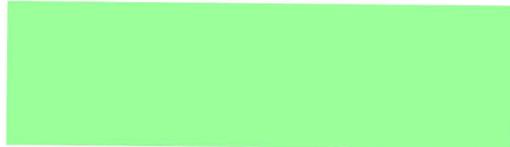


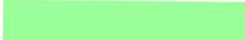


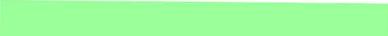
U.S. Citizenship
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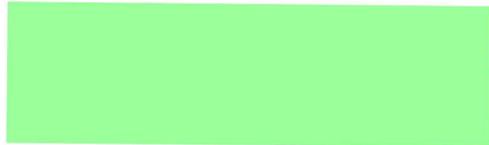
DATE: **MAY 31 2013**

Office: CALIFORNIA 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 (AAO) 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,

for Michael T. Kelly
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, through counsel, submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on November 21, 2011. On the Form I-129 visa petition, the petitioner describes itself as a freight forwarding, corporate logistics services, and customs clearance services business with six employees, established in 2003. In order to employ the beneficiary in what it designates as a logistics analyst 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)¹, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, 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 for the petitioner asserts that the director's basis for denial was arbitrary and capricious. In support of this assertion, counsel for the petitioner submitted a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice denying the petition; and (5) the petitioner's 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's decision 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.

Beyond the decision of the director, the AAO also finds that the petitioner failed to establish that the beneficiary would be paid the required wage for the occupational classification and area of employment for which the Labor Condition Application (LCA) had been certified. For this reason also, the petition will be denied.

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:

¹ The AAO notes that on appeal counsel cites to the Act and quotes a number of cases that refer to the "distinguished merit and ability" standard. It is noted that "distinguished merit and ability," as currently used in section 101(a)(15)(H)(i)(b) of the Act, is used solely with respect to fashion models and not for aliens to be employed in specialty occupations.

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise

interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a logistics analyst to work on a full-time basis at a salary of \$3,000 per month. In the Form I-129, the petitioner described the proposed duties of the proffered position, as follows:

Research, analyze client corporations' business models, operations and logistics needs, perform logistics planning for client corporations. Collect data of labor, trucking, warehousing, ocean and air shipping operations, compute costing; assist Management in developing proper pricing for the logistics services.

In its support letter, dated November 17, 2011, the petitioner provided the following description of the proffered position:

- 1) Research, study client corporations' business models, operations & logistics needs, design, develop customized logistics and shipping plann[i]ng for the client corporations. Perform computer modeling to forecast wholesale and retailing corporations' peak season for logistics support and cargo distribution, perform quantitative analysis on volume, demands, timing and scheduling of delivery, inventory level, assist client corporations' logistics and warehousing management in planning import and distribution planning and prepare proposed logistics support and service plan by [the petitioner].
- 2) Review, analyze [petitioner's] logistics and shipping service products, calculating costs & assisting in developing proper pricing for the service products with a proper profit margin. Collect data on shipping volume,

charges by third party service providers such as air and ocean carriers, airports and seaports, customs clearance, foreign cargo brokers and agencies, analyze and assess impact by fuel price increase on the Company's shipping and logistics services and prepare analysis reports for the Management to adjust pricing and bundle service items.

- 3) Apply information technology in establishing and maintaining international shipping and logistics support networking for the [petitioner's] multinational operations. Analyze supply chain arrangement in the cargo movement and transportation, assist the Company in planning optimum routing and the most economic and efficient shipping plan for the corporate clients.

In addition, the petitioner stated that "[t]he minimum job requirement for this position is a Bachelor's degree in Logistics Management or International Business with one or two years [of] experience; or a Master's degree in the specified fields of study." The petitioner also stated that the beneficiary is qualified for the proffered position because she has a Master's degree in International Business from the [redacted] in California.

The petitioner also submitted an LCA in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Business Operations Specialists, All Other" – SOC (ONET/OES Code) 13-1199.00, at a Level I wage.

