit and collection, sales and customer services;
3. Effectively train new employees in the export process so that they contribute to its profitable growth[.]

In addition, the job description states the following regarding the requirements for the proffered position:

The candidate to fill the position of Business Development Manager (Export) must have a degree, or its equivalent, in business administration/management.⁵ This person must have at least 10 years of experience in both the welding industry and in the export business.⁶ This person must be a problem solver, have exceptional people skills and customer service skills, and be a self-motivator. Advanced negotiation skills are also required. This candidate must understand account profitability and cash flow. Fluency in English, Spanish and Portuguese is a must, with additional foreign language skills being a strong plus. This candidate must possess exceptional overall communication skills.

The AAO notes that the document entitled "Job Description, Business Development Manager (Export)" is not on the petitioner's letterhead and is not endorsed by the petitioner.⁷ The record of

⁵ Notably, in the section regarding the job duties, the document repeatedly states that the position requires a bachelor's degree in business administration, **marketing**, management, **or a related field**. No explanation for the variance was provided.

⁶ No further information was provided regarding the requirement of "experience in both the welding industry and in the export business."

⁷ Further, the AAO also notes that the job duties for the proffered position have been expanded and the requirements revised. 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 its associated job responsibilities and requirements. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported

proceeding does not indicate the source of the duties and responsibilities that this document attributes to the proffered position.

Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on January 4, 2011. Thereafter, counsel submitted an appeal of the denial of the H-1B petition.⁸

Counsel states that the "USCIS [U.S. Citizenship and Immigration Services] Adjudicator's Field Manual states that in most circumstances, adjudications are governed by the preponderance of the evidence standard of proof." With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. See *INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987)

by the facts in the record. The information provided in response to the director's request for further evidence did not clarify or provide more specificity to the original duties and requirements of the position, but rather added new duties and requirements to the job description.

⁸ The AAO received the appeal and conducted a preliminary review of the record of proceeding. The AAO issued an RFE on January 25, 2013 regarding the petitioner's corporate status. The petitioner responded to the RFE on February 25, 2013, and provided documentation regarding its corporation status in the State of Georgia, along with related documents.

(discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. 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. As will be discussed, that burden has not been met.

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

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

In the letter of support dated October 8, 2010 and submitted with the initial petition, the petitioner stated that it requires a "Bachelor's degree (or equivalent) in Business Administration, Management, or a closely related field, with applicable experience" for the proffered position.⁹ Thus, the petitioner indicated that a degree in business administration is sufficient for the proffered position.

⁹ In the letter of support dated October 8, 2010, the petitioner did not specify what would qualify as "applicable experience." In response to the RFE, counsel submitted a document that states that "at least 10 years of experience in both the welding industry and in the export business" is required for the proffered position. The document provide any further information regarding this statement. The AAO will not attempt to "guess" what is meant by "applicable experience" and/or what would qualify as "experience in both the welding industry and in the export business." Furthermore, as will be discussed in this decision, the petitioner has provided inconsistent information regarding the nature and requirements of the proffered position and in what capacity the beneficiary will actually be employed.

The AAO observes that such an assertion is inadequate to establish that the proposed position qualifies as a specialty occupation. That is, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the acceptance of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).¹⁰

Again, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Furthermore, the record of proceeding contains discrepancies between what the petitioner claims about the level of responsibility inherent in the proffered position set against the contrary level of responsibility conveyed by the wage level indicated on the LCA submitted in support of petition. That is, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Marketing Managers" - SOC (ONET/OES) code 11-2021. The petitioner stated in the LCA that the wage level for the proffered position was a Level

¹⁰ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

I (entry) position, with a prevailing wage of \$64,563 per year.¹¹ The LCA was certified on October 13, 2010 and signed by the petitioner on October 26, 2010.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.¹² Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.¹³ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and

¹¹ It is noted that, if the proffered position were determined to be a higher level position, the prevailing wage at that time would have been \$89,107 per year for a Level II position, \$113,672 per year for a Level III position, and \$138,216 per year for a Level IV position.

