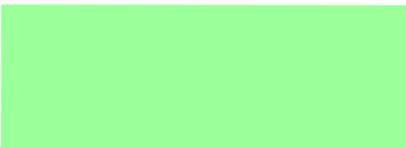


(b)(6)

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



U.S. Citizenship  
and Immigration  
Services

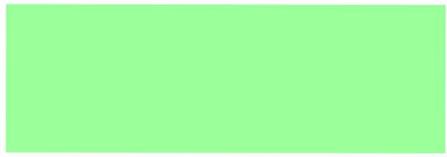


DATE: NOV 05 2013      OFFICE: VERMONT SERVICE CENTER      FILE: [REDACTED]

IN RE:            Petitioner: [REDACTED]  
                     Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

*per Michael T. Kelly*  
Ron Rosenberg  
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a wholesaler of grocery items established in 2009. In order to employ the beneficiary in a full-time position to which the petitioner assigns the title "Accountant," at a salary of \$43,451 per year, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the petitioner failed to demonstrate that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); the petitioner's response to the RFE; (4) the director's notice of intent to dismiss (NOID); (5) the petitioner's response to the NOID; (6) the director's decision denying the petition; and (7) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Additionally, however, the AAO withdraws so much of the director's comments and findings that suggest that accountants comprise an occupational classification which requires for entry at least a bachelor's degree, or, the equivalent in a specific specialty. Such a suggestion is erroneous, as will be evident in this decision's discussion of the Accountants occupational classification. Likewise erroneous, and hereby also withdrawn, are any comments in the director's decision which suggest that a position's inclusion within the Accountants occupational classification is sufficient in itself to establish that position as a specialty occupation.

As will now be discussed, to meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term “specialty occupation” is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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), 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.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position’s title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 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 petitioner provided a description of the position in a letter of support which accompanied the petition. According to the support letter, the position included the following job responsibilities:

- 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 prepared tax returns, ensuring compliance with payment, reporting or other tax requirements.
- Maintain or examine the records of government agencies.
- 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 and external auditing services for business or individuals.
- Analyze business operations, trends, costs, revenues, financial commitments, and obligations, to project future revenues and expenses or to provide advice.

This list is identical to that found in the 2010 version of O\*NET's analysis of Occupational Specialty Code 13-2011.01, Accountants. <http://www.onetonline.org/link/details/13-2011.01> (Last accessed October 13, 2013)

The AAO will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

At the outset, and beyond the decision of the director, the AAO will address an aspect of this particular petition which, the AAO finds, in itself precludes its approval. That aspect is the fact the petitioner states that the list of proposed duties that it filed as part of the petition included several that the beneficiary would not actually perform. The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d at 145)), and it was in the process of this review that the AAO noted this material defect.

The regulation at 8 C.F.R. § 214.2(h)(10)(ii) directs, in part:

The petition will be denied if it is determined that the statements on the petition were inaccurate, fraudulent, or misrepresented a material fact.

The AAO observes that, on appeal, the petitioner's present counsel asserts:

[T]he Petitioner's previous counsel was erroneously over over-inclusive in listing [the beneficiary's] job duties in the initial petition by including tasks performed by public accountants and CPAs. Our firm was retained to correct the mistakes of the petitioner's previous attorney. . . .

The AAO also observes that it was in the petitioner's response to the NOID that current counsel first made this assertion.

The AAO therefore finds that the petitioner, through its current counsel, claims and acknowledges that, when and as filed, the petition ascribed to the proffered position duties that, in fact, the beneficiary would not be expected to actually perform. Thus, the AAO finds that the petitioner itself acknowledges that the petition was inaccurate as filed.

In light of their particular nature, the AAO also finds that the inaccuracies amount to material misrepresentations. After all, they pertained to what the petitioner claimed to be the substantive nature of the proffered position. In fact, the petitioner also submitted, for consideration as expert testimony, a position-evaluation that expressly included and relied upon the set of duties now acknowledged as inaccurate.

The AAO also observes that, aside from the petitioner's attestation as to the truth of the matters submitted (by signing the Form I-129), the petitioner affirmatively stated that the proffered position included the duties that are now disavowed by the petitioner. That is, the petitioner's letter

“submitted in support of the petition” included those duties within its list of the position’s “job responsibilities.”

In summary, for the reasons stated above, the AAO finds that the petition must also be denied, in accordance with the above-quoted provision at 8 C.F.R. § 214.2(h)(10)(ii), because the petition included material statements that were inaccurate, and also because the petition misrepresented a material fact, that is, the composition of the duties that comprised the proffered position.

