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



U.S. Citizenship
and Immigration
Services



DATE: **NOV 27 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:

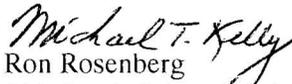


INSTRUCTIONS:

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,

for 
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 three-employee supermarket established in 2003. The petitioner filed this petition to extend the validity period of the H-1B petition that was previously approved for the beneficiary, so that it could continue to employ the beneficiary 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 petitioner has assigned the job title of “Cost Accountant” to the proffered position. The petitioner attests that beneficiary will work part-time at a salary of \$30.03 per hour. The record reflects that the petitioner intends to pay the beneficiary at a Level I prevailing-wage rate (the lowest paying of the four levels that are assignable.)

The petitioner claimed that performance of the proffered position requires an individual with a bachelor’s degree in accounting or a similar field, or the equivalent.

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 three requests for additional evidence (RFE); (3) the petitioner’s responses to the director’s requests; (4) the director’s letter denying the petition; and (5) 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.

Beyond the decision of the director, the AAO finds an additional aspect which, although not addressed in the director’s decision, nevertheless also precludes approval of the petition, namely, the petitioner’s failure to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation.¹ For this additional reason, the petition must also be denied.

Furthermore, the AAO also finds that the petitioner provided as the supporting Labor Condition Application (LCA) for this petition an LCA which does not correspond to the petition, in that the LCA was certified for a wage level below that which is compatible with the level of responsibility the petitioner claimed for the proffered position through its descriptions of its constituent duties and level

¹ The AAO conducts appellate review on a *de novo* basis (See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional ground for denial.

within the company's organizational hierarchy.² This aspect of the petition undermines the credibility of the petition as a whole and any claim as to the proffered position or the duties comprising it as being particularly complex, unique, and/or specialized.

I. The Petitioner and its Proffered Position

As indicated above, in the Form I-129, the petitioner identified itself as a three-employee supermarket established in 2003.

In its June 22, 2012 letter of support, the petitioner described itself as follows:

[The petitioner] is a discounted retail store offering a wide assortment of general goods, including food, toys, house wares [sic] cleaning supplies, health and beauty aids, hardware, books, stationery, paper products, and other consumer items.

In the Form I-129, the petitioner attested that its Gross Annual Income was \$590,848 and that its Net Annual Income was \$189,408.

The petitioner claimed further that it has employed the beneficiary as a cost accountant since November 13, 2009, and that it proposes extending the beneficiary's current H-1B employment.

As will now be discussed, the AAO is not persuaded by the petitioner's descriptions that the beneficiary would be engaged in the application of at least a bachelor's degree level of highly specialized knowledge in accounting or a closely related specialty.

The AAO first observes that, as evidenced in the following paragraphs from the petitioner's June 22, 2012 letter of support that it filed with the Form I-129, the petitioner ascribes numerous duties that, on their face, appear to involve at least the application of some level of accounting knowledge. After all, the paragraphs claim that the beneficiary will, among other functions, continue "to prepare, examine, and analyze accounting records, financial statements, and other financial reports" for accuracy, completeness, and conformance to reporting and procedural standards; "continue to "develop, maintain, and analyze budgets," and continue to "analyze and interpret the financial information" needed for sound business decisions." However, neither the support letter nor any other document in the record of proceeding documents or explains what the actual performance of these or the numerous other functions ascribed to the proffered position would involve in terms of practical and theoretical applications of a body of highly specialized knowledge of accounting.

Those paragraphs of the letter of support state:

As a Cost Accountant, [the beneficiary] will continue to prepare, examine, and analyze accounting records, financial statements, and other financial reports to assess accuracy, completeness, and conformance to reporting and procedural standards. He will continue to analyze business operations, trends, costs, revenues, financial

² See *id.*

commitments, and obligations, to project future revenues and expenses or to provide advice. He will also continue to establish tables of accounts, and assign entries to proper accounts. He documents, price[s] and total[s] the inventories, taking into account markdowns [and] price reductions[,] so that our inventory levels are not too high as a result of overbuying, seasonal merchandise, or shopworn merchandise. He generates daily and weekly reports that summarizes [sic], in a simple and easy to view format[,] all [of] the key daily and weekly operating data including sales (by category), labor, and other purchases as well as beginning and ending inventories and other fixed expenses allocated on a daily basis to produce a weekly estimate of the store's net profit.

He will continue to perform variance analysis and commentary, including store physical inventory accounting and reporting, store shrink reserve calculations, store use, and participate in process improvement that leads to continual evaluation and revision to the physical inventory accounting processes to streamline and reduce time and resources spent[,] and manage [the] relocation [of] store inventory transfers and closed store inventory disposition.

