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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

[Redacted]

DATE: **MAY 29 2013**

OFFICE: VERMONT SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner:  
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,

Handwritten signature of Ron Rosenberg in black ink.

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 October 5, 2011. In the Form I-129 visa petition, the petitioner describes itself as an e-commerce business established in 2000. In order to employ the beneficiary in what it designates as an economist 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 August 31, 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, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submitted a brief.

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 discuss an additional, independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to submit a Labor Condition Application (LCA) that corresponds to the petition. Thus, the petition cannot be approved for this reason as well.<sup>1</sup>

In this matter, the petitioner stated in the Form I-129 petition that it seeks the beneficiary's services as an economist to work on a part-time basis (20 hours per week) at a rate of pay of \$34.76 per hour. In a support letter dated September 23, 2011, the petitioner stated that the proffered position involves the following duties:

- Study economic and statistical data in the area of specialization, such as finance, labor, or agriculture.
- Provide advice and consultation on economic relationships to businesses, public and private agencies, and other employers.

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

- Compile, analyze, and report data to explain economic phenomena and forecast market trends, applying mathematical models and statistical techniques.
- Formulate recommendations, policies, or plans to solve economic problems or to interpret markets.
- Develop economic guidelines and standards and prepare points of view used in forecasting trends and formulating economic policy.
- Testify at regulatory or legislative hearings concerning the estimated effects of changes in legislation or public policy and present recommendations based on cost-benefit analyses.
- Supervise research projects and students' study projects.
- Forecast production and consumption of renewable resources and supply, consumption and depletion of non-renewable resources.
- Teach theories, principles, and methods of economics.

The AAO notes that these duties are nearly identical to those listed on the Occupational Information Network (O\*NET) OnLine Summary Report for the occupation "Economists." See U.S. Department of Labor, Employment & Training Administration, O\*NET OnLine, 19-3011.00 – Economists, on the Internet at <http://www.onetonline.org/link/summary/19-3011.00> (last visited May 21, 2013).

In its letter of support accompanying the initial I-129 petition, the petitioner did not specifically state the minimum requirements for the proffered position but stated, "We consider a Bachelor's degree in Business Administration or its equivalent for this position." The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of his education and work experience. The petitioner provided an evaluation of the beneficiary's credentials prepared by [REDACTED] which states that the beneficiary has the equivalent of "Bachelor of Business Administration in Management and Marketing earned at a regionally accredited institution of higher education in the United States." The petitioner also submitted a copy of a diploma in the beneficiary's name (along with an English translation) and the beneficiary's resume.

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 "Economists" - SOC (ONET/OES Code) 19-3011, at a Level II wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 10, 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 statement explaining the beneficiary's duties and responsibilities, with the percentage of time to be devoted to each duty, the educational requirements for the duties, and an explanation as to how the beneficiary's education relates to the position. The petitioner was also

asked to submit evidence regarding the beneficiary's qualifications and maintenance of status. The director outlined the specific evidence to be submitted.

On July 27, 2012, the petitioner and its counsel responded to the director's RFE by providing letters and additional evidence. Specifically, the petitioner and counsel submitted the following: (1) a letter from the petitioner with a revised description of the proffered position; (2) a statement regarding the petitioner's business operations; (3) printouts from the petitioner's website; (4) a statement regarding the petitioner's use of Google AdWords, and supporting documentation; (5) a letter from [REDACTED] Professor Emeritus at [REDACTED] regarding the proffered position and the beneficiary's qualifications; (6) a letter from [REDACTED] regarding alternative means of earning credit at [REDACTED] (7) a letter from [REDACTED] of [REDACTED] (8) evidence regarding options for earning academic credit at [REDACTED] (9) an evaluation of the beneficiary's qualifications prepared by [REDACTED] (10) evidence regarding the beneficiary's prior employment; and (11) a brief prepared by the petitioner's counsel.