In response to the director's March 21, 2012 RFE, counsel submitted a response letter and additional evidence. In the letter submitted in response to the RFE, dated June 8, 2012, counsel provided the following revised description of the duties of the proffered position:

- 1) **Research, study client corporations' business models, operations & logistics needs, design, develop customized logistics and shipping plann[ing] for the client corporations.** In performing this job duty, the Logistics Analyst will use computer modeling to forecast wholesale and retailing corporations' peak season for logistics support and cargo distribution, perform quantitative analysis on volume, demands, timing and scheduling of delivery, inventory level, assist client corporations' logistics and warehousing management in planning import and distribution planning and prepare proposed logistics support and service plan by [the petitioner].
- 2) **Review, analyze [petitioner's] logistics and shipping service products, calculating costs & assisting in developing proper pricing for the service products with a proper profit margin.** In performing this job duty, the Logistics Analyst will collect data on shipping volume, charges by third party service providers such as air and ocean carriers, airports and seaports, customs clearance, foreign cargo brokers and agencies, analyze and assess impact by fuel price increase on the Company's shipping and logistics services and prepare analysis reports for the Management to adjust pricing and bundle service items.

- 3) **Apply information technology in establishing and maintaining international shipping and logistics support networking for the [petitioner's] multinational operations.** In performing this job duty, the Logistics Analyst will analyze supply chain arrangement in the cargo movement and transportation, assist the Company in planning optimum routing and the most economic and efficient shipping plan for the corporate clients. [Emphasis in original.]

Percentage of Time:

The petitioner estimates that approximately 40% of work time is spent on job duty Item #1, *above*; 40% of time is spent on job duty Item #2, *above*; and 20% of time is on job duty Item #3, *above*.

On August 10, 2012, the director denied the petition. 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. Counsel for the petitioner submitted a timely 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 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.

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

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

The petitioner stated that the beneficiary would be employed in a position to which the petitioner assigned the job title "logistics analyst." 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 evidence in the record of proceeding establishes that performance of the particular proffered 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 a specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook*

(*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.² As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Business Operations Specialists, All Other." The *Handbook* does not contain an occupation with the specific title of business operations specialist. However, the AAO notes that in response to the RFE³ and on appeal counsel submitted a copy of the pages from the *Handbook* related to "Logisticians." The director reviewed the position under the "Logisticians" category.

The AAO reviewed the information in the *Handbook* regarding the occupational category "Logisticians." However, the *Handbook* does not indicate that these positions 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.

The subchapter of the *Handbook* entitled "What Logisticians Do" states the following about this occupational category:

Logisticians analyze and coordinate an organization's supply chain - the system that moves a product from supplier to consumer. They manage the entire life cycle of a product, which includes how a product is acquired, distributed, allocated, and delivered.

Duties

Logisticians typically do the following:

- Develop business relationships with suppliers and customers
- Work to understand customers' needs and how to meet them
- Direct the allocation of materials, supplies, and finished products
- Design strategies to minimize the cost or time required to move goods
- Review the success of logistical functions and identify areas for improvement
- Present performance data to management
- Propose improvements to management and customers
- Stay current on advances in logistics technology and incorporate new technologies into procedures

Logisticians oversee activities including purchasing, shipping and transportation, inventory, warehousing, and delivery. They may direct the movement of a range of goods, people, or supplies, from common consumer goods to military supplies.

Logisticians use sophisticated software systems to plan and track the movement of goods. They operate software programs specifically tailored to manage

² The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. The AAO's references to the *Handbook* (except as noted otherwise) are to the 2012-2013 edition available online.

³ The AAO notes that the copy of the pages from the *Handbook* that counsel submitted in response to the RFE are from the 2011-2012 print edition of the *Handbook*.

logistical functions, such as procurement, inventory management, and other supply chain planning and management systems.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Logisticians, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/logisticians.htm#tab-2> (last visited May 28, 2013).

The subchapter of the *Handbook* entitled "How to Become a Logistician" states the following about this occupational category:

Although an associate's degree is sufficient for many logistician jobs, candidates increasingly need a bachelor's degree to advance beyond entry-level positions.

Education

Logisticians can qualify for positions with an associate's degree in business or engineering or by taking courses on logistics. However, as logistics becomes increasingly complex, more companies prefer to hire workers who have at least a bachelor's degree. Many logisticians have a bachelor's or master's degree in business, finance, industrial engineering, or supply chain management.

