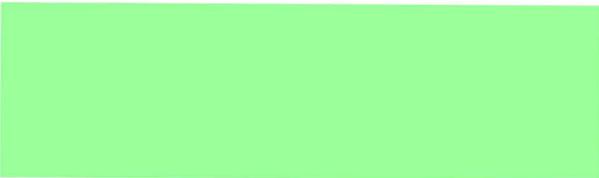


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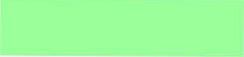
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

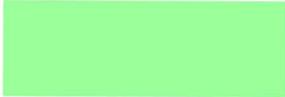
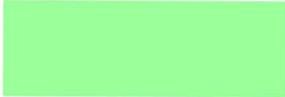


U.S. Citizenship
and Immigration
Services



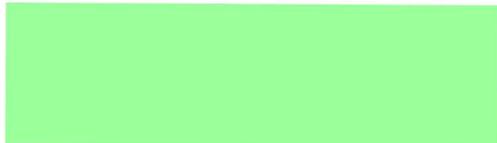
DATE **MAY 29 2013**

OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on April 2, 2012. In the Form I-129 visa petition, the petitioner describes itself as a wholesaler of building products established in 2009. In order to employ the beneficiary in what it designates as an accountant 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 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. Counsel submitted a brief and additional evidence in support of this assertion.

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 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 an adequate salary for the beneficiary's work, as required under the applicable statutory and regulatory provisions; and (2) failed to submit a Labor Condition Application (LCA) that corresponds to the petition. Thus, the petition cannot be approved for these reasons as well. They are considered independent and alternative bases for denial of the petition.¹

In this matter, the petitioner stated in the Form I-129 petition that it seeks the beneficiary's services as an accountant to work on a full-time basis. In a support letter dated March 26, 2012, the petitioner stated that the beneficiary will perform the following duties in the proffered position:

- Prepare, examine, or analyze accounting records, financial statements, or other financial reports to assess accuracy, completeness, and conformance to reporting and procedural standards.

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

- Report to Financial Controller and management regarding the finances of the company.
- Establish tables of accounts and assign entries to proper accounts.
- Develop, implement, modify, and document recordkeeping and accounting systems, making use of current computer technology.
- Compute taxes owed and prepare tax returns, ensuring compliance with payment, reporting or other tax requirements.
- Maintain or examine the records of government agencies.
- Develop, maintain, and analyze budgets, preparing periodic reports that compare budgeted costs to actual costs.
- Provide internal auditing services for company.
- Analyze business operations, trends, costs, revenues, financial commitments, and obligations to project future revenues and expenses or to provide advice.
- Work with company's outside consultants, tax and legal professionals, and company's suppliers and customers in company's sourcing and marketing areas for accounting and tax matters, using foreign language, where necessary.

The AAO notes that, with the exception of the last duty listed, these duties are nearly identical to those listed on the Occupational Information Network (O*NET) OnLine Summary Report for the occupation "Accountants." See U.S. Department of Labor, Employment & Training Administration, O*NET OnLine, 13-2011.01 – Accountants, on the Internet at <http://www.onetonline.org/link/summary/13-2011.01> (last visited May 22, 2013).

In its letter of support accompanying the initial I-129 petition, the petitioner did not state a minimum educational requirement for the proffered position. Rather the petitioner asserted that "knowledge required to perform the duties is usually associated with the attainment of a baccalaureate degree or higher." The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of her American and Canadian degrees, her prior volunteer work experience, and her Chinese language abilities. The petitioner provided a copy of the beneficiary's diploma from the [REDACTED] indicating that she was granted a Bachelor of Arts in accounting in May 2011.

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 "Accountants and Auditors" - SOC (ONET/OES) code 13-2011, at a Level I (entry level) wage.

Along with the Form I-129, the petitioner provided evidence in support of the petition, including corporate documents (articles of incorporation and assignment of employer identification number); a copy of the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*'s chapter entitled "Accountants and Auditors"; and the beneficiary's resume.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 16, 2012. The director outlined the evidence to be submitted. The AAO

notes that the director specifically requested that the petitioner submit probative evidence to establish that the proffered position is a specialty occupation. In the request, the petitioner was asked to provide a more detailed description of the work to be performed by the beneficiary, along with the percentage of time to be spent on each duty, the educational requirements for the specific duties, etc.