The AAO reviewed the description of the proffered position provided in response to the RFE. Specifically, the job description states the following:

1. Studying economic and statistical data in the E-Commerce industry
  - Forecasting economic conditions for the geographic business area of interest
  - Gathering data about consumers, competitors, and market conditions
  - Studying the supply and demand decisions of individuals and firms
  - Analyzing data using statistical software
  - Helping owner/management to understand how the economy will affect the business and explaining what information means and how it can be used
2. Compiling, analyzing, and reporting data to explain economic phenomena and forecast market trends, applying mathematical models and statistical techniques.
  - Informing the owners/managers of the company how to set prices for products and services based on the current state of the economy and how to best market those products and services to consumers.
  - Analyzing issues such as consumer demand and sales to help a company maximize its profit
  - Monitoring and forecasting marketing and sales trends
  - Measuring the effectiveness of marketing programs and strategies e.g. Google Adwords and Google Analytics
  - Converting complex data and findings into understandable tables, graphs, and written reports
  - Preparing reports and presenting results to owner

3. Formulating recommendations, policies, or plans to solve economic problems or to interpret markets.
  - Analyzing government economic policies in prospective clientele's country and timely informing management on how and where to do business based on policy developments. (Note: U.S. Notebook Inc. exports products to over 150 countries. A change in government policies may have a significant affect on the economy within the country or on economic relations with another country. Analyzing and communicating such policy changes is critical to [the] company's profitability and growth.)
  - Determining the most effective shipping and distribution methods
  - Making recommendations for solving business problems by using a variety of software programs, including spreadsheets, statistical analysis, and database management programs to analyze information and develop practical solutions.
  
4. Developing economic guidelines and standards and preparing points of view used in forecasting trends and formulating economic policy.
  - Developing company economic policy based on these trends or other factors and recommending changes within the business that will reap long-term benefits or profits.
  - Developing online advertising policy, sales plans, and product promotions.
  - Making recommendations for solving business problems by using a variety of software programs, including spreadsheet management programs to analyze information and develop practical solutions

(Errors in the original). In its letter of support, dated July 10, 2012, the petitioner did not provide the minimum requirements for the proffered position, but reiterated, "We consider a Bachelor's degree in Business Administration or its equivalent for this position."

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 August 31, 2012. Counsel for 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.

Upon review of the record of proceeding, the AAO notes that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility

with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

The petitioner stated that the beneficiary would be employed in an economist position. However, to determine whether a particular job qualifies as a specialty occupation, U.S. Citizenship and Immigration Services (USCIS) does not simply rely on a position's title. 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."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through attainment of at least a baccalaureate degree in a specific discipline. The AAO finds that the petitioner has not done so.

In the instant case, the AAO observes that the duties of the proffered position, as described by the petitioner in support of the Form I-129 petition and in response to the director's RFE, have been stated in generic terms that fail to convey the actual tasks the beneficiary will perform on a day-to-day basis. As previously noted, the AAO observes that the list of duties provided by the petitioner in its initial letter of support, dated September 23, 2011, are nearly identical to those listed on the O\*NET OnLine Summary Report for the occupation "Economists."<sup>2</sup> The O\*NET OnLine Summary Report for "Economists" contains the following "tasks":

- Supervise research projects and students' study projects.
- Teach theories, principles, and methods of economics.
- Provide litigation support, such as writing reports for expert testimony or testifying as an expert witness.
- Compile, analyze, and report data to explain economic phenomena and forecast market trends, applying mathematical models and statistical techniques.

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<sup>2</sup> On appeal, counsel for the petitioner acknowledges that the duties were taken directly from O\*NET and states that they are applicable to any industry: "Petitioner respectfully asserts that the duties and responsibilities of the proffered position of Economist mimic exactly those cited for this position as published in the ONET online summary. **See ONET Summary Report for Economist (Code19-3011.00).** In other words, the duties described by the petitioner are both common and standard for the professional position of Economist, regardless of the industry."