Certification

Logisticians may get certification through the American Society of Transportation and Logistics (ASTL) or the International Society of Logistics (SOLE). The certification offered by each organization typically requires a combination of education, experience, and passing an exam. Although it is not required, certification can demonstrate professional competence and a broad knowledge of logistics.

Work Experience

Logisticians typically need work experience in a field related to logistics or business. Because military operations require a large amount of logistical work, some logisticians gain work experience while serving in the military. Some firms allow applicants to substitute several years of work experience for a degree.

Important Qualities

Communication skills. Logisticians need strong communication skills to collaborate with colleagues and do business with suppliers and customers.

Critical-thinking skills. Logisticians must develop, adjust, and successfully carry out logistical plans, and they often must find ways to cut costs and improve efficiency.

Organizational skills. Logisticians must be able to do several tasks at one time, keep detailed records, and manage several projects at once in a fast-paced workplace.

Problem-solving skills. Logisticians must handle unforeseen circumstances, such as delivery problems, and adjust plans as needed to resolve the issues.

Id., Logisticians, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/logisticians.htm#tab-4> (last visited May 28, 2013).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the prevailing wage for the proffered position as wage for a Level I (entry level) position on the LCA.⁴ This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.⁵ That is, in accordance with the relevant DOL explanatory information on wage levels, this Level I wage rate is only appropriate for a position in which the

⁴ Wage levels should be determined only after selecting the most relevant Occupational Information Network (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.

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. 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.

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

⁵ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes 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.

Id.

beneficiary is only required to have a basic understanding of the occupation and would be expected to perform routine tasks that require limited, if any, exercise of judgment. This wage rate also indicates that the beneficiary would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

The *Handbook* does not indicate that a baccalaureate or higher degree, in a specific specialty, or its equivalent is normally the minimum requirement for entry into the proffered position. As stated above, this passage of the *Handbook* reports that an associate's degree is sufficient for entry into the occupation. Thus, this is not indicative of an occupation for which there is a normal requirement for at least a baccalaureate or higher degree, in a specific specialty, or its equivalent.

Accordingly, as the *Handbook* indicates that working as a logistics analyst does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation.

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This first alternative prong 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)).

The petitioner and counsel submitted copies of ten job-vacancy announcements to support their assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. Upon review of the documents, however, the AAO finds that the petitioner's reliance on the job announcements is misplaced.

In order for the petitioner to establish that another organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Here, the petitioner submits no evidence demonstrating that any of the advertising companies are similar in size and scope to that of the petitioner, a six-person freight forwarding, corporate logistics services, and customs clearance services business. Thus, the record is devoid of sufficient information regarding the ten advertising companies to conduct a legitimate comparison of each of these firms to the petitioner. For instance, the first advertisement is a confidential posting advertisement in which the employer is not even identified, and the third advertisement is for a position with the [REDACTED] a Fortune 350, multi-billion dollar company. In addition, some of the other ads include diverse businesses such as a consumer packaged goods manufacturing business; a paints, coatings and specialty chemicals business; an engineering, construction and technical services organization; and an infant formula and children's nutritional products business, among others.

Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. The record is devoid of sufficient information regarding the advertising employers to conduct a meaningful comparison of the organizations to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

In addition, the petitioner and counsel did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting and hiring history for the types of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Thus, the record is devoid of sufficient information regarding the advertising companies to establish that their job-vacancy advertisements are relevant to the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Without such evidence, job announcements submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and another organization share the same general characteristics, information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the

level of revenue and staffing (to list just a few elements) may be considered. It is not sufficient for the petitioner to simply claim that the organizations are similar and in the same industry without providing a legitimate basis and sufficient corroborating evidence to support such an assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Moreover, aside from the position with [REDACTED] (which does not specify a degree in a specific specialty requirement), most of the advertisements do not appear to be for parallel positions. That is, the positions do not appear to have similar duties and requirements to the proffered position and there is no indication that the beneficiary will have a similar role in his work with the petitioner. Thus, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Thus, for the reasons discussed above, the petitioner's reliance on the job-vacancy advertisements is misplaced. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.⁶

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

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

⁶ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just ten job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of logistics analyst at a freight forwarding, corporate logistics services, and customs clearance services business required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. Specifically, the petitioner failed to demonstrate how the proffered position as described in the record of proceeding requires the theoretical and practical application of such a body of highly specialized knowledge in a specific specialty such that a person who has attained a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them.