His duties will continue to be the following: [to] develop, maintain, and analyze budgets, preparing periodic reports that compare budgeted costs to actual costs. He will have to develop, implement, modify, and document recordkeeping and accounting systems, [and] making use of current computer technology. Our Cost Accountant will continue to help us in choosing new directions to optimize the growth of our retail business. He will help us in managing our cash flow, [with] tax planning, and [with] conducting computerized bookkeeping tasks. He will continue to oversee our billing functions and monitor, control[,] and report special billing arrangements considering our work plan and business practice.

As Cost Accountant-also called management accountant, [the beneficiary] will continue to record and analyze the financial information of the company, [and] among his other responsibilities as [sic] budgeting, performance evaluation, cost management, and asset management. He will continue to analyze and interpret the financial information that we need in order to make sound business decisions. Other responsibilities of our Cost Accountant are budgeting, performance evaluation, cost management, and asset management.

As reflected in the general and relatively abstract statements above, the record of proceeding leaves the AAO without any substantial evidence of particular accounting and financial matters that the beneficiary would address as generated by the financial and accounting dimensions of the petitioner's particular operations. Rather, the evidence of record leaves to speculation the extent and complexity of financial records, budgeting issues, cost accounting, report preparation, financial and accounting, and other issues that the petitioner says would occupy the beneficiary. Likewise, too - and in spite of the assertion that the beneficiary has been employed in the same position since 2009 - the record of proceeding does not include evidence establishing that the beneficiary has been applying, and would continue to apply, a body of highly specialized accounting knowledge that can

only be obtained by achieving at least a bachelor's degree, or the equivalent, in accounting or a related specialty.

In light of the above-discussed lack of evidence of the substantive matters upon which the beneficiary would be employed, and the corresponding lack of evidence as to the nature and educational level of accounting knowledge that beneficiary would have to actually apply, we accord no weight to assertions - such as illustrated in the excerpts below from counsel's January 15, 2013 letter in response to RFE - that the nature of the position here proffered requires at least a bachelor's degree, or the equivalent, in accounting or a related specialty. The illustrative paragraphs state:

Cost Accountant[ing] is a highly theoretical area of work that is conceptually complex, demanding serious analysis of specialized methodologies, techniques built on a theoretical understanding of the principles and concepts of business, finance, and accounting. Only an individual with at least a bachelor's degree can perform said duties such as analyzing account records, financial statements[,] or other financial reports as well as auditing contracts, orders, and vouchers and preparing reports to substantiate individual transactions prior [to] settlement, are complex duties that required [sic] highly specialized knowledge[.]

* * *

Based on the nature, size[,] and regulations of our business, the position offered of a Cost Accountant is a highly theoretical area of work that is conceptually complex, demanding serious analysis of specialized methodologies, techniques built on a theoretical understanding of the principles[,] and concepts of business, finance, and accounting.

As such claims are not substantiated by the evidence of record, they merit no weight. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. Likewise, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

II. The LCA Submitted by the Petitioner in Support of the Petition

The record contains several claims by the petitioner regarding the complexity and specialization of the duties of the proffered position. For ease of review, we here again present excerpts from the petitioner's January 15, 2013 letter. They illustrate the assertions that the petitioner has made in ascribing a relatively high level of complexity to the proffered position. Here again are those previously quoted parts of the letter:

Cost Accountant[ing] is a highly theoretical area of work that is conceptually complex, demanding serious analysis of specialized methodologies, techniques built on a theoretical understanding of the principles and concepts of business, finance, and accounting. Only an individual with at least a bachelor's degree can perform said duties such as analyzing account records, financial statements[,], or other financial reports as well as auditing contracts, orders, and vouchers and preparing reports to substantiate individual transactions prior [to] settlement, are complex duties that required [sic] highly specialized knowledge[.]

* * *

Based on the nature, size[,], and regulations of our business, the position offered of a Cost Accountant is a highly theoretical area of work that is conceptually complex, demanding serious analysis of specialized methodologies, techniques built on a theoretical understanding of the principles[,], and concepts of business, finance, and accounting.

These assertions conflict materially with the wage level designated in the LCA that the petitioner submitted with the petition. As noted above, the LCA submitted by the petitioner in support of the instant position specifies the occupational classification for the position as "Accountants and Auditors," SOC (O*NET/OES) Code 13-2011, at a Level I (entry-level) wage. The *Prevailing Wage Determination Policy Guidance*³ 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 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 materially inconsistent with 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 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,

³ Available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (accessed Oct. 7, 2013).

exercise of judgment; will be closely supervised and have her work closely monitored and reviewed for accuracy; and will receive specific instructions on required tasks and expected results.