- Study the socioeconomic impacts of new public policies, such as proposed legislation, taxes, services, and regulations.
- Testify at regulatory or legislative hearings concerning the estimated effects of changes in legislation or public policy and present recommendations based on cost-benefit analyses.
- Provide advice and consultation on economic relationships to businesses, public and private agencies, and other employers.
- Develop economic guidelines and standards and prepare points of view used in forecasting trends and formulating economic policy.
- Conduct research on economic issues and disseminate research findings through technical reports or scientific articles in journals.
- Forecast production and consumption of renewable resources and supply, consumption and depletion of non-renewable resources.

U.S. Department of Labor, Employment & Training Administration, O\*NET OnLine, 19-3011.00 – Economists, on the Internet at <http://www.onetonline.org/link/summary/19-3011.00> (last visited April 24, 2013).

In the RFE, the director informed the petitioner that the duties that it had initially provided were inadequate to establish that the proffered position is a specialty occupation position, and requested that the petitioner provide a detailed statement regarding the duties and responsibilities of the proffered position.<sup>3</sup> In response, the petitioner provided a revised description of the proffered position. The AAO observes that these duties are copied largely verbatim from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*. Notably, the duties are taken from two distinct occupations: "Economists" and "Market Research Analysts." The section of the *Handbook* entitled "What Market Research Analysts Do," lists the following duties of a market research analyst:

#### Duties

Market research analysts typically do the following:

- Monitor and forecast marketing and sales trends

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<sup>3</sup> Specifically, the director stated the following:

The duties and responsibilities you have described are vague and do not clearly establish the need for an individual who possesses the minimum of a baccalaureate degree in a specific field of study. Therefore, additional evidence is required to establish that the petitioner can sustain an employee performing the duties at the level required for consideration as a "specialty occupation" per 8 CFR 214.2(h)(4)(ii).

\* \* \*

Submit a detailed statement to:

- explain the beneficiary's proposed duties and responsibilities,
- indicate the percentage of time devoted to each duty,
- state the educational requirements for these duties, and
- explain how the beneficiary's education relates to the proffered position.

- Measure the effectiveness of marketing programs and strategies
- Devise and evaluate methods for collecting data, such as surveys, questionnaires, or opinion polls
- Gather data about consumers, competitors, and market conditions
- Analyze data using statistical software
- Convert complex data and findings into understandable tables, graphs, and written reports
- Prepare reports and present results to clients or management

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Market Research Analysts, on the Internet at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-2> (last visited May 21, 2013).

The AAO observes that each of these duties appears nearly verbatim in the description of the proffered position provided by the petitioner in response to the RFE. Only one of these duties does not appear in the description of the proffered position submitted by the petitioner.<sup>4</sup>

The AAO further observes that other duties are nearly identical to language found in the *Handbook's* section on "Economists." Specifically, in the section entitled "What Economists Do," the *Handbook* states that economists analyze data "using a variety of software programs, including spreadsheets, statistical analysis, and database management programs." The AAO notes that in its letter dated July 10, 2012, the petitioner claims that the beneficiary will "[make] recommendations for solving business problems by *using a variety of software programs, including spreadsheets, statistical analysis, and database management programs . . . [emphasis added].*" The AAO also observes that this section of the *Handbook* reports that "economists may analyze issues such as consumer demand and sales to help a company maximize its profits." The AAO notes that the petitioner asserts that the beneficiary will be "analyzing issues such as consumer demand and sales to help a company maximize its profit." According to the *Handbook*, "[m]any economists work for corporations and help them understand how the economy will affect their business." The petitioner claims that the beneficiary will be "helping owner/management to understand how the economy will affect the business." In addition, the *Handbook* states that microeconomists "study the supply and demand decisions of individuals and firms." The petitioner asserts that the beneficiary will be "[s]tudying the supply and demand decisions of individuals and firms."

The AAO notes that three of the four major duties listed in the description of the proffered position submitted in response to the RFE are "core" duties from the O\*NET OnLine Summary Report for "Economists," which also appeared in the petitioner's original list of duties submitted in support of the Form I-129. Specifically, the duties numbered "2," "3," and "4," are virtually identical to duties listed in the O\*NET report. Moreover, in response to the RFE, the petitioner no longer claimed that the beneficiary would perform the following duties that were provided in the initial petition:

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<sup>4</sup> Specifically, the duty reading "Devise and evaluate methods for collecting data, such as surveys, questionnaires, or opinion polls" is the only duty of this list that does not appear in the description of the proffered position.

