



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **MAY 02 2013** OFFICE: VERMONT SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

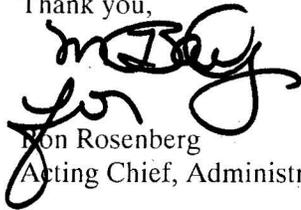
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:
[Redacted]

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 May 25, 2012. In the Form I-129 visa petition, the petitioner describes itself as a law firm established in 2009.¹ In order to employ the beneficiary in what it designates as a legal assistant position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on September 13, 2012, 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, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it 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 response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director 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, and the petition will be denied.

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

In this matter, the petitioner stated in the Form I-129 petition that it seeks the beneficiary's services as a legal assistant to work on a part-time basis (25 hours per week) at a rate of pay of \$20.18 per hour. In a support letter dated May 21, 2012, the petitioner stated that the proffered position entails the following duties:

1. Assist both American and Chinese clients in the negotiations for investment and transactions including the assessment of investment opportunities and the

¹ In the Form I-129 petition, the petitioner indicated that it has one employee.

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

- drafting of legal documents including joint ventures between U.S. companies and Chinese companies in the U.S. and China;
2. Assist in offering legal consultations concerning company law, international business laws, copy right law and trademark law;
 3. Assist in analyzing law sources, investigating facts and law to determine causes of action and to prepare case accordingly;
 4. Assist in preparing legal documents for legal proceedings, real estate closing statement and assist in closing process;
 5. Assist in reviewing lease and agreement and giving legal advice;
 6. Prepare and draft legal documents such as agreements, divorce files, contracts, business transfer and sell agreements, closing papers, deeds, and immigration petition letters and forms;
 7. Interviewing mandarin-speaking clients and explaining the legal documents to clients.

(Errors in the original.) In its letter of support accompanying the initial I-129 petition, the petitioner stated the following regarding the requirements for the proffered position:

To be able to perform the above specified duties and responsibilities, the beneficiary must be acquired the legal educational qualifications such as a Bachelor Degree in Law (LL.B) and practical experience necessary for the position. A large portion of our clients consists of Chinese speaking people. . . . Therefore our law firm needs a legal assistant who has the bilingual ability, a high degree in law and bilingual working experience in both USA and China.

(Errors in the original.) The petitioner stated that the beneficiary is qualified to perform the duties of the proffered position by virtue of her Master in Laws (LL.M). In support of this assertion, the petitioner provided a copy of the beneficiary's academic credentials, including an academic diploma and transcript in the beneficiary's name from [REDACTED]

In support of the Form I-129, the petitioner also included several documents that are in a foreign language. They are not accompanied by an English translation.³

³ Any document submitted containing a foreign language must be accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English. See 8 C.F.R. § 103.2(b)(3). Because the petitioner failed to comply with the regulations by submitting a certified translation of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *Id.* Accordingly, the evidence that is in a foreign language is not probative and will not be accorded any weight in this proceeding. The

In addition, the petitioner submitted an LCA in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification "Paralegals and Legal Assistants" - SOC (ONET/OES) code 23-2011 at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 17, 2012. In the RFE, the director notified the petitioner that additional evidence was needed to establish eligibility for the benefit sought. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. Furthermore, the director acknowledged that the petitioner had submitted a job description, but notified the petitioner that it was not persuasive in establishing that the proffered position is a specialty occupation. The director provided examples of documentation for the beneficiary to submit, including a "detailed description of the proffered position, to include approximate percentages of time for each duty the beneficiary will perform." The petitioner was also asked to submit evidence to confirm its corporate status. The director outlined the specific evidence to be submitted.⁴

On August 30, 2012, the petitioner's counsel responded to the RFE by submitting a letter and additional evidence. Specifically, counsel submitted the following: (1) a chart describing the duties of the proffered position; (2) evidence related to other individuals employed by the petitioner; (3) a printout from the Occupational Information Network (O*NET) OnLine; (4) a printout from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*; (5) several job advertisements; and (6) evidence related to the petitioner's business operations (including a lease agreement, corporate documents, and tax filings).

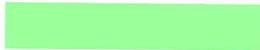
As mentioned above, counsel submitted a chart describing the duties of the proffered position. Specifically, the chart provides the following information:

AAO will not attempt to decipher or "guess" the meaning of documents that are not accompanied by a full, certified English language translation.