Further, the fact that the petitioner asserts that the beneficiary has been working in the proffered position, for the petitioner, since 2009, calls into question the accuracy of the Level I wage-rate which is the rate specified in the LCA that the petitioner submitted to support the petition.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the assertions regarding the proffered position's level of responsibility within the petitioner's hierarchy. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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).

The U.S. Department of Labor (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) also makes clear that certification of an LCA does not constitute a determination that a position qualifies for classification as 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 (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

As previously noted, the conflict between the LCA and the petition adversely affects the merits of the petition, because it materially undermines the credibility of the petition's statements with regard to the nature and level of work that the beneficiary would perform.

III. Specialty Occupation

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 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 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.

As a preliminary matter, 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 asserted 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 statements of generalized functions (such, as for instance, "[a]nalyz[ing] business operations, trends, costs, revenues, financial commitments, and obligations"; "examin[ing] and analyz[ing] accounting records, financial statements, and other financial reports to assess accuracy, completeness, and conformance to reporting and procedural standards"; and "analyz[ing] and interpret[ing] the financial information"). This level of description does not contain sufficient details to 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.

It should also be noted that the AAO adopts and incorporates the above comments and findings as part of the analysis of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), 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 (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.⁴

Two portions of the *Handbook* are directly relevant to this proceeding: (1) the *Handbook's* discussion of the "Bookkeeping, Accounting, and Auditing Clerks" occupational classification; and (2) its discussion of the "Accountants and Auditors" occupational classification.

The AAO finds that the *Handbook's* entries for the "Bookkeeping, Accounting, and Auditing Clerks" and "Accountants and Auditors" occupational classifications both contain aspects of the proposed duties, and that both occupations require some understanding of accounting principles. However, the question to be addressed in this proceeding is not whether the proffered position requires some knowledge of accounting principles, but whether it is one that normally requires the level of knowledge of a body of highly specialized knowledge in accounting that is signified by attainment of at least a bachelor's degree, or its equivalent, in accounting or a closely-related specialty.

As discussed in the *Handbook*, bookkeeping, auditing, and auditing clerks do not comprise an occupational category that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. The *Handbook* states the following with regard to this occupational classification:

Bookkeeping, accounting, and auditing clerks produce financial records for organizations. They record financial transactions, update statements, and check financial records for accuracy.

Duties

Bookkeeping, accounting, and auditing clerks typically do the following:

- Use bookkeeping software as well as online spreadsheets and databases
- Enter (post) financial transactions into the appropriate computer software
- Receive and record cash, checks, and vouchers

⁴ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

- Put costs (debits) as well as income (credits) into the software, assigning each to an appropriate account
- Produce reports, such as balance sheets (costs compared to income), income statements, and totals by account
- Check figures, postings, and reports for accuracy
- Reconcile or note and report any differences they find in the records

The records that bookkeeping, accounting, and auditing clerks work with include expenditures (money spent), receipts (money that comes in), accounts payable (bills to be paid), accounts receivable (invoices, or what other people owe the organization), and profit and loss (a report that shows the organization's financial health).

Workers in this occupation have a wide range of tasks. Some in this occupation are full-charge bookkeeping clerks who maintain an entire organization's books. Others are accounting clerks who handle specific tasks.

These clerks use basic mathematics (adding, subtracting) throughout the day.

As organizations continue to computerize their financial records, many bookkeeping, accounting, and auditing clerks use specialized accounting software, spreadsheets, and databases. Most clerks now enter information from receipts or bills into computers, and the information is then stored electronically. They must be comfortable using computers to record and calculate data.

The widespread use of computers also has enabled bookkeeping, accounting, and auditing clerks to take on additional responsibilities, such as payroll, billing, purchasing (buying), and keeping track of overdue bills. Many of these functions require clerks to communicate with clients.

Bookkeeping clerks, also known as **bookkeepers**, often are responsible for some or all of an organization's accounts, known as the general ledger. They record all transactions and post debits (costs) and credits (income).

They also produce financial statements and other reports for supervisors and managers. Bookkeepers prepare bank deposits by compiling data from cashiers, verifying receipts, and sending cash, checks, or other forms of payment to the bank.

In addition, they may handle payroll, make purchases, prepare invoices, and keep track of overdue accounts.

Accounting clerks typically work for larger companies and have more specialized tasks. Their titles, such as accounts payable clerk or accounts receivable clerk, often reflect the type of accounting they do.

Often, their responsibilities vary by level of experience. Entry-level accounting clerks may enter (post) details of transactions (including date, type, and amount), add up accounts, and determine interest charges. They also may monitor loans and accounts to ensure that payments are up to date.

More advanced accounting clerks may add up and balance billing vouchers, ensure that account data is complete and accurate, and code documents according to an organization's procedures.