- Testify at regulatory or legislative hearings concerning the estimated effects of changes in legislation or public policy and present recommendations based on cost-benefit analyses.
- Supervise research projects and students' study projects.
- Forecast production and consumption of renewable resources and supply, consumption and depletion of non-renewable resources.
- Teach theories, principles, and methods of economics.

No explanation was provided for the omission of these duties in response to the RFE. In place of these duties, the petitioner added several duties from the *Handbook's* description of "Market Research Analyst," as described above. Again, no explanation for the addition of duties from a *different occupation* was provided.

The initial inclusion and subsequent omission of the above listed duties raises serious concerns about the veracity of the petitioner's assertions. On the Form I-129 petition and supporting materials, the petitioner has represented that it is e-commerce business with seven employees, specializing in the sale of refurbished laptop computers. There is no evidence in the record that would indicate under what circumstances the beneficiary would "testify at regulatory hearings concerning the estimated effects of changes in legislation or public policy and present recommendations based on cost-benefit analysis." Nor is there any indication in the record that the beneficiary or petitioner is affiliated with an academic institution in a capacity that would require the beneficiary to "supervise research projects and students' study projects." The petitioner has also failed to establish the relevance of the "production and consumption of non-renewable resources" and the "supply, consumption, and depletion of non-renewable resources" to its business operations. Further, the petitioner has not indicated where, to whom, and for what purpose the beneficiary would "teach theories, principles, and methods of economics."

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). 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 by the facts in the record.

The AAO notes that providing job duties for a proffered position from O\*NET is generally not sufficient for establishing H-1B eligibility. That is, while this type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, it cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval as this type of generic description fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations. Accordingly, it cannot be relied upon when discussing the duties attached to specific employment.

In establishing a position as qualifying 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.

Such generalized information does not in itself establish a correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. The AAO also observes, therefore, that 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. Moreover, the job descriptions in the record of proceeding fail 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 petitioner's assertion with regard to what it will "consider" for the position is conclusory and unpersuasive, as it is not supported by the job description or probative evidence.

That is, the job duties of the proffered position, as provided by the petitioner, do not convey the substantive nature of the actual work that the beneficiary would perform. Rather, the job descriptions convey, at best, only generalized functions of the occupational categories of "Economists" and "Market Research Analysts" at a generic level. Moreover, the AAO notes that the petitioner failed to indicate the percentage of time that the beneficiary will spend performing each duty. That is, the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position. Further, it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

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 or its equivalent in a specific specialty. 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. Here, the petitioner stated on the Form I-129 that it employs seven people. The petitioner has not provided information regarding the duties and responsibilities of the other staff members such that the AAO can ascertain how the beneficiary would be relieved from performing non-qualifying duties.

Furthermore, despite the director's specific request in the RFE that the petitioner "state the educational requirements for [the] duties," and "explain how the beneficiary's education relates to the position," the petitioner elected to provide a list of duties without the requested information. The description of the proffered position does not illuminate the substantive application of knowledge involved in the performances of the duties or any particular educational attainment associated with such application. In its letters of support (submitted with the initial petition and in response to the RFE), the petitioner did not provide the minimum requirements for the proffered position, but stated, "We consider a Bachelor's degree in Business Administration or its equivalent for this position." On appeal, counsel provided inconsistent requirements for the proffered position, including "a bachelor's degree or higher in business administration or a related field," "a bachelor's degree," (no specific specialty) and "a bachelor's degree (preferably a Bachelor's in Business Administration or a related field)." The AAO notes that obviously a *preference* for a particular degree does not indicate a *requirement* for the same. Counsel also suggests that the proffered position may require a graduate degree. On appeal, counsel states that the O\*NET Summary for the occupation of "Economists" indicates that "extensive preparation is needed," and that "most of these occupations require graduate school." Counsel also cites the Preamble to the PERM regulation, Professional Recruitment Occupations list (published by the U.S. Department of Labor), as indicating that the position of economist "requires a master's degree."<sup>5</sup>