On August 10, 2012, the petitioner and its counsel responded to the director's RFE by providing a description of the duties of the proffered position and additional evidence. Although in the RFE the director requested that the petitioner provide a more detailed description of the proffered position, the petitioner elected to submit the same list of duties as that provided with the initial petition, with the addition of the percentage of time that the beneficiary would spend performing each duty. Specifically, the petitioner stated that the beneficiary would perform the following duties:

- Prepare, examine, or analyze accounting records, financial statements, or other financial reports to assess accuracy, completeness, and conformance to reporting and procedural standards. (20%)
- Report to Financial Controller and management regarding the finances of the company. (10%)
- Establish tables of accounts and assign entries to proper accounts. (5%)
- Develop, implement, modify, and document recordkeeping and accounting systems, making use of current computer technology. (15%)
- Compute taxes owed and prepare tax returns, ensuring compliance with payment, reporting or other tax requirements. (2%)
- Maintain or examine the records of government agencies. (3%)
- Develop, maintain, and analyze budgets, preparing periodic reports that compare budgeted costs to actual costs. (20%)
- Provide internal auditing services for company. (5%)
- Analyze business operations, trends, costs, revenues, financial commitments, and obligations to project future revenues and expenses or to provide advice. (10%)
- Work with company's outside consultants, tax and legal professionals, and company's suppliers and customers in company's sourcing and marketing areas for accounting and tax matters, using foreign language, where necessary. (10%)

In addition, the response to the RFE included a copy of the O*NET OnLine Summary Report for the occupation "Accountants"; another copy of the *Handbook's* chapter entitled "Accountants and Auditors"; a copy of the advertisement for the proffered position posted on www.craigslist.org by the petitioner; copies of brochures and flyers advertising the petitioner's products and services; printouts from the petitioner's "Twitter" webpage and website; and unsigned copies of the petitioner's 2010 and 2011 federal tax returns.²

The director reviewed the information provided by the petitioner and counsel. 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. In support of the appeal, counsel submitted a brief and additional evidence.³

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.

The AAO first notes that on appeal counsel asserts that the petitioner demonstrated eligibility for the benefit sought by a preponderance of the evidence, suggesting that the director failed to properly apply the preponderance of the evidence standard of proof while adjudicating the instant petition. With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states, in pertinent part, the following:

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

* * *

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

² The AAO notes that in Part 5 of the Form I-129, the petitioner reported an approximate gross annual income of \$8 million and an approximate net annual income of \$200,000. The 2011 federal tax return submitted by the petitioner shows an approximate gross annual income of \$8.5 million, and an approximate net annual income of -\$500,000. No explanation was provided.

³ The AAO also acknowledges that the beneficiary submitted a statement directly to the AAO on February 4, 2013. The AAO reviewed the statement; however, it must be noted that a beneficiary is not a recognized party in a proceeding. 8 C.F.R. § 103.2(a)(3).

* * *

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

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, U.S. Citizenship and Immigration Services (USCIS) examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As will be discussed, in the instant case, that burden has not been met.

To ascertain the intent of a petitioner, 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."

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.⁴ The AAO finds that the petitioner has not done so.

⁴ Prior to April 1, 1992, the H-1B category applied to persons of "distinguished merit and ability." The standard of "distinguished merit and ability" was defined in the regulations as "one who is a member of the

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 March 26, 2012, are nearly identical to those listed on the O*NET OnLine Summary Report for the occupation "Accountants."⁵ The O*NET OnLine Summary Report for "Accountants" contains the following "tasks":

- Prepare, examine, or analyze accounting records, financial statements, or other financial reports to assess accuracy, completeness, and conformance to reporting and procedural standards.
- Report to management regarding the finances of establishment.
- Establish tables of accounts and assign entries to proper accounts.
- Develop, implement, modify, and document recordkeeping and accounting systems, making use of current computer technology.
- Compute taxes owed and prepare tax returns, ensuring compliance with payment, reporting or other tax requirements.
- Maintain or examine the records of government agencies.

professions or who is prominent in his or her field." On October 1, 1991, the *Immigration Act of 1990* ("IMMACT 90") deleted the term "distinguished merit and ability" from the general H-1B description; however, the implementation of this change was delayed until April 1, 1992. The *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991* ("MTINA"), which was enacted on December 12, 1991, restored the standard of "distinguished merit and ability" to the H-1B category, but only as the qualifying standard for fashion models.