⁴ Among other suggested evidence, the director requested the following:

Please submit evidence showing that in your company and in similarly situated businesses in your industry, a baccalaureate degree in a specific field of study is a standard minimum requirement for the job offered. Attestations to industry standards must be for similar positions among companies in your industry that are of comparable nature and scope. Please note that a statement by the petitioner does not serve as documentary evidence to establish that a bachelor's degree is an industry requirement.

Beneficiary's Duties	Corresponding Percentages of Time	Educational Requirements of the Position	Beneficiary's Qualified Education
Assist both American and Chinese clients in the negotiations for investment and transactions including the assessment of investment opportunities and the drafting of legal documents including joint ventures between U.S. companies and Chinese companies in the U.S. and China	7%	Bachelor's degree in Law	Master of Law in Business Law [REDACTED] May 2011
Assist in offering legal consultations concerning company law, international business laws, copy right law and trademark law	8%	Bachelor's degree in Law	Master of Law in Business Law [REDACTED] May 2011
Assist in analyzing law sources, investigating facts and law to determine causes of action and to prepare cases accordingly	5%	Bachelor's degree in Law	Master of Law in Business Law [REDACTED] May 2011
Assist in preparing legal documents for legal proceedings, real estate closing statement and assist in closing process	25%	Bachelor's degree in Law	Master of Law in Business Law [REDACTED] May 2011
Assist in reviewing lease and agreement and giving legal advice	20%	Bachelor's degree in Law	Master of Law in Business Law [REDACTED] May 2011



Prepare and draft legal documents such as agreements, divorce files, contracts, business transfer and sell agreements, closing papers, deeds, and immigration petition letters and forms	25%	Bachelor's degree in Law	Master of Law in Business Law  May 2011
Interviewing mandarin-speaking clients and explaining the legal documents to clients	10%	Bachelor's degree in Law	Master of Law in  May 2011

(Errors in original.) The AAO notes that the description of the proffered position provided in response to the RFE is identical to the job description submitted with the initial petition, with the addition of the percentage of time to be spent on each duty, the educational requirements of the position, and the "beneficiary's qualified education." Thus, despite the director's request that the petitioner provide a "detailed" description of the proffered position, the petitioner elected to provide the same description of the duties that was originally submitted. No explanation was provided.

The director reviewed the information provided by the petitioner. 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 September 13, 2012. The petitioner submitted an appeal of the denial of the H-1B petition.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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.

To ascertain the intent of a petitioner, U.S. Citizenship and Immigration Services (USCIS) must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. 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."

Furthermore, while the petitioner has identified its proffered position as that of a legal assistant, the description of the beneficiary's duties, as provided by the petitioner, lacks the specificity and detail necessary to support the petitioner's contention that the position is a specialty occupation. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. In the instant case, it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the AAO finds the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position. The job description fails to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that 65% of the beneficiary's time will be spent "assisting" in the completion of certain duties. However, the petitioner has failed to indicate the specific tasks the beneficiary will perform. For example, counsel has stated that the beneficiary will spend 20% of her time "assist[ing] in reviewing lease[s] and agreement[s] and giving legal advice." There is no indication in the record that the beneficiary is a licensed attorney. Thus, the beneficiary is not authorized to be "giving legal advice." The petitioner has not provided any specifics as to what "assist[ing] in . . . giving legal advice" entails. In addition, counsel has indicated that the beneficiary will spend 25% of her time "assist[ing] in preparing legal documents for legal proceedings, real estate closing statement and assist in closing process." The AAO is unable to ascertain from the vague language of this statement exactly what tasks the beneficiary is expected to perform. Notably, the petitioner did not indicate if this is a purely clerical task, or if involves the application of substantive legal knowledge. These statements fail to provide any particular details regarding the demands, level of responsibilities and requirements necessary for the performance of these duties.

This is further illustrated by the petitioner's statement that the beneficiary will be "assist[ing] both American and Chinese clients in the negotiations for investment and transactions including the assessment of investment opportunities, and the drafting of legal documents." The statement does not delineate the actual work the beneficiary will perform, and the petitioner does not explain the beneficiary's specific role in "assisting" in such negotiations. According to the petitioner, the beneficiary will be responsible for "assist[ing] in offering legal consultations." However, the petitioner does not clarify what tasks are involved in "assisting in offering" such that the AAO can ascertain whether the beneficiary is participating in the legal consultations in some way, or if she is

merely providing assistance in advertising such consultations to potential clients. The statement fails to provide any specifics regarding the beneficiary's role and it does not provide any information as to the complexity of the job duties, the amount of supervision required, and the level of judgment and understanding required to perform the duty. Furthermore, the phrase could cover a range of issues, and without further information, does not provide any insights into the beneficiary's day-to-day work.