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<sup>5</sup> Counsel suggests that the DOL provisions as they relate to the "PERM" program for permanent labor certification, and as set forth in the *Federal Register*, Vol. 69, No. 247 at Appendix A to the Preamble-Professional Recruitment Occupations-Education and Training Categories at 77377 (December 27, 2004), are relevant to this proceeding.

Contrary to counsel's assertion, the AAO notes that the *Federal Register* states that the purpose of the list of occupations at Appendix A is not for determining whether a position is a specialty occupation. In fact, the *Federal Register* specifically states that "**the list is not intended to be used to qualify an alien for purposes of eligibility under the H-1B and H-1B1 program** [emphasis added]." Moreover, the *Federal Register* clearly states that "[t]he primary purpose of the list of occupations is to provide employers with the necessary information to determine whether to recruit under the standards provided in the regulations for professional occupations or for nonprofessional occupations." The *Federal Register* continues by stating that "the only presumption the list of occupations should create is that if the occupation involved in the application is on the list of occupations in Appendix A, employers must follow the recruitment regiment for professional occupations at § 656.17(e) of this final rule."

Thus, the AAO finds no merit in counsel's assertion that the Professional Recruitment Occupations list is relevant to this matter. Counsel cites no statutory or regulatory authority, case law, or precedent decision to support it. Moreover, neither the statutory nor regulatory provisions governing USCIS adjudication of Form I-129 petitions provide for the approval of an H-1B petition on the grounds argued by the petitioner's counsel, or even indicate that an employer's recruitment regiment for permanent labor certification is relevant to USCIS adjudications of Form I-129 petitions.

The petitioner and its counsel have not established that the petitioner requires a baccalaureate (or higher degree) in a specific specialty, or its equivalent, for the proffered position. However, assuming, *arguendo*, that the petitioner had stated a requirement for a bachelor's degree in business administration or its equivalent, the AAO notes that a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the duties and responsibilities of the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement 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).<sup>6</sup>

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

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Furthermore, as noted previously, in order to qualify as a specialty occupation, the position must require a degree in a specific specialty. The AAO is therefore not persuaded by counsel's claim that the proffered position is a specialty occupation because of the cited appendix. The appendix is a list of occupations for which a degree is a customary requirement. It does not, however, 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). Therefore, despite counsel's assertion to the contrary, the DOL provisions as they relate to the "PERM" program are not probative of the proffered position qualifying as a specialty occupation.

<sup>6</sup> 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.

*Id.*

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.

Moreover, 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 submitted an LCA in support of the instant petition that designated the proffered position under the occupational category of "Economists" - SOC (ONET/OES) code 11-3011. The petitioner stated in the LCA that the wage level for the proffered position was a Level II (qualified level) position, with a prevailing wage of \$34.76 per hour. The LCA was certified on September 20, 2011. The petitioner signed the LCA on September 30, 2011 attesting that the information provided was true and accurate.

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.<sup>7</sup> 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.<sup>8</sup> 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 II wage rate is described as follows:

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<sup>7</sup> For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>8</sup> 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.

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

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

Throughout the record of proceeding, the petitioner and counsel claim that the proffered position involves complex, unique and/or specialized duties. For example, in its September 23, 2011 letter, the petitioner states that the proffered position is "specialized in nature and involves significant responsibilities and complexities." The petitioner further claims that the beneficiary will "[t]estify at regulatory or legislative hearings" and will deal with the "estimated effects of changes in legislation or public policy and present recommendations." Moreover, according to the petitioner, the beneficiary will "[t]each theories, principles and methods of economics" and be responsible for the supervision of "research projects and students' study projects." According to the petitioner, the position "is very specific and possess [sic] a level of complexity." The petitioner asserts that it requires "formal education and work experience" for the proffered position.