As an additional matter, the AAO notes that the petitioner’s attempt to “amend” the composition of the duties comprising the proffered position is ineffective. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm’r 1998). A petitioner may of course change a material term and condition of employment. However, such a change cannot be made to a petition after it has already been filed with USCIS. Instead, the change must be documented through the filing of an amended or new petition. *See* 8 C.F.R. § 214.2(h)(2)(i)(E). The only recognized legal procedure for amending a previously approved petition is by filing an amended or new petition, with the appropriate fee and Labor Condition Application. *Id.* The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the requested benefit. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm’r 1978).

That all being said, the AAO will now proceed to discuss the merits of the appeal, by applying to the evidence of record the aforementioned statutory and regulatory framework regarding H-1B specialty occupations.

At the outset, the petitioner should recognize that, for this analysis, the AAO will disregard the duties that the petitioner ascribed to the proffered position (from the initial filing of the petition through the RFE response), but later disavowed (both in the NOID response and on appeal). As listed in the September 28, 2012 “Expert Opinion Evaluation” document from [REDACTED] Ph.d. that was submitted as part of the RFE response, those duties are:

- Maintaining or examining the records of government agencies.
- Advising clients in areas such as . . . long-range tax or estate plans.
- Providing internal and external auditing services for businesses or individuals

Additionally, the petitioner should note that the AAO will accord no evidentiary value to the September 28, 2012 document entitled “Expert Opinion Evaluation” that the petitioner obtained from [REDACTED] Ph.D. Dr. [REDACTED] bases his analysis on a position which he expressly describes as including, as essential components, duties that the petitioner has since disavowed as being part of the position. Consequently, the AAO finds that the factual basis of Dr. [REDACTED] opinion as to the particular position here proffered is erroneous and, as such, is neither an accurate assessment of that position nor a relevant document for the resolution of this appeal. Aside from this material defect, which alone renders Dr. [REDACTED] opinion insignificant and deprives it of any weight, the AAO also

finds that Dr. [REDACTED] opinion merits no probative weight because it is conclusory – that is, it does not articulate whatever substantive analysis, if any, the author made of the actual position here in question, and also because neither the opinion document itself, its allied documents, nor any evidence in the record of proceeding establishes that Dr. [REDACTED] has such special knowledge in the particular area upon which he is opining - the educational requirements of particular positions within the Accountants occupational classification - that he should be regarded as expert or authoritative in that area.

Next, the AAO enters the following comments and findings with regard to the record's descriptions of the proposed duties and the proffered position that they are said to comprise. The AAO finds that, while numerous, those descriptions are not sufficiently detailed to relate either the substantive nature of the accounting work that the beneficiary would actually perform or, for that matter, the substantive nature and relative levels of specialization and/or complexity of the accounting matters upon which the beneficiary would work in the context of the petitioner's particular business operations. Rather, the AAO finds, those descriptions are relatively abstract identifications of generalized functions (such as, for instance, "monthly financial reporting"; "preparing monthly, quarterly, and annual financial reports; and, "preparing accrual and other accrual reports") that do not reveal the substantive nature - or any relative complexity, specialization, or uniqueness – of the type of accounting matters upon which the beneficiary would work, as generated by the petitioner's particular business operations. Likewise, the AAO finds, the evidence of record does not persuasively explain or document why actual performance of the proffered position upon the petitioner's particular accounting matters would require any particular level of educational attainment in accounting or a related specialty. In this regard, the AAO also notes that the petitioner has not shown that performance of the proffered position would require practical and theoretical applications of a body of highly specialized knowledge in accounting, or a closely related specialty, that require, or are usually associated with, attainment of at least a bachelor's degree level of knowledge in accounting or a related specialty.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

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

The petitioner claims that the proffered position is that of an accountant; and, naturally enough, the *Handbook* addresses accountant positions in its "Accountants and Auditors" chapter, which addresses the related Standard Occupational Classification (SOC) title and code for the Accountants occupational classification.

In pertinent part, the *Handbook* states the following with regard to this occupational classification:

Accountants and auditors prepare and examine financial records. They ensure that financial records are accurate and that taxes are paid properly and on time. Accountants and auditors assess financial operations and work to help ensure that organizations run efficiently. . . .

Accountants and auditors typically do the following:

- Examine financial statements to be sure that they are accurate and comply with laws and regulations
- Compute taxes owed, prepare tax returns, and ensure that taxes are paid properly and on time
- Inspect account books and accounting systems for efficiency and use of accepted accounting procedures
- Organize and maintain financial records
- Assess financial operations and make best-practices recommendations to management
- Suggest ways to reduce costs, enhance revenues, and improve profits

In addition to examining and preparing financial documentation, accountants and auditors must explain their findings. This includes face-to-face meetings with organization managers and individual clients, and preparing written reports.

Many accountants and auditors specialize, depending on the particular organization that they work for. Some organizations specialize in assurance services (improving the quality or context of information for decision makers) or risk management (determining the probability of a misstatement on financial documentation). Other organizations specialize in specific industries, such as healthcare.