In support of the petition, counsel references the term "profession" as defined at 101(a)(32) of the Act. Contrary to counsel's assertion, the issue before the AAO is whether the petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation and not whether it is a profession as that term is defined in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and 8 C.F.R. § 204.5(k)(2). Thus, while a position may qualify as a profession as that term is defined in section 101(a)(32) of the Act, the occupation would not necessarily qualify as a specialty occupation unless it met the definition of that term at section 214(i)(1) of the Act.

⁵ On appeal, counsel for the petitioner acknowledges that the description of the duties for the proffered position was taken directly from O*NET: "Comparing the proffered duties to the [*Handbook*] and O*Net duties of accountants, the duties of the proffered accountant are nearly **identical** to those in the [*Handbook*] and O*Net." (Emphasis in the original). To demonstrate the similarities between the duties of the proffered position and the tasks for accountants as stated on the O*NET Summary for the occupation "Accountants," counsel reproduces the list of the O*NET tasks in his brief.

- Advise clients in areas such as compensation, employee health care benefits, the design of accounting or data processing systems, or long-range tax or estate plans.
- Develop, maintain, and analyze budgets, preparing periodic reports that compare budgeted costs to actual costs.
- Provide internal auditing services for businesses or individuals.
- Analyze business operations, trends, costs, revenues, financial commitments, and obligations, to project future revenues and expenses or to provide advice.

U.S. Department of Labor, Employment & Training Administration, O*NET OnLine, 13-2011.01 – Accountants, on the Internet at <http://www.onetonline.org/link/summary/13-2011.01> (last visited May 22, 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. In response, the petitioner provided an identical list of duties as those originally provided, with the addition of the percentage of time that the beneficiary would spend performing each duty. 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 the educational requirement 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 category of "Accountants" at a generic level.

The AAO notes that in response to the RFE, the petitioner provided a copy of the advertisement for the proffered position which lists the responsibilities for the proffered position as follows:

- Accounts Payable functions
- Record daily cash activity
- Reconcile various financial statement accounts
- Assist in Inventory Control function
- Assist in special projects as needed
- Assist Controller with financial statement preparation and analysis
- Prepare various month end reports

The AAO observes that the duties of the proffered position as stated on the job advertisement appear substantially more limited in scope than those provided by counsel and the petitioner elsewhere in the supporting documents for the instant petition, as described above. Notably, these duties do not suggest that the beneficiary will perform duties involving "[computing] taxes owed and prepar[ing] tax returns," or "[developing], implement[ing], modify[ing], and document[ing] recordkeeping and accounting systems." Nor do the duties suggest that the beneficiary will "[p]rovide internal auditing services" or "[m]aintain or examine the records of government agencies." However, despite the apparent unsophisticated nature of the responsibilities of the proffered position, the petitioner submitted a statement in response to the director's RFE characterizing the proffered position as a "management accountant" position, and indicating that the beneficiary is "part of [the petitioner's] executive team involved in strategic planning and development of the financial health of [the] company."

The AAO notes the various descriptions of the proffered position provided by the petitioner, and observes that the totality of the evidence fails to establish the substantive nature of the proffered position such that the AAO can ascertain in what capacity the beneficiary will actually be employed. Consequently, the petitioner has not demonstrated that the proffered position qualifies as a specialty occupation, and the appeal may be dismissed and the petition denied on this basis alone.

Further, in the instant case, the petitioner has provided inconsistent information regarding the requirements of the proffered position. The petitioner's various statements regarding the academic

requirements for the accountant position do not establish that the position qualifies as a specialty occupation.

That is, with the initial petition, the petitioner asserted that "knowledge required to perform the duties is usually associated with the attainment of a baccalaureate degree or higher." The AAO notes 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). Thus, the petitioner initially failed to state an educational requirement that would qualify the position as a specialty occupation.