In response to the RFE, in a letter dated July 10, 2012, the petitioner claims that the position "is specialized in nature and involves significant responsibilities and complexities." The petitioner further indicates that the beneficiary will be "[h]elping [the] owner/management to understand how the economy will affect the business and explaining what information means and how it can be used." Further, the petitioner asserts that the beneficiary will "[inform] the owners/manager of the company how to set prices for products and services based on the current state of the economy and how to best market those products and services to consumers." Additionally, the petitioner claims that the beneficiary will analyze foreign governments' economic policies and "timely [inform] management on how and where to do business based on policy developments." To this point, the petitioner noted that "[a]nalyzing and communicating such policy changes is critical to [the petitioner's] profitability and growth." Moreover, counsel claims that "the beneficiary will work in a complex and highly specialized position."

Furthermore, the petitioner's counsel submitted an evaluation of the proffered position from [redacted] professor emeritus of the School of Business Administration at [redacted]. According to [redacted] the proffered position "requires an individual with the theoretical and practical knowledge to be able to forecast economic conditions, compile and analyze data, maximize the company profits, solve business problems, develop economic guidelines, and measure effectiveness of marketing programs." Further, [redacted] states that the proffered position "requires significant understanding of business administration, marketing, economics and operations." In an unsigned, undated brief submitted in response to the RFE, counsel for the petitioner cites [redacted] letter and states that the proffered position is needed to "analyze/interpret the global market and

communicate potential changed in its clientele's country(ies) in order to formulate the most adequate economic and marketing plan to ensure the Petitioner's continued growth and profitability."<sup>9</sup>

As noted above, the petitioner states that the beneficiary will "[t]estify at regulatory or legislative hearings" and will deal with the "estimated effects of changes in legislation or public policy and present recommendations." The petitioner further claims that the beneficiary will "[t]each theories, principles and methods of economics" and be responsible for the supervision of "research projects and students' study projects." The AAO observes that the petitioner, its counsel, and [REDACTED] have all indicated that the petitioner will be relying heavily on the beneficiary's work product to make critical decisions about the petitioner's business operations, which are expected to directly affect the petitioner's "profitability and growth." Such reliance on the beneficiary's work appears to surpass the expectations of a Level II position, as described above, in which the employee is expected to have attained a "good" understanding of the occupation," perform only "moderately complex" tasks, and exercise "limited judgment." Here, rather than exercising "limited judgment," the petitioner has represented that the beneficiary will "[t]estify at regulatory or legislative hearings," "teach theories, principles and methods of economics," supervise research projects, and "[inform] the owners/manager of the company how to set prices for products and services based on the current state of the economy and how to best market those products and services to consumers."

Thus, upon review of the assertions made by the petitioner and counsel, the AAO must question the level of complexity, independent judgment and understanding actually required for the proffered position as the LCA is certified for a Level II qualified position. This 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-level position relative to others within the occupation. As noted above, in accordance with the relevant DOL explanatory information on wage levels, the selected wage rate indicates that the beneficiary is only required to perform "moderately complex tasks that require limited judgment."

The AAO observes that in a Level III (experienced) position, the incumbent performs "tasks that require exercising judgment," and "have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge." In a Level IV (fully competent) position, an incumbent would "plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques." Based on the representations made by the petitioner, counsel, and [REDACTED] regarding the proffered position, the AAO finds that a Level II characterization of the proffered position appears to be inconsistent with the claimed level of judgment required and the extent to which the petitioner intends to rely on the work product generated by the beneficiary.

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

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<sup>9</sup> Later in the decision, the AAO will further discuss the opinion letter from [REDACTED]

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 . . . 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 II 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. 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.

Additionally, the AAO observes that the petitioner and counsel rely heavily on an opinion letter prepared by [redacted] professor emeritus at [redacted] citing it extensively in

response to the RFE and on appeal.<sup>10</sup> The AAO reviewed the letter in its entirety. However, as discussed below, the letter from [REDACTED] is not persuasive in establishing the proffered position as qualifying as a specialty occupation position.