While some of the courses listed on the copy of the beneficiary's transcript for the Master of Business Administration with a concentration in International Business degree from the [REDACTED] in California may be beneficial in performing certain duties of a logistics analyst 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, are required to perform the duties of the particular position here proffered.

Additionally, the AAO observes that the Level I wage-level for which the LCA was certified is not indicative of the relative level of complexity required to satisfy this prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Again, the AAO incorporates by reference and reiterates its earlier discussion regarding the implications of the LCA Level I wage-level. This wage level designation is appropriate for positions for which the petitioner expects the beneficiary to have a basic understanding of the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

By way of comparison, the AAO notes that a position classified at a Level IV (fully competent) position is designated by the DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." Thus, the wage level designated by the petitioner in the LCA for the proffered position is not consistent with claims that the position would entail any particularly complex or unique duties or that the position itself would be so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty.

The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than positions in the pertinent occupation that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other logistics analyst positions that can be performed by a person without at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, the petitioner has not 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 the equivalent, for the position.

Of course, the AAO will necessarily review and consider whatever evidence the petitioner may have submitted with regard to its history of recruiting and hiring for the proffered position and with regard to the educational credentials of the persons who have held the proffered position in the past. Here, there is no such evidence, as the petitioner has not previously employed anyone in the proffered position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the position.

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

In any event, the record of proceeding does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. Upon review of the record, there is insufficient evidence to establish that the duties of the logistics analyst position require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category.

whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

Aside from and in addition to the lack of probative evidence related to this criterion, the AAO here incorporates into this analysis its earlier comments and findings with regard to the implication of the Level I wage-rate designation (the lowest of four possible wage-levels) in the LCA. That is, that the proffered position's Level I wage designation is indicative of a low, entry-level position relative to others within the pertinent occupational category and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, the DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation."

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

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

As noted earlier in this decision, beyond the decision of the director, the AAO finds that the petitioner failed to establish that the beneficiary would be paid the required wage for the occupational classification and area of employment for which the LCA had been certified. The LCA filed with the Form I-129 indicates that the prevailing wage for the occupational category of "Business Operations Specialists, All Other" – SOC (ONET/OES Code) 13-1199.00, for a Level I position, is \$2886 per month. The prevailing wage source is listed as OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.⁷

The LCA was certified on November 3, 2011. However, a search of the FLC Data Center indicates that the prevailing wage for the occupational category of "Business Operations Specialists, All Other" for Los Angeles County (Los Angeles-Long Beach-Glendale, CA Metropolitan Division) was \$39,582 per year (\$3298.50 per month) at the time the petition was filed in this matter.⁸

⁷ The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/> (last visited May 28, 2013). The OES All Industries Database is available at the Foreign Labor Certification Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

⁸ For additional information on the prevailing wage for "Business Operations Specialists, All Other" in Los Angeles County (Los Angeles-Long Beach-Glendale, CA Metropolitan Division), see the All Industries Database for 7/2011 - 6/2012 at the Foreign Labor Certification Data Center, Online Wage

In the Form I-129 petition and supporting documents, the petitioner stated that the beneficiary would be employed on a full-time basis at a salary of \$3000 per month. Thus, the petitioner's offered wage to the beneficiary is below the prevailing wage level for the occupational classification in the area of intended employment.

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 DOL has clearly stated that its LCA certification process is cursory, that it does not involve substantive review, and that it makes the petitioner responsible for the accuracy of the information entered in the LCA. With regard to LCA certification, the regulation at 20 C.F.R. § 655.715 states the following:

Certification means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Likewise, the regulation at 20 C.F.R. § 655.735(b) states, in pertinent part, that “[i]t is the employer’s responsibility to ensure that ETA [(the DOL’s Employment and Training Administration)] receives a complete and accurate LCA.”

Further, 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 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 the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part:

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.

(Italics added). 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 failed to submit an LCA for the correct wage. Accordingly, the petition will be denied for this reason also.

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

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.