Upon review of the record of proceeding, the AAO finds that the overall responsibilities for the proffered position contain insufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their daily performance. Furthermore, although the petitioner submitted general documentation regarding its business operations, the petitioner did not provide sufficient documentation to establish and substantiate the actual job duties and responsibilities of the proffered position. That is, the petitioner submitted a few documents regarding its business operations (i.e., a lease, articles of organization, tax return); however, the petitioner did not submit probative evidence to establish the actual duties that the beneficiary will perform. The petitioner failed to establish the beneficiary's specific role within its business operations.

Moreover, the AAO notes that it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's operations are relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in a specific specialty, or its equivalent. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties.

In the Form I-129, the petitioner described itself as law firm with one employee (the attorney/president). The petitioner listed its net annual income as approximately \$36,000. In the RFE, the director specifically noted that "it is not clear how the beneficiary will be relieved from performing non-qualifying functions." Neither the petitioner nor counsel addressed how the beneficiary will be relieved from performing non-qualifying duties. A position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129.

Furthermore, the AAO observes that 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 by 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 "Paralegals and Legal Assistants" at a

Level I (entry level) wage.

Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing-wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation. It is important to note that prevailing wage determinations start with an entry level wage (Level I) 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.⁵⁶ 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 as indicated by the job description.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

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

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

DOL guidance further indicates that a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones would be an indication that a wage

⁵ 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.

determination at Level II would be proper classification for a position. The occupational category "Paralegals and Legal Assistants," has been assigned an O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, most occupation in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." See O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3.

In the instant case, the petitioner designated the proffered position as a Level I position. This suggests that the petitioner's academic and/or professional experience requirements for the proffered position would be *less than* "training in vocational schools, related on-the-job experience, or an associate's degree" as stated for occupations designated as O*NET Job Zone 3.

Notably, the petitioner claims that the proffered position requires a degree and experience. The petitioner and counsel further assert that the position involves complex, unique and/or specialized duties. The petitioner has indicated that it seeks an educated and experienced individual to fill the proffered position, and that it will be relying heavily on this individual in its rapidly growing business. In its support letter dated May 21, 2012, the petitioner indicated that it requires an individual with "excellent legal business, linguistic background and working experience in both American and Chinese law firms." The petitioner claims that it "require[s] an individual with high academic qualifications and legal experiences in China and U.S." In the description of the proffered position, the petitioner states that the beneficiary will be "interviewing mandarin-speaking clients and explaining the legal documents to clients."

In response to the RFE, counsel for the petitioner states that the proffered position requires that the beneficiary "understand legal terminologies, draft legal documents, consult the clients, prepare the cases, and do legal research using LexisNexis or Westlaw." Counsel further states that the proffered position is "more like an attorney-at-law position without [an] attorney's license." Counsel submitted a chart regarding the proffered position, which indicates that the legal assistant position requires a bachelor's degree plus one year of experience.

On appeal, counsel references the "sophisticated, professional duties" of the proffered position. According to counsel, the job duties of the proffered position are not similar to that of an ordinary legal assistant. Counsel compares the duties to an "ordinary legal assistant" and classifies the duties of the proffered position as "More discretionary," "Highly Demanding," "Very Complex," "Very Advanced," "Specialized in law," "Very sophisticated," and "More professional." Counsel then specifically states that "the duties to be performed by [the] beneficiary are more discretionary, demanding, complex, highly advanced, specialized, and sophisticated." According to counsel, the duties are "highly complex and unique." Counsel again compares the knowledge and skills required for the proffered position to that of an "entry-level attorney."⁷

⁷ Counsel claims that the occupational category of "Paralegals and Legal Assistants" was selected because the petitioner could not "find a higher level legal assistant title/code to fit [the] petition when [it] filed the LCA." The AAO notes that a petitioner may distinguish its proffered position from others within the occupation through the proper wage level designation to indicate factors such as 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. That is, through the wage level, the petitioner is able to reflect the job requirements,

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 by the petitioner and counsel 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 she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

Furthermore, the petitioner claims that knowledge of the Mandarin language 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 AAO notes that the prevailing wage of 20.18 per hour on the LCA corresponds to a Level I position for the occupational category of "Paralegals and Legal Assistants" for [REDACTED] NY).⁸ Notably, if the proffered position had been designated at a higher level, the prevailing wage at that time would have been \$24.64 per hour for a Level II position, \$29.11 per hour for a Level III position, and \$35.57 per hour for a Level IV position.