Professor [REDACTED] submitted his curriculum vitae, along with documentation from a dean at [REDACTED] confirming the professor's employment at the university. [REDACTED] did not provide any further supporting documentation to establish his credentials as a recognized authority on the relevant educational requirement for the proffered position.

[REDACTED] curriculum vitae indicates that he has served in various positions at [REDACTED] from 1978 to the present (professor emeritus since 2003; associate dean and director of international programs, school of business from 1999 to the present; and professor of business from 1978 to the present). Based upon the information provided, the vast majority of [REDACTED] experience, including his current work, is in the academic setting. In addition, the professor states that he has authored articles, which have been published in the journals regularly read by professionals in this industry. According to his curriculum vitae, [REDACTED] most recent "publication or other creative achievement" was in 1995 when he contributed a chapter to a book regarding academic initiatives. His most recent presentation at a professional conference was in 1993. His most recent honor was in 1997 for teaching.<sup>11</sup>

In the letter, [REDACTED] provides his opinion on the educational requirements for the proffered position. [REDACTED] states that the petitioner's educational requirement for the proffered position, which he describes as "a bachelor's degree in Business Administration or its equivalent," is "quite appropriate." He further states that "the position of Economist, as described, would be a specialty occupation requiring an in-depth theoretical and practical knowledge and require the attainment of a bachelor's degree or higher." He asserts that "a Bachelor's degree or equivalent in Business Administration, or a related field" would be the "most appropriate degree."

The AAO observes that [REDACTED] states in his letter that his "opinions are limited to the information that [he] received and [his] educational and professional experience and judgment." [REDACTED] indicates that he reviewed the following documents regarding the proffered position:

1. A petition letter to the U.S. Department of Homeland Security dated Sept. 23, 2011 from [the petitioner's president; and]

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<sup>10</sup> As a preliminary matter, the AAO notes that the term "recognized authority" means a person or an 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 include how the conclusions were reached and the basis for the conclusions supported by copies or citations of any research material used. *Id.*

<sup>11</sup> The petitioner provided [REDACTED] eleven page curriculum vitae. Aside from his current employment with [REDACTED] there are three entries that are dated within five years of the advisory opinion, including a semester at sea voyage during the spring of 2006; serving as an adjunct professor in France during the summers until 2007; and serving as a faculty consultant for a foundation until 2007. The vast majority of entries on [REDACTED] curriculum vitae are from the 1980's and early 1990's.

2. A petition letter to the U.S. Department of Homeland Security dated July 10, 2012 from [the petitioner's president]. The letter describes the duties of the position of Economist in the company.

Upon review of [redacted] opinion letter, there is no indication that he possesses any knowledge of the petitioner's business operations and the proffered position beyond this information. That is, [redacted] does not demonstrate or assert 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. Notably, in the opinion letter, [redacted] restated the duties for the proffered position as provided in the petitioner's support letter. As previously discussed, the generalized description provided by the petitioner may be appropriate when defining the range of duties that may be performed within an occupational category, but it fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, provides insufficient details to be relied upon to establish the specific beneficiary's role and responsibilities for the duration of the period requested for H-1B employment.

Further, it must be noted that there is no indication that the petitioner and counsel advised [redacted] that the petitioner characterized the proffered position as a Level II economist position on the LCA, for a which the employee is expected to have attained a "good" understanding of the occupation," perform only "moderately complex" tasks, and exercise "limited judgment." It appears that [redacted] would have found this information relevant for his 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 educational requirement based upon job duties and responsibilities.

Based upon the information provided, [redacted] has not established that his education, training, skills or experience have provided him with expertise or specialized knowledge of the current requirements in the industry for economist positions (or parallel positions) among e-commerce companies that are similar to the petitioner. That is, there is no specific information in the record regarding [redacted] claimed expertise on the issue here, i.e., the hiring practices and recruitment of economists (or parallel positions) with e-commerce businesses (or similar organizations).