¹² For additional information on wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

¹³ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

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

In the instant case, the petitioner and counsel assert that the duties of the proffered position are complex, unique and/or specialized. Furthermore, according to the revised job description submitted in response to the RFE, the petitioner requires a candidate for the proffered position to possess a degree and "at least 10 years of experience in both the welding industry and in the export business" along with "[a]dvanced negotiation skills." In addition, the revised job description indicates that "[f]luency in English, Spanish and Portuguese is a must, with additional foreign language skills being a strong plus. This candidate must possess exceptional overall communication skills." Furthermore, the revised job description repeatedly emphasizes that the position requires advanced knowledge and skills. The revised description indicates that the beneficiary's work "forms the basis for the management of the petitioner's business development efforts abroad." According to the revised job description, the beneficiary will spend 20% of his time performing "Management" duties, and he will be responsible for "[e]ffectively training new employees in the export process."

Moreover, the petitioner submitted an opinion letter from [REDACTED] who references the "complex responsibilities" of the proffered position. He continues by stating that "specialized knowledge" prepares a candidate for "the challenging tasks of the position." [REDACTED] describes the specific responsibilities of the position as "specialized and complex." He claims that the success of the petitioner is "largely dependent on the ability and expertise of a Business Development Manager (Exports)" and that "the specialized duties of this individual directly and indirectly affect the company's growth, operations, revenues and profits, and ultimately the overall success of the company."

The petitioner indicates that it will be relying heavily on the beneficiary's work product to make critical decisions regarding the direction of the company and that he will have a significant degree of independent involvement in various key company functions. Such reliance on the beneficiary's work appears to surpass the expectations of a Level I position, as described above, where the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and limited exercise of judgment. Here, rather than the beneficiary's work being "monitored and reviewed for accuracy," it appears that the petitioner claims that it will be relying on the accuracy of the beneficiary's work product to make major business decisions about the direction of the company and that his work will "directly and indirectly affect the company's growth, operations, revenues and profits, and ultimately the overall success of the company."

The AAO must question the level of complexity, independent judgment and understanding required for the proffered position as the LCA is certified for a Level I entry-level position. The characterization of the position and the claimed duties and responsibilities as described in the record of proceeding conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

Furthermore, the petitioner claims that knowledge of English, Spanish and Portuguese is required for the position. A language requirement other than English in a petitioner's job offer generally is considered a special skill for all occupations, with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers. In the instant case, the petitioner has not established that the foreign language requirement has been reflected in the wage-level for the proffered position.

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

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted.

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

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

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

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

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

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

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

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

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below for dismissing the appeal.

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

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

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

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

of occupations that it addresses.¹⁴ The Form I-129 indicates that the proffered position is a "Business Development Manager (Exports)." As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Marketing Managers."

The occupational classification "Marketing Managers" is listed under the *Handbook's* chapter on "Advertising, Promotions, and Marketing Managers." The subchapter of the *Handbook* entitled "How to Become an Advertising, Promotions, and Marketing Managers" states the following about "Marketing Managers":

Education

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

Most marketing managers have a bachelor's degree. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, completing an internship while in school is highly recommended.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Advertising, Promotions, and Marketing Managers, on the Internet at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-4> (last visited April 30, 2013).

When reviewing the *Handbook*, the AAO must again note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate is assigned to job offers for beginning level employees who have only a basic understanding of the occupation. That is, based upon this wage rate, there is an expectation that the beneficiary will perform routine tasks that require limited, if any, exercise of judgment; he will work under close supervision and receive specific instructions on required tasks and expected results; and his work will be closely monitored and reviewed for accuracy. DOL guidance indicates that a job offer for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

The *Handbook* does not support a finding that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. In

¹⁴ 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/>.

general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties.¹⁵ Section 214(i)(1)(B) of the Act (emphasis added).

Here, although the *Handbook* indicates that most marketing managers have a bachelor's degree, the *Handbook* also states that courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. The *Handbook* does not state that entry into the occupation normally requires a minimum of a baccalaureate (or higher degree) in a *specific specialty* directly related to the duties and responsibilities of the position. Notably, the *Handbook* recognizes courses in disparate fields (i.e., business law, management, economics, accounting, finance, mathematics, and statistics) as advantageous for entry into this occupation. Absent evidence to the contrary, these fields are not closely related specialties. Accordingly, as such evidence fails to establish that normally the minimum requirement for entry into the occupation is at least a bachelor's degree *in a specific specialty* or its equivalent, the *Handbook* does not support the assertion that the proffered position qualifies as a specialty occupation and, in fact, supports the opposite conclusion.