In response to the director's RFE, the petitioner provided a copy of the advertisement for the proffered position that was posted on www.craigslist.org. The posting states that the petitioner requires a "[d]egree in Accounting with a minimum of 4 years of experience" along with "2 to 3 years [of] experience using manufacturing and warehouse systems." The AAO observes that the posting does not indicate that the petitioner requires a bachelor's degree. The petitioner has not specified any particular level of education (e.g., associate's degree, baccalaureate degree, master's degree). Thus, it appears from the advertisement that an associate's degree and experience may be acceptable to be hired into the proffered position. Also in response to the RFE, the petitioner submitted a statement in which the petitioner's vice president asserts that the educational requirement in the posting was "intended to hire a candidate with [a] bachelor's degree in accounting." With the petition, the petitioner submitted the beneficiary's resume. The AAO notes that the beneficiary was awarded an associate's degree in 2009 and a bachelor's degree in May 2011. Her only experience has been as a volunteer "Accounting Assistant" in which she "[s]cheduled client appointments and maintained up-to-date confidential client files." The petitioner indicated in the letter of support that the beneficiary served in this position "for about a year." The evidence does not indicate that the beneficiary possesses a bachelor's degree *and* four years of experience in accounting *and* two to three years of experience using manufacturing and warehouse systems. Thus, the petitioner has not established that the beneficiary is qualified to serve in the proffered position under the petitioner's own claimed requirements.

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. The petitioner has not established that the proffered position requires attainment of such a degree.

Further, in the instant case, the record of proceeding also 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 "Accountants and Auditors" at a Level I (entry level) wage. The LCA was certified on March 21, 2012 and signed by the petitioner's vice president on March 26, 2012.

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.⁶ 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.⁷ 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 "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 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.

⁶ 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.

⁷ 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.

The AAO notes that the petitioner has repeatedly claimed that the duties of the proffered position require foreign language skills. Specifically, in support of the initial petition and in response to the RFE, the petitioner stated that the beneficiary will "work with the company's outside consultants, tax and legal professionals, and company's sourcing and marketing areas for accounting and tax matters, *using foreign language where necessary.*" (Emphasis added.) The petitioner indicated in its letter of support dated March 26, 2012 that the beneficiary's "bilingual ability (English and Chinese) will also help [the petitioner] in [its] business relationships with [its] Chinese counterparts." In a letter dated October 29, 2012, the petitioner stated that "due to her bi-lingual ability, [the beneficiary] is responsible for representing [the] executive team in direct communication in Chinese language and reporting [the] company's financial [state] to . . . current and potential investors in China." The AAO notes that 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.

Further, throughout the record of proceeding the petitioner and counsel repeatedly claim that the proffered position involves complex, unique and/or specialized duties. Moreover, the petitioner claims that the proffered position requires a degree in accounting and four years of experience, along with two to three years of experience using manufacturing and warehouse systems. In a statement submitted in response to the RFE, the petitioner characterizes the proffered position as a "management accountant" position, and indicates that the beneficiary is "part of [the petitioner's] executive team involved in strategic planning and development of the financial health of [the] company." On appeal, counsel states that the beneficiary "is required to perform high level management accountant duties" in the proffered position. Also on appeal, in a letter dated October 29, 2012, the petitioner states that the proffered position is part of the petitioner's "management team," and requires "[the beneficiary to] perform high level of accounting functions which involve strategic planning, analysis, development of [the petitioner's] financial states and reporting and advice to the executive team regarding . . . all aspects of the company's finances." Additionally, as noted above, the petitioner represents that "due to her bi-lingual ability, [the beneficiary] is responsible for representing [the] executive team in direct communication in Chinese language and reporting [the] company's financial [state] to . . . current and potential investors in China."

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 I entry-level position. This characterization of the position and the claimed duties and responsibilities as described by the petitioner 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, the selected 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.

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 designated by the petitioner on the LCA corresponds to a Level I position for the occupational category of "Accountants and Auditors" for [REDACTED] Florida.⁸ Notably, if the proffered position had been designated at a higher level, the prevailing wage at that time would have been significantly higher.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted. Thus, for this reason, even if it were determined that the petitioner overcame the director's basis for denial of the petition (which it has not), the petition could not be approved.

Moreover, 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 an 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. 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.

⁸ For additional information regarding the prevailing wage for Accountants and Auditors in Hillsborough County (Tampa, FL), see the All Industries Database for 7/2011 - 6/2012 for Accountants and Auditors at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?code=13-2011&area=45300&year=12&source=1> (last visited May 22, 2013).

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.

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, as previously mentioned, 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."

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.

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 instant case, the petitioner has failed to establish nature of the proffered position and in what capacity the beneficiary will actually be employed. 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.