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

experience, education, special skills/other requirements and supervisory duties.

⁸ For additional information regarding the prevailing wage for this occupation in [REDACTED] see the All Industries Database for 7/2011 - 6/2012 for Paralegals and Legal Assistants at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at [REDACTED] (last visited April 29, 2013).

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.

Upon review of the record of proceeding, the AAO notes that 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, the petition could still 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, and for the specific reasons described below, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

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

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

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

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

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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 determine whether the proffered position qualifies as a specialty occupation, the AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). In the interest of efficiency, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the

proffered position into the analysis of each criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which follows below.

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 normally the minimum requirement for entry into the particular position.

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

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁹ As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Paralegals and Legal Assistants."

The AAO reviewed the sections of the *Handbook* relating to "Paralegals and Legal Assistants," which describes the duties of a legal assistant as follows:

Paralegals and legal assistants do a variety of tasks to support lawyers, including maintaining and organizing files, conducting legal research, and drafting documents.

Duties

Paralegals and legal assistants typically do the following:

- Investigate the facts of a case
- Conduct research on relevant laws, regulations, and legal articles
- Organize and present the information
- Keep information related to cases or transactions in computer databases
- Write reports to help lawyers prepare for trials
- Draft correspondence and other documents, such as contracts and mortgages
- Get affidavits and other formal statements that may be used as evidence in court
- Help lawyers during trials

⁹ 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/>.

Paralegals and legal assistants help lawyers prepare for hearings, trials, and corporate meetings. However, their specific duties may vary depending on the size of the firm or organization.

In smaller firms, paralegals duties tend to vary more. In addition to reviewing and organizing information, paralegals may prepare written reports that help lawyers determine how to handle their cases. If lawyers decide to file lawsuits on behalf of clients, paralegals may help prepare the legal arguments and draft documents to be filed with the court.

In larger organizations, paralegals work mostly on a particular phase of a case, rather than handling a case from beginning to end. For example, a litigation paralegal might only review legal material for internal use, maintain reference files, conduct research for lawyers, and collect and organize evidence for hearings. Litigation paralegals often do not attend trials, but might prepare trial documents or draft settlement agreements.

Law firms increasingly use technology and computer software for managing documents and preparing for trials. Paralegals use computer software to draft and index documents and prepare presentations. In addition, paralegals must be familiar with electronic database management and be up to date on the latest software used for electronic discovery. Electronic discovery refers to all electronic materials that are related to a trial, such as emails, data, documents, accounting databases, and websites.

Paralegals can assume more responsibilities by specializing in areas such as litigation, personal injury, corporate law, criminal law, employee benefits, intellectual property, bankruptcy, immigration, family law, and real estate. In addition, experienced paralegals may assume supervisory responsibilities, such as overseeing team projects or delegating work to other paralegals.

Paralegal tasks may differ depending on the type of department or the size of the law firm they work for.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Paralegals and Legal Assistants, <http://www.bls.gov/ooh/Legal/Paralegals-and-legal-assistants.htm#tab-2> (last visited April 29, 2013).

The AAO finds that the *Handbook* does not indicate that paralegals and legal assistants comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. The subchapter of the *Handbook* entitled "How to Become a Paralegal or Legal Assistant" states, in part, the following about this occupation:

Most paralegals and legal assistants have an associate's degree in paralegal studies,

or a bachelor's degree in another field and a certificate in paralegal studies. In some cases, employers may hire college graduates with a bachelor's degree but no legal experience or education and train them on the job.

Education

There are several paths to become a paralegal. Candidates can enroll in a community college paralegal program to earn an associate's degree. A small number of schools also offer bachelor's and master's degrees in paralegal studies. Those who already have a bachelor's degree in another subject can earn a certificate in paralegal studies. Finally, some employers hire entry-level paralegals without any experience or education in paralegal studies and train them on the job, though these jobs typically require a bachelor's degree.