[redacted] asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement. Likewise, he does not provide a substantive, analytical basis for his opinion and ultimate conclusion. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for his assertions regarding 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. [REDACTED] does not provide sufficiently substantive and analytical bases for his opinion.

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 the opinion letter into each of the bases in this decision for dismissing the appeal.

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.

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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

As previously discussed, in place of a detailed description of the proffered position and the duties to be performed, the petitioner provided a description of duties of the proffered position that (1) was

substantially copied verbatim (from the description of two distinct occupations) from Internet sources, including the *Handbook* and O\*NET Online; (2) fails to indicate the percentage of time to be spent on each duty (or otherwise indicate which are primary and essential duties of the proffered position); and (3) fails to state the relationship between the duties and the education that the petitioner claims is required to perform them. Thus, as indicated above, the petitioner has failed to establish the substantive nature of the work to be performed by the beneficiary.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), 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.

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.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the 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 did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent.<sup>12</sup> Therefore,

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<sup>12</sup> Notably, the petitioner first provided an evaluation from [REDACTED] dated, March 16, 2007, which indicates that, based on the beneficiary's five-year undergraduate program in Management and Marketing at the [REDACTED] in Poland, the beneficiary has the equivalent of "the U.S. degree of Bachelor of Business Administration in Management and Marketing." In his resume the beneficiary indicates that he has the "Polish equivalent of [a] Business Administration in Management and Marketing degree." The AAO observes that the beneficiary does not claim to have completed a degree in economics (or its equivalent).

the AAO need not and will not address the beneficiary's qualifications further, except to note that the petitioner has provided conflicting evaluations of the beneficiary's credentials, and has not provided an academic transcript and other evidence upon which these evaluations were based.<sup>13</sup> 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. at 591-92. The petitioner has not provided any explanation or objective evidence to resolve this discrepancy. Thus, even if the petitioner had established that the proffered position qualifies as a specialty occupation (which it did not), the AAO could not find that the petitioner has met its burden of proof to establish that the beneficiary is qualified to perform services in a specialty occupation position.

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<sup>13</sup> In response to the RFE, the petitioner provided two additional evaluations of the beneficiary's credentials. The first is from [REDACTED] and finds that the beneficiary's education at the [REDACTED] is equivalent to "a bachelor's degree in business administration and economics and a master's degree in economics from a regionally accredited college or university in the United States." The evaluation was based on a copy of the beneficiary's diploma and a "Student Book . . . verifying program information and listing the subjects examined from 1992/1993 through 1996/1997, including the credit and grade for each." The "student book" was not provided to USCIS. The second evaluation provided in response to the RFE was undertaken by [REDACTED] states that he reviewed the following documentation regarding the beneficiary's academic credentials:

- A diploma from [REDACTED] Faculty of Economics showing that [the beneficiary] received a Master of Science in Management and Marketing on Dec. 18, 1997. A transcript was attached.
- A certificate from the [REDACTED] showing that [the beneficiary] submitted a Master of Science diploma theses [sic] on Functioning and Development of Vobis Microcomputer Company on the Polish Market and passed the Master Science examination on Dec. 18, 1997.

Notably, the transcript and certificate from the [REDACTED] were not submitted to USCIS for review. [REDACTED] claims that "[b]ased on [the beneficiary's] educational credentials from [REDACTED] [the beneficiary] has earned the educational equivalent of a Bachelor's Degree in Business Administration and Economics and a Master's degree in Economics from a regionally accredited college or university in the United States."

Notably, the first evaluation indicates the beneficiary has the equivalent of "the U.S. degree of Bachelor of Business Administration in Management and Marketing." Thereafter, the petitioner submitted documentation from evaluators claiming that the beneficiary possesses the equivalent to "a bachelor's degree in business administration and economics and a master's degree in economics from a regionally accredited college or university in the United States." However, all of the evaluations are based upon the beneficiary's five-year program in Management and Marketing at the [REDACTED] in Poland. No further explanation for the variance was provided.

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.