\* \* \*

The four main types of accountants and auditors are the following:

**Public accountants** do a broad range of accounting, auditing, tax, and consulting tasks. Their clients include corporations, governments, and individuals.

They work with financial documents that clients are required by law to disclose. These include tax forms and balance sheet statements that corporations must provide

potential investors. For example, some public accountants concentrate on tax matters, advising corporations about the tax advantages of certain business decisions or preparing individual income tax returns.

External auditors review clients' financial statements and inform investors and authorities that the statements have been correctly prepared and reported.

Public accountants, many of whom are Certified Public Accountants (CPAs), generally have their own businesses or work for public accounting firms.

Some public accountants specialize in forensic accounting, investigating financial crimes, such as securities fraud and embezzlement, bankruptcies and contract disputes, and other complex and possibly criminal financial transactions. Forensic accountants combine their knowledge of accounting and finance with law and investigative techniques to determine if an activity is illegal. Many forensic accountants work closely with law enforcement personnel and lawyers during investigations and often appear as expert witnesses during trials.

**Management accountants**, also called cost, managerial, industrial, corporate, or private accountants, record and analyze the financial information of the organizations for which they work. The information that management accountants prepare is intended for internal use by business managers, not by the general public.

They often work on budgeting and performance evaluation. They may also help organizations plan the cost of doing business. Some may work with financial managers on asset management, which involves planning and selecting financial investments such as stocks, bonds, and real estate.

**Government accountants** maintain and examine the records of government agencies and audit private businesses and individuals whose activities are subject to government regulations or taxation. Accountants employed by federal, state, and local governments ensure that revenues are received and spent in accordance with laws and regulations.

**Internal auditors** check for mismanagement of an organization's funds. They identify ways to improve the processes for finding and eliminating waste and fraud. The practice of internal auditing is not regulated, but the Institute of Internal Auditors (IIA) provides generally accepted standards.

Information technology auditors are internal auditors who review controls for their organization's computer systems, to ensure that the financial data comes from a reliable source.

auditors.htm#tab-2 (accessed October 17, 2013).

With regard to the educational requirements necessary for entry into this occupational classification, the *Handbook* states that “[m]ost accountants and auditors need at least a bachelor’s degree in accounting or a related field.” See the *Handbook* at <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-4>. However, “most” does not indicate that an accountant position normally requires at least a bachelor’s degree, or its equivalent, in a specific specialty. The first definition of “most” in *Webster’s New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is “[g]reatest in number, quantity, size, or degree.” As such, if merely 51% of accountant positions require at least a bachelor’s degree in a specific specialty, it could be said that “most” accountant 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. 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.” Section 214(i)(1) of the Act.

Furthermore, the *Handbook* includes the following statement:

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.

*Id.* Thus, the *Handbook* does not indicate that a minimum of a bachelor’s degree in a specific specialty, or its equivalent, is normally required for entry into this occupational category. Instead, this category accommodates a wide spectrum of educational credentials, and that spectrum includes credentials that fall short of a bachelor’s degree.

As is clear from the above excerpts from the *Handbook*, the facts that a person may be employed in a position designated as that of an accountant and may apply accounting principles in the course of that job are not in themselves sufficient to establish that particular position as one for which a bachelor’s or higher degree in a specific specialty is normally a minimum requirement for entry.

It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position being proffered would involve accounting 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 accounting. This the petitioner does not do.

The AAO notes that the list of duties that the petitioner initially ascribed to the proffered position - and has partially disavowed - is a list of duties for Accountants and Auditors which were taken

verbatim from the “Tasks” list at the O\*NET’s Summary Report on the Accountants occupational classification.<sup>1</sup> That list reads:

- 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 prepared tax returns, ensuring compliance with payment, reporting or other tax requirements.
- Develop, maintain, and analyze budgets, preparing periodic reports that compare budgeted costs to actual costs.
- Analyze business operations, trends, costs, revenues, financial commitments, and obligations, to project future revenues and expenses or to provide advice.<sup>2</sup>

As such, the petitioner’s descriptions of the proposed duties amount to a claim that the proffered position would involve the generalized functions usually associated with the general occupational classification as reported in the O\*NET. However, such descriptions of generalized functions that are generic to an occupational classification do not convey any substantive information regarding the substantive nature of the actual services that would be required of the beneficiary in actual performance of the particular accounting position in question. Nor do such generalized descriptions provide a sufficient basis for a USCIS determination as to what particular level of education or educational equivalency would be required to perform them.

Nor does the record of proceeding contain any persuasive documentary evidence from any relevant authoritative source establishing that the proffered position’s inclusion in this occupational category would be sufficient in and of itself to establish the proffered position as, in the words of this criterion, a “particular position” for which “[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry.”

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<sup>1</sup> See O\*NET OnLine, “Accountants,” <http://www.onetonline.org/link/summary/13-2011.01> (accessed October 31, 2013).