Associate's and bachelor's degree programs in paralegal studies usually combine paralegal training, such as courses in legal research and the legal applications of computers, with other academic subjects. Most certificate programs provide this intensive paralegal training for people who already hold college degrees. Some certificate programs only take a few months to complete.

More than 1,000 colleges and universities offer formal paralegal training programs. However, only about 270 paralegal programs are approved by the American Bar Association (ABA).

Many paralegal training programs also offer an internship, in which students gain practical experience by working for several months in a private law firm, the office of a public defender or attorney general, a corporate legal department, a legal aid organization, or a government agency. Internship experience helps students improve their technical skills and can enhance their employment prospects.

Handbook, 2012-13 ed., Paralegals and Legal Assistants, <http://www.bls.gov/ooh/Legal/Paralegals-and-legal-assistants.htm#tab-4> (last visited April 29, 2013).

The AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates that the proffered position is a low-level, entry position relative to others within the occupation. The wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty is normally the minimum requirement for entry into this occupation. Rather, the *Handbook* states that most paralegals and legal assistants have an associate's degree in paralegal studies, or a bachelor's degree in another field and a certificate in paralegal studies. The narrative of the

Handbook indicates that there are several educational paths to become a paralegal, including obtaining an associate, baccalaureate or master's degree in paralegal studies, as well as earning a certificate in paralegal studies (for those who already have a bachelor's degree in another subject). For entry into the occupation, the *Handbook* indicates that some employers hire paralegals without any experience or education in paralegal studies and train them on the job. The *Handbook* states that these jobs typically require a bachelor's degree. The *Handbook* does not conclude that normally the minimum requirement for entry into these positions is at least a bachelor's degree in a specific specialty, or its equivalent.

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

Next, the AAO reviews the record 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. Also, there are no submissions from the industry's professional association indicating that it has made a degree 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.

As previously mentioned, in the Form I-129, the petitioner stated that it is a law firm established in 2009 and consists of one employee. The petitioner's filing indicates that principal attorney/president is the petitioner's sole employee. The petitioner listed its gross annual income as approximately \$122,000 and its net annual income as approximately \$36,000. The petitioner

designated its business operations under the NAICS code 541110 - "Offices of Lawyers." The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This industry comprises offices of legal practitioners known as lawyers or attorneys (i.e., counselors-at-law) primarily engaged in the practice of law. Establishments in this industry may provide expertise in a range or in specific areas of law, such as criminal law, corporate law, family and estate law, patent law, real estate law, or tax law.

U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 541110 – Offices of Lawyers, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited April 29, 2013).

The AAO notes that under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must establish that "the degree requirement is common to *the industry in parallel positions* among *similar organizations* [emphasis added]." For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, letters submitted by other organizations 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 organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

The AAO reviewed the job advertisements submitted by the petitioner with the initial Form I-129 and in response to the RFE. Notably, the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documents, the AAO finds that they do not establish that a requirement for a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position. Contrary to the purpose for which they were submitted, none of the announcements establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions.

Specifically, the posting for a bi-lingual law clerk in [redacted] Maryland states that the "ideal candidate" would be a recent law school graduate, but does not state any specific academic requirement for the position. Likewise, the posting from [redacted] indicates that a "college degree" is preferred. Obviously a *preference* for a candidate with a particular level of education is not indication of a *requirement*.

Furthermore, the posting for an immigration paralegal for a [REDACTED] requires a bachelor's degree (no specialty specified) or completion of a paralegal program. Similarly, the posting for a corporate and real estate paralegal in Washington, D.C. indicates that the company will accept a candidate with an associate's degree and a paralegal certificate. The posting from [REDACTED] requires a general four year degree (no specific specialty) or paralegal certification. The postings for a paralegal/legal assistant in northeast Ohio, and for a legal administrative assistant at [REDACTED] all call for a four year degree or a bachelor's degree, but none indicate that the degree must be in a specific specialty. Although a general-purpose bachelor's degree 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 at 147.