Moreover, the fact that "most" marketing managers have a bachelor's degree does not equate to a normal minimum entry requirement. 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 marketing managers have a bachelor's degree, it could be said that "most" marketing managers possess such a degree. It cannot be found, therefore, that a statement that "most" employees in a given occupation have a bachelor's degree equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. (As previously discussed, the petitioner designated the proffered position in the LCA as a Level I position, which signifies that it is a low, entry-level position relative to others within the occupation.) 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

¹⁵ Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

On appeal, counsel states that the printout of the O*NET Summary Report for "Marketing Managers" is relevant to this matter. The AAO reviewed the printout in its entirety. However, upon review of the printout, the AAO finds that it is insufficient to establish that the proffered position qualifies as a specialty occupation for which at least a bachelor's degree in a *specific specialty*, or its equivalent, is normally the minimum requirement for entry. The AAO observes that the O*NET printout provides information regarding the educational requirements as stated by "respondents." Notably, the printout does not account for 100% of the "respondents." Additionally, the graph (regarding the respondents) does not indicate that any particular "education level" must be in a *specific specialty*. Thus, the information regarding "respondents" does not demonstrate that a bachelor's degree in a *specific specialty* is required, and does not, therefore, demonstrate that a position so designated qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). The AAO also observes that the O*NET report does not distinguish the respondents' positions within the occupation, such as by career level (e.g., entry-level, mid-level, senior-level), etc. Upon review of the document, the printout is not probative evidence to establish that the proffered position qualifies as a specialty occupation.

In support of the assertion that the proffered position is a specialty occupation, counsel also references the Dictionary of Occupational Titles ("DOT"). The AAO notes that DOT was last updated in 1991 (approximately 20 years prior to the submission of the H-1B petition) and has been superseded by O*NET.¹⁶ The chronological element of this resource materially diminishes its evidentiary value as an indication of current practices in the industry and it has not been established how this material is relevant to this proceeding. That is, the petitioner and counsel have not established the relevancy of DOT here to establish the current educational requirements for entry into the occupation.

Further, in response to the RFE, counsel submitted an opinion letter from [REDACTED]

However, as discussed below, the letter from Professor [REDACTED] is not persuasive in establishing the proffered position as a specialty occupation position.

¹⁶ See, for instance, this note at the opening page of the U.S. Department of Labor Internet site at <http://www.oalj.dol.gov/libdot.htm> (last visited on April 30, 2013) (emphasis in the original):

The Dictionary of Occupational Titles (DOT) was created by the Employment and Training Administration, and was last updated in 1991. It is included on the Office of Administrative Law Judges (OALJ) web site because it was a standard reference in several types of cases adjudicated by the OALJ, especially in older labor-related immigration cases. **The DOT, however, has been replaced by the O*NET.**

As a preliminary matter, the AAO notes that the regulations define the term "recognized authority" as a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. 8 C.F.R. § 214.2(h)(4)(ii). A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. *Id.*

Based upon a complete review of [REDACTED] letter, the AAO notes that [REDACTED] may, in fact, be a recognized authority on various topics; however, he has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. While he attached a resume, he has not established his expertise pertinent to the hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. Neither his self-endorsement nor his resume establishes his expertise pertinent to the recruiting and hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. Without further clarification, it is unclear how his education, training, skills or experience would translate to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of enterprises engage in the distribution and manufacturing of welding and industrial supplies (or similar organizations) for business development manager (export) positions (or parallel positions). [REDACTED] opinion letter does not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for business development manager (export) positions (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. He did not provide any documentation to establish his credentials as a recognized authority on evaluating the educational requirements for the position.

[REDACTED] claims to possess expertise in the field of business administration, information technology and systems engineering, but he did not identify the specific elements of his knowledge and experience that he may have applied in reaching his conclusions here. For example, the opinion letter contains no evidence that it was based on scholarly research conducted by [REDACTED] in the specific area upon which he is opining. He claims that as a professor, he "had opportunity over the years to become familiar with the qualifications required to attain the position of Business Development Manager (Exports) and similar professional positions, and the specialized and unique needs of the companies that recruit graduates for this position." However, he does not provide documentary support for his expertise and basis for the ultimate conclusion regarding the education required for the position (i.e., statistical surveys, authoritative industry publications, or professional studies). He does not provide a substantive, analytical basis for his opinion and ultimate conclusion.