<sup>2</sup> In response to the director’s March 19, 2013, the petitioner withdrew the following position requirements, stating the original list had been overbroad:

- Maintain or examine the records of government agencies;
- 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; and,
- Provide internal and external auditing services for business or individuals.

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no reliable submissions from professional associations, individuals,<sup>3</sup> or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Additionally, the petitioner has gone to lengths to explain that the position is not governed by the public accountancy rules, which would require a bachelor's degree.

Nor has the petitioner submitted any probative evidence 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.

Therefore, as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as 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, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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<sup>3</sup> As already discussed, the petitioner provided a submission from [REDACTED] Ph.D. which opined that a bachelor's degree was required for the position. Dr. [REDACTED] position evaluation was performed prior to the petitioner withdrawing several of the previously stated position requirements. The director correctly informed the petitioner that Dr. [REDACTED] evaluation was no longer responsive to the position, but the petitioner did not submit an additional evaluation.

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that “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.”

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor’s degree, or the equivalent, in a specific specialty.

The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor’s or higher degree in a specific specialty or its equivalent is required to perform that position. In this regard, the AAO observes that the record of proceeding lacks any substantive evidence of the specific types and levels of accounting matters that would engage the beneficiary within the context of the petitioner’s day-to-day operations, and that there is no attempt to show a necessary correlation between the petitioner’s actual accounting matters and the degree-requirement asserted in the petition.

Furthermore, the Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O\*NET/OES) Code 13-2011, the associated Occupational Classification of “Accountants and Auditors,” and a Level I (entry-level) prevailing wage rate. The Prevailing Wage Determination Policy Guidance<sup>4</sup> issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

**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 [emphasis in original].

The petitioner’s assertions of record regarding the proposed duties’ level of complexity and specialization, as well as the level of independent judgment and responsibility and the occupational understanding required to perform them, are undermined by the petitioner’s submission of an LCA certified for a Level I, entry-level position. The LCA’s wage level (Level I, the lowest of the four that can be designated) is only appropriate for a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels

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<sup>4</sup> The *Prevailing Wage Determination Policy Guidance* (available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf)) issued by DOL.

quoted above, this wage rate is appropriate for positions in which the beneficiary is only required to have a basic understanding of the occupation; will be expected to perform routine tasks requiring limited, if any, exercise of judgment; will be closely supervised and her work closely monitored and reviewed for accuracy; and will receive specific instructions on required tasks and expected results.

It should be noted that, for efficiency's sake, the AAO's discussion and findings regarding the material conflict between assertions in the petition and the LCA wage-level are hereby incorporated as part of this decision's later analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Consequently, as it has not been shown that the particular position for which this petition was filed is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. 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 proffered position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

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 employer 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 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position 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 at 387. 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 a 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 proposed 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.

As the record of proceeding contains no evidence regarding the petitioner's recruiting and hiring of any other persons for the position that is the subject of this petition, there is nothing to consider with regard to 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's 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 the specialty.

In reviewing the record of proceeding under this criterion, the AAO reiterates its earlier discussion regarding the *Handbook's* entry for the "Accountants and Auditors" occupational category, and the AAO here also incorporates and adopts as part of its analysis of this criterion this decision's earlier comments and findings reflecting the fact that the petitioner describes the proposed duties in terms of generalized and relatively abstract functions. The AAO finds that those descriptions are not sufficiently detailed to relate, how, if at all, the nature of the duties of this particular proffered position is so specialized and complex that the job's performance would require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty.

Again, the *Handbook* does not indicate that a minimum of a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the claimed occupational category of Accountants. Instead, this occupational category accommodates a wide spectrum of educational credentials, including credentials that fall short of a bachelor's degree, or the equivalent, in accounting or any closely related specialty. Further, the AAO finds, the extent of the evidence of record regarding the proposed duties does not establish their nature as more specialized and complex than the nature of the duties of other accounting positions whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in accounting or a closely related specialty.

The petitioner failed to establish that its company size (sixteen employees) and business type (wholesale groceries) possesses duties so complex and specialized that an employee with a bachelor's degree or higher in the specialty is required to perform the tasks. Rather, to the extent that they are described in the record, the AAO finds that the petitioner has not distinguished the proposed duties from generic bookkeeping and accounting duties, which, the *Handbook* indicates,

do not necessarily require an individual with a bachelor's degree in a specific specialty, or the equivalent.

Further, there is the countervailing weight of the wage-level of the LCA. Both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level I is indicative of duties of relatively low complexity.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

**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 [emphasis in original].

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

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

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, Level II wage-rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

**Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

**Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II). The AAO also finds that, separate and apart from the petitioner's submission of an LCA with a wage-level I designation, the petitioner has also failed to provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved 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.

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the evidence in the record of proceeding does not establish the nature of the proposed duties as so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's degree in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.