Several job announcements submitted by the petitioner advertise positions that do not appear to be parallel to the proffered position. The posting for a legal administrative assistant at [REDACTED] appears to be an entirely clerical position. The postings from SNI Legal, a national company located in Northeastern Ohio, MGA Entertainment, Inc., Shalimar Law Firm, a mid-sized law firm in Rockville, Maryland, and the "prominent corporation" seeking an immigration paralegal lack sufficient information regarding the duties of the advertised positions such that the AAO can ascertain whether the advertised positions are parallel to the proffered position.

Finally, none of the job announcements contain sufficient information regarding the advertising organizations such that the AAO can determine whether they are similar to the petitioner. Some of the organizations appear to be clearly dissimilar. For example, one of the organizations is described as [REDACTED] and another organization is described as a "national company." SNI Legal is described as "a national staffing company with locations in Washington, D.C. and 5 offices in the Chicagoland area." The petitioner is a one-employee law firm. Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

The AAO reviewed all of the advertisements submitted by the petitioner.¹⁰ However, as the

¹⁰ In support of its appeal, the petitioner provided additional job postings. Notably, in the RFE, the director requested the petitioner submit probative evidence to establish eligibility under this criterion of the regulations. Evidence requested in an RFE but not included in the petitioner's RFE response will not be considered if later submitted. See 8 C.F.R. §§ 103.2(b)(8)(iv) and (b)(11). See also *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not consider the sufficiency of the requested evidence submitted by the petitioner on appeal. Nevertheless, the AAO reviewed the job postings submitted with the appeal, but finds that the advertisements submitted have similar deficiencies to the advertisements discussed above. The job advertisements do not 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.

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. 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 the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹¹

On appeal, counsel asserts that the director did not "give enough notice and clear directions in the RFE compared with other RFE in . . . similar situations. Counsel claims that, had clearer instructions, been provided, the petitioner would have "provided letters or affidavits from firms or individuals in the industry to attest." In support of this assertion, counsel provides copies of two RFEs from unrelated cases. The AAO notes that in the RFE issued to the petitioner, the director specifically requested the following:

Please submit evidence showing that in your company and in similarly situated businesses in your industry, a baccalaureate degree in a specific field of study is a standard minimum requirement for the job offered. Attestations to industry standards must be for similar positions among companies in your industry that are of comparable nature and scope. Please note that a statement by the petitioner does not serve as documentary evidence to establish that a bachelor's degree is an industry requirement.

The AAO observes that the director communicated that the petitioner could submit "attestations to industry standards." However, the AAO also observes that the regulation at 8 C.F.R. § 103.2(b)(8)

¹¹According to the *Handbook's* detailed statistics on paralegals and legal assistants, there were approximately 256,000 persons employed as paralegals and legal assistants in 2010. *Handbook*, 2012-13 ed., available at <http://www.bls.gov/ooh/Legal/Paralegals-and-legal-assistants.htm#tab-6> (last accessed April 17, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the 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.

states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." It does not state that such evidence must be refuted. As to the perceived error in the director's failure to issue an RFE covering all of the possible bases for denial of the petition, the AAO notes that there is no requirement for USCIS to issue an RFE or to issue an RFE pertinent to a ground later identified in the decision denying the visa petition. Title 8 C.F.R. § 103.2(b)(8) clearly permits the director to deny a petition for failure to establish eligibility without having to request evidence regarding the ground or grounds of ineligibility identified by the director. Counsel's assertion is tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. His attempt to shift the evidentiary burden in this proceeding is without merit. The burden to establish eligibility in this matter remains solely with the petitioner. Section 291 of the Act. When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). It must be noted that the regulations governing RFEs clearly indicate that the issuance of an RFE is purely discretionary and that the director may instead deny an application when eligibility has not been established. *See* 8 C.F.R. § 103.2(b)(8). The regulations are clear that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1).

On appeal, counsel submitted two attestations. One is written by the petitioner's counsel. The petitioner's counsel attests that based upon his personal experience, he "observed that these offices [in his building] usually hired legal assistants with LL.M or law degrees." He provides the names of two individuals in support of his assertion. Notably, counsel did not furnish any evidence to establish that the duties of these individual are similar or parallel to the proffered position. Further, he did not submit any evidence to substantiate his claim. Counsel continues by stating that the duties of the proffered position are "specific, complex, unique, and sophisticated." As previously discussed, in the instant case, the petitioner has provided inconsistent information regarding its legal assistant position. The petitioner has failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed. Further, the petitioner has designated the proffered position as a Level I (entry) level position on the LCA.