[REDACTED] repeatedly claims that he examined the position in detail. He states "[a]fter examining the responsibilities of this Business Development Manager (Exports) position in detail, it becomes apparent that a minimum of a Bachelor's Degree in Management, Marketing, Business Administration or a related area, or the equivalent, provides the student with the core competencies

and skills needed for a Business Development Manager (Exports) position."¹⁷ Further, he also states "[having] reviewed the position in detail, it is my opinion as a scholar in the field of Business and as one with professional experience in the same, that these duties are specialized and require the theoretical and practical application of a body of highly specialized knowledge."

However, the proposed duties, as stated in his opinion letter, are copied verbatim from the unendorsed document entitled "Job Description, Business Development Manager (Export)." Upon review of the opinion letter, there is no indication that [REDACTED] possesses any knowledge of the petitioner's proffered position beyond this information. Further, [REDACTED] does not demonstrate in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. Accordingly, the very fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. There is no evidence that [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. He has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty, or its equivalent.

Moreover, it does not appear that [REDACTED] is aware that the petitioner designated the proffered position as a Level I (entry) position in the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation. The petitioner's designation of the position under this wage level signifies that the beneficiary will be expected to work under close supervision and receive specific instructions on required tasks and expected results. Additionally, the beneficiary will be expected to perform routine tasks that require limited, if any exercise of judgment. Moreover, the beneficiary's work will be closely monitored and reviewed for accuracy. It appears that [REDACTED] would have found this information relevant for the opinion letter. Moreover, without this information, the petitioner has not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the advisory opinion rendered by [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the

¹⁷ The AAO observes that [REDACTED] does not indicate that a candidate for the position would require any additional experience, training and/or special skills to perform the duties of the position. The statements that "applicable experience" and/or "at least 10 years of experience in both the welding industry and in the export business" are required for the proffered position are not corroborated by [REDACTED] evaluation.

manner in which he reached such conclusions. There is an inadequate factual foundation established to support the opinion and the AAO finds that the opinion is not in accord with other information in the record. Therefore, the AAO finds that the letter from [REDACTED] does not establish that the proffered position is a specialty occupation. As such, neither Professor Chen's findings nor his ultimate conclusions are worthy of any deference, and his opinion letter is not probative evidence towards satisfying any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding by the petitioner do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

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

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

In support of the petitioner's assertion that the proffered position is a specialty occupation position, the record of proceeding contains several job announcements. However, upon review of the evidence, the AAO finds that the petitioner's reliance on the job announcements is misplaced.

In the Form I-129, the petitioner stated that it is a distributor and manufacturer of welding and industrial supplies with 46 employees. The petitioner also reported its gross annual income as approximately \$22 million but did not indicate its net income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 423830.¹⁸ The AAO notes that this NAICS code is designated for "Industrial Machinery and Equipment Merchant Wholesalers." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments primarily engaged in the merchant wholesale distribution of specialized machinery, equipment, and related parts generally used in manufacturing, oil well, and warehousing activities.

See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 423830-Industrial Machinery and Equipment Merchant Wholesalers, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed April 30, 2013).

The AAO reviewed the job advertisement submitted by the petitioner. Notably, the petitioner and counsel did not provide any independent evidence of how representative these job advertisements are of the particular advertising employer's recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Moreover, the job announcements do not contain sufficient information regarding the advertising organizations such that the AAO can determine whether they are similar to the petitioner. For example, one of the advertisements states that it is a "leading provider of worldwide product and service solutions for enclosing, protecting and cooling electrical and electronic systems." Another advertisement is for a "manufacture of equipment, accessories and replacement parts for the global forestry, garden and construction industries." The petitioner also submitted an advertisement for a company that describes itself as manufacturing "oxy-fuel cutting, welding and heating equipment." For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the

¹⁸ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity. Each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited on April 30, 2013).

particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). In the instant case, the petitioner has not established which aspects or traits (if any) it shares with the advertising organizations.

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

The job advertisements do not establish that the proffered position qualifies as a specialty occupation under this criterion of the regulations. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from *just three* advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹⁹

The AAO acknowledges that the petitioner and counsel submitted an opinion letter from [REDACTED]. However, the AAO incorporates by reference and reiterates its earlier discussion and analysis that the opinion letter does not establish the proffered position as qualifying as a specialty occupation.

Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2)

¹⁹ According to the *Handbook's* detailed statistics on advertising, promotions, and marketing managers, there were approximately 216,800 persons employed as advertising, promotions and marketing managers in 2010. *Handbook*, 2012-13 ed., available at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm> (last accessed April 30, 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 postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that organizations similar to the petitioner in its industry commonly require, for positions parallel to the one here proffered, at least a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

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

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

To begin with and as discussed previously, the petitioner itself does not require at least a baccalaureate degree or its equivalent in a *specific specialty*. Moreover, a review of the record indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or 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 AAO acknowledges that the petitioner and counsel may believe that the proffered position is so complex and/or unique that it can be performed only by an individual with at least a bachelor's degree. In support of this assertion, the petitioner submitted (1) a three-page printout from its website, which includes information about the petitioner and links to its vendors; and (2) an opinion letter from [REDACTED] (as previously discussed).²⁰ However, neither the petitioner nor counsel has submitted sufficient probative evidence regarding the petitioner's business operations and the proffered position to substantiate its claim that the proffered position qualifies as a specialty occupation under this criterion of the regulations. That is, the AAO finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."²¹

²⁰ In response to the AAO's RFE regarding the petitioner's corporate status, the petitioner submitted additional documentation regarding its business operations, including bank statements, tax documents, and printouts regarding its corporate status in the State of Georgia.

²¹ For additional information regarding wage levels as defined by DOL, see Employment and Training

The petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty. Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position.

It is further noted that although the petitioner asserts that a bachelor's degree is required to perform the duties of the proffered position, the petitioner failed to sufficiently demonstrate how the duties require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. That is, the record of proceeding does not establish that the petitioner's requisite knowledge for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or the equivalent. For example, 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 or unique. While a few related courses may be beneficial in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. The petitioner has not credibly demonstrated that this position, which the petitioner characterized in the LCA as an entry-level position, is so complex or unique that it can be performed only by an individual with at least a baccalaureate degree in a specific specialty, or the equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background and prior experience will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not adequately explained or clarified which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record, the petitioner has failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

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

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

On the Form I-129 petition, the petitioner stated that it was established in 1985 (approximately twenty-five years prior to the submission of the H-1B petition) and that it has 46 employees. The petitioner did not submit any information regarding employees who previously held the position, stating that the proffered position is a new position within the petitioner's business operations.

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

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

The AAO acknowledges the petitioner and counsel may believe that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. In support of the petition, the petitioner submitted various documents regarding its business operations, including a printout from its website, an opinion letter, financial and tax documents, and printouts regarding its corporate status in the State of Georgia.²² The AAO reviewed the documentation submitted by the petitioner and finds that it fails to support the assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

The petitioner and counsel claim that the proffered position is needed to expand and develop the business. In the support letter dated October 8, 2010, the petitioner states "[d]ue to the current economic conditions in the U.S., we now seek expansion opportunities in foreign markets, and we are therefore in need of a Business Development Manager for the export portion of our business." In response to the RFE, counsel again claims that "the petitioner seeks to expand its business into foreign markets due to the unprecedented economic conditions in the U.S." and that "the beneficiary's overall responsibilities require him to develop and capitalize on new business ventures and revenue possibilities and direct efforts of the company to further penetrate assigned accounts and target new opportunities." The petitioner did not submit documentation substantiating concrete expansion opportunities, new business ventures, new customers or contracts, or other evidence regarding its business development.

It is noted that 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.²³

²² As previously discussed, the petitioner and its counsel submitted an opinion letter from Professor Chen. The AAO addressed the letter earlier in the decision. As a reasonable exercise of its discretion the AAO discounts the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

²³ The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the

While the petitioner is certainly permitted to petition for H-1B classification on the basis of facts not in existence at the time the instant petition was filed, it must nonetheless file a new petition to have these facts considered in any eligibility determination requested, as the agency may not consider them in this proceeding pursuant to the law and legal precedent cited, *supra*. Thus, future plans for expansion do not support the assertion that the proffered position is specialized and complex.

Moreover, the AAO finds that the level of complexity, independent judgment and understanding claimed by the petitioner and counsel is materially inconsistent with the LCA certification for a Level I entry-level position. The AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupation. The petitioner designated the position as a Level I position (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Marketing Managers," and hence one not likely distinguishable by relatively specialized and complex duties. Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV position, requiring a significantly higher prevailing wage of \$138,216 per year. A Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." 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. 591-92.

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner has failed to establish that the proffered position requires a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the AAO need not and will not address the beneficiary's qualifications.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision.²⁴ In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met.

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

²⁴ The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 145. However, as the appeal is dismissed for the reasons discussed above, the AAO will not further discuss the additional issues and deficiencies that it observes in the record of proceeding.