Nevertheless, assuming, *arguendo*, that the duties of the proffered position as described by the petitioner would in fact be the duties performed by the beneficiary, the AAO will nevertheless analyze them and the evidence in the record of proceeding to determine whether the proffered position as described would qualify as a specialty occupation. To make its determination as to whether the employment described by the petitioner qualifies as a specialty occupation, 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)(1), 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 an accountant position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, 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 discussed, the petitioner designated the proffered position in the LCA under the occupational category "Accountants and Auditors."

In the instant case, the AAO finds that the petitioner has not provided sufficient information to establish that the proffered position falls under the occupational category "Accountants and Auditors." Nevertheless, the AAO reviewed the chapter of the *Handbook* entitled "Accountants and

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/>.

Auditors" including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that "Accountants and Auditors" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

When reviewing the *Handbook*, the AAO must note that the petitioner designated the proffered position as a Level I (entry) position in the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation. Furthermore, the petitioner's designation of the position under this wage level signifies that the beneficiary will be expected to work under close supervision and receive specific instructions on required tasks and expected results. Additionally, the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment. Moreover, the beneficiary's work will be closely monitored and reviewed for accuracy.

The *Handbook* reports that certification may be advantageous or even required for some accountant positions. However, the AAO notes that there is no indication that the petitioner requires the beneficiary to have obtained the designation Certified Public Accountant (CPA), Certified Management Accountant (CMA) or any other professional designation to serve in the proffered position.

While the *Handbook* states that most accountant positions require at least a bachelor's degree in accounting or a related field, the *Handbook* continues by stating the following:

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Accountants and Auditors, on the Internet at <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-4> (last visited May 22, 2013).

The *Handbook* does not support a finding that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. More specifically, the *Handbook* reports that some graduates from junior colleges or business or correspondence schools, as well as bookkeepers and accounting clerks meeting education and experience requirements set by employers, can advance to accountant positions by demonstrating their accounting skills. According to the *Handbook*, individuals who have less than a bachelor's degree in a specific specialty, or its equivalent, can obtain junior accounting positions and then advance to accountant positions. The *Handbook* does not state that this education and experience must be the equivalent to at least a bachelor's degree in a specific specialty.

The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is normally the minimum requirement for entry into this occupation. Rather, the occupation accommodates a

wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. The *Handbook* states that most accountants and auditors need at least a bachelor's degree, however, this statement does not support the view that any accountant job qualifies as a specialty occupation as "most" is not indicative that a particular position within the wide spectrum of accountant jobs normally requires at least a bachelor's degree in a specific specialty, or its equivalent.¹⁰ More specifically, "most" is not indicative that a position normally requires at least a bachelor's degree in a specific specialty, or its equivalent, (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)), or that a position is so specialized and complex as to require knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)). Therefore, even if the proffered position were determined to be an accountant position, the *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers 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. As previously mentioned, 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." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

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

¹⁰ For instance, the first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of the positions require at least a bachelor's degree in a specific specialty, it could be said that "most" of the positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner (which as noted above is designated as a Level I entry position in the LCA). Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

Next, the AAO will review the record 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 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a standard industry-wide requirement for 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. Furthermore, the petitioner did not submit any letters or affidavits from similar firms or individuals in the petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals." Thus, 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 equivalent, is common to the petitioner's industry for positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner.

The AAO notes that in the RFE, the director requested that the petitioner provide evidence to demonstrate that "[i]n [the petitioner's] company or industry, a baccalaureate degree in a specific field of study is a standard minimum requirement for the job offered." The petitioner and counsel elected not to provide this evidence in response to the RFE. For the first time on appeal, counsel submits several job advertisements in support of this criterion of the regulations. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaighbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the

evidence. Under the circumstances, the AAO need not and does not consider the sufficiency of such evidence submitted for the first time on appeal.

The record that was before the director is devoid of evidence to establish that a degree requirement is common to the industry in parallel positions among organizations similar to the petitioner. Thus, the AAO finds that 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.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted its articles of incorporation; an assignment of employer identification number; copies of brochures and flyers advertising the petitioner's products and services; printouts from the petitioner's "Twitter" webpage and website; and unsigned copies of the petitioner's 2010 and 2011 federal tax returns. On appeal, counsel provided an organizational chart; a balance sheet and a profit and loss statement; and a letter from the petitioner's external Certified Public Accountant. The AAO reviewed the record of proceeding in its entirety. However, upon review of the record, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of accountant.