The second letter is written by [REDACTED] an employee of the law firm [REDACTED] [REDACTED] states, from personal knowledge acquired through interviewing for paralegal positions, that law firms in [REDACTED] New York require job applicants to have a bachelor's degree or higher. [REDACTED] does not indicate that the law firms require applicants to have a degree in a specific specialty, or its equivalent. The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the position. *See* 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). The AAO reviewed both of the letters in their entirety. However, the letters do not establish that the proffered position qualifies as a specialty occupation.¹²

Based upon a complete review of the record of proceeding, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its

¹² Accordingly, the AAO will not address the additional deficiencies that it identifies in the attestations.

equivalent, is common to the petitioner's industry in positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

The AAO acknowledges that the petitioner may believe that its particular position is so complex and/or unique that it can be performed only by an individual with at least a bachelor's degree. However, the petitioner did not submit sufficient probative evidence regarding its business operations or the proffered position 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, or its equivalent. The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. 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.

More specifically, the petitioner fails to demonstrate how the duties of the proffered position as described in the record of proceeding require the theoretical and practical application of a body of highly specialized knowledge such that a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties that it may believe are so complex or unique. While related courses may be beneficial in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here. The petitioner makes various claims about the duties of the proffered position, but fails to explain or clarify 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.

The AAO reviewed the record in its entirety and finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a Level I (entry level) wage. The wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Thus, the record lacks sufficient probative evidence to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. In other words, the record lacks sufficiently detailed information to discern the proffered position as unique from or more complex than similar positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background and prior experience working for the petitioner and other law firms will assist her in carrying out the duties of the proffered position, and takes particular note of her language skills. 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. On appeal, counsel indicates that some of the duties of the proffered position are more complex than those of an "ordinary legal assistant" not requiring a law degree.¹³ The AAO here incorporates its previous discussion regarding the vague nature of the duties of the proffered position and the inconsistencies in the record of proceeding. Further, the AAO again notes that the LCA was certified at a Level I entry-level wage. The AAO notes that this is the lowest assignable wage level of four potential wage levels. Counsel's comparison does not explain this discrepancy. 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. To this end, the AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

¹³ Furthermore, as previously discussed, DOL guidance indicates that a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones would be an indication that a wage determination at Level II would be proper classification for a position. The occupational category "Paralegals and Legal Assistants," has been assigned an O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, most occupation in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." See O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3. In the instant case, the petitioner designated the proffered position as a Level I position, suggesting that the petitioner's academic and/or professional experience requirements for the proffered position would be *less than* "training in vocational schools, related on-the-job experience, or an associate's degree" as stated for occupations designated as O*NET Job Zone 3.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. Upon review of the record of proceeding, the petitioner has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

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

In response to the RFE, counsel stated that two other individuals have held this position in the past. One of these individuals is [REDACTED] the principal attorney/president and the petitioner's only employee. The petitioner has not provided any evidence to support counsel's claim that Ms. [REDACTED] served as a legal assistant for the petitioner. Furthermore, a review of Ms. [REDACTED] resume indicates that she has only served at the petitioning company in the position of "Attorney/President."

Counsel claims that the other individual to serve as a legal assistant for the petitioner is [REDACTED]. According to counsel, [REDACTED] was granted a bachelor's degree in the field of accounting, and was ultimately terminated from her employment with the petitioner. Counsel provided a 2010 Form W-2, Wage and Tax Statement, in the name of [REDACTED] indicating that the petitioner paid her \$15,206. No further evidence was provided. It appears that the petitioner claim that the "legal educational qualifications such as a Bachelor Degree in Law (LL.B) and practical experience [are] necessary for the position" is a new requirement.

In the instant case, the petitioner did not submit probative evidence of its recruiting and hiring practices to establish eligibility under this criterion of the regulations. The documentation does not demonstrate that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The AAO acknowledges that 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. 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. As previously discussed, the petitioner has provided inconsistent information regarding the nature of the proffered position.

The record lacks sufficient probative evidence regarding the petitioner's business operations and/or the proffered position to support such a claim. The petitioner submitted evidence regarding its business operations (including a lease agreement, corporate documents, and tax filings). The AAO reviewed this evidence in its entirety. However, the evidence is insufficient to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. Furthermore, the AAO also reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation."

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.

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 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's

enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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

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