A review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. The petitioner has not established that the duties of the proffered position require at least a baccalaureate degree in a specific specialty, or its equivalent. Furthermore, the petitioner has not established why a few related courses or industry experience alone is insufficient preparation for the proffered position. Additionally, the AAO finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition.

More specifically, the LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that 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."¹¹

The petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or is equivalent. Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position. Specifically, the petitioner fails to demonstrate how the duties of the position as described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background, her language skills, and her prior experience as an accounting assistant will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. In the instant case, the petitioner does not establish 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 petitioner fails to demonstrate 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. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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.

¹¹ For additional information regarding wage levels as defined by DOL, 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

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").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In response to the director's RFE, the petitioner submitted a copy of an advertisement for an accountant position that appeared on Craig's List on January 25, 2012. As previously discussed, the stated requirements in the advertisement include a degree in accounting and four years of experience, along with two to three years of experience using manufacturing and warehouse business systems. Notably, the advertisement does not state the level of education required (associate's degree, baccalaureate, master's degree). Furthermore, the advertisement includes a list

of job duties; however, the job posting lacks information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required and the amount of supervision received. It is unclear whether the duties and responsibilities of the advertised position are the same as the proffered position. Moreover, as the posting is only a solicitation for hire, it is not evidence of the petitioner's actual hiring practices.

The petitioner stated in the Form I-129 petition that it has 30 employees and was established in 2009 (approximately three years prior to the filing of the H-1B petition). Consequently, it cannot be determined how representative the submission of one job vacancy announcement is of the petitioner's normal hiring practices. Furthermore, in an undated statement submitted in response to the RFE, the petitioner's vice president [REDACTED] indicated that the proffered position is a new position.

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

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that 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 may believe that the nature of the specific duties of the position in the context of its business operations 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 all of the evidence in the record that was before the director, including the job descriptions and the evidence regarding the petitioner's business operations, such as articles of incorporation; an assignment of employer identification number; copies of brochures and flyers advertising the petitioner's products and services; printouts from the petitioner's "Twitter" webpage and website; and the petitioner's tax returns. On appeal, counsel provided an organizational chart; a balance sheet and a profit and loss statement; and a letter from the petitioner's external Certified Public Accountant. The AAO finds that the petitioner's statements and the submitted documentation fail 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.

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." Without further evidence, it is simply not credible that the

petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, as previously mentioned, 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 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).

The AAO notes that on appeal the petitioner has submitted an unpublished AAO case, and indicates that the facts of the instant case are analogous to this case. Counsel refers to an unpublished decision in which the AAO determined that the position proffered in that matter qualified as a specialty occupation. 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. The AAO notes that the petitioner has not provided any underlying evidence from this case that would establish that the facts of this unpublished case are analogous to those facts presented in the instant matter.¹² Without further information, it does not appear that the facts of the referenced case are analogous to those of the instant petition.¹³ Furthermore, any suggestion that USCIS must request and review the case file relevant to that decision, while being impractical and inefficient, would also be 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. Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

¹² The AAO reviewed the copy of the decision submitted with the appeal and notes that the petitioner has not established that the case is analogous to the instant proceeding. The AAO notes that the case involved an ocean freight shipments transportation company. The AAO found that the detailed information and documentation regarding the proposed duties, the petitioner's business operations, and the petitioner's organizational structure, established the position as qualifying as a specialty occupation. As discussed above, in the instant case, there are numerous inconsistencies and discrepancies in the record of proceeding, which undermine the assertions of the petitioner and counsel with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. As detailed in this decision, the documentation provided by the petitioner fails to establish the proffered position as a specialty occupation.

¹³ This record of proceeding contains insufficient information regarding various aspects of the position in the unpublished decision, such as the complexity of the job duties, supervisory duties (if any), independent judgment required, and the amount of supervision received, as well as information regarding the employer's business operations, the occupational category and wage level at which the LCA was certified, et cetera (to list just a few factors that could be relevant).

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 acknowledges that the beneficiary filed a statement outlining her personal circumstances and some aspects of her work with the petitioner. The AAO notes that USCIS does not have the discretion to disregard its own regulations, even if it would benefit a petitioner (or beneficiary). *See Reuters Ltd. v. F.C.C.*, 781 F.2d 946 (C.A.D.C. 1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned).

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. Here, that burden has not been met.

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