Auditing clerks check figures, postings, and documents to ensure that they are mathematically accurate and properly coded. They also correct or note errors for accountants or other workers to fix.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Bookkeeping, Accounting, and Auditing Clerks," <http://www.bls.gov/ooh/office-and-administrative-support/bookkeeping-accounting-and-auditing-clerks.htm#tab-2> (accessed Oct. 7, 2013).

As noted above, the duties proposed for the beneficiary include such tasks as preparing financial statements and reports; conducting computerized bookkeeping tasks; and making entries to accounts. However, the *Handbook* indicates that these are the duties of bookkeeping, accounting, and auditing clerks, not accountants, and it states the following with regard to the educational requirements necessary for entrance into that occupational category:

Most bookkeeping, accounting, and auditing clerks need a high school diploma. However, some employers prefer candidates who have some postsecondary education, particularly coursework in accounting. In 2009, 25 percent of these workers had an associate's or higher degree.

Id. at <http://www.bls.gov/ooh/office-and-administrative-support/bookkeeping-accounting-and-auditing-clerks.htm#tab-4> (accessed Oct. 7, 2013).

These statements do not support a conclusion that a bachelor's degree in a specific specialty, or its equivalent, is normally required for employment as a bookkeeping, accounting, or auditing clerk. Consequently, the beneficiary's duties that align with such clerk work do not support a finding that the proffered position satisfies the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The remaining duties proposed for the beneficiary are generally similar to the general duties that the *Handbook* ascribes to positions within the Accountants and Auditors occupational category. 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.

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.” *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 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 statements from the *Handbook* excerpted above, 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. Thus, 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. To make this determination, the AAO turns to the record for information regarding the duties and nature of the petitioner’s business operations.

In the instant matter, the AAO finds that those job duties listed by the petitioner which do generally fall within those described in the *Handbook* as normally performed by accountants (as opposed to the duties which align with those of bookkeeping and accounting clerks) are generalized descriptions of functions generic to accounting positions. As such, they do not establish that their

performance requires the theoretical and practical application of at least a bachelor's-degree level of a body of highly specialized knowledge in a specific specialty.

Next, the Occupational Information Network (O*NET) should not be regarded as evidence establishing that the proffered position requires at least a bachelor's degree, or the equivalent, in a specific specialty. In this regard, we note that the O*NET Summary Report for Accountants, to which counsel refers, does not state that the Accountant's occupational group requires a degree in accounting or a closely related specialty for entry.

Additionally, counsel's language-structure in the following segment of her brief on appeal appears to suggest, mistakenly, that the O*NET specifies that a person cannot attain a position as a cost accountant without at least "a four-year bachelor degree in accounting or related field:

The position of a Cost Accountant **O-NET 13-2011** a level four (4) position which requires a four-year bachelor's degree in accounting or related field

First, the O*NET does not focus upon a Cost Accountant as a distinct type of Accountant position, let alone as one that requires, in counsel's words, "a four-year bachelor's degree in accounting or related field." Second, the pertinent O*NET Summary Report on Accountants just mentions "Cost Accountant" as just one of the flowing "Sample of Reported Titles": "Accountant, Certified Public Accountant (CPA), Staff Accountant, Accounting Manager, Cost Accountant, General Accountant, Accounting Officer, Business Analyst, Accounting Supervisor, Financial Reporting Accountant." Third, no section of the O*NET Summary Report for Accountants states that entry into the Accountants occupational category, or Cost Accountants positions in a particular, requires at least a bachelor's degree or the equivalent in a specific specialty.⁵

As was noted previously, the AAO 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 proposed position.

Also, the O*NET's Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require.⁶

For all of these reasons, the O*NET OnLine excerpt submitted by counsel is of little evidentiary value to the issue presented on appeal.

⁵ See O*NET Online, Summary Report for 13-2011.01 – Accountants, available online at <http://www.onetonline.org/link/summary/13-2011.01>.

⁶ For an explanation of the various components of the O*NET Summary Report, see O*NET Online, O*NET Online Help, Summary Report, available on the Internet at <http://www.onetonline.org/help/online/summary>.

Nor does the record of proceeding contain any persuasive documentary evidence from any other 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."

It is also noted that, when asked to name his occupation on his 2010 and 2011 federal income tax returns, the beneficiary described himself as an "office assistant." These statements made by the beneficiary to the Internal Revenue Service undermine any assertion by the petitioner that any of the beneficiary's accounting duties 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.

Finally, the AAO notes once again that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.

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 1151, 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. Nor are there any submissions from a professional association in the petitioner's industry stating 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.

The petitioner submitted a December 13, 2012 letter from [REDACTED] writing as the Vice President of the [REDACTED] in response to the director's November 27, 2012 RFE. In her

letter, Ms. [REDACTED] stated that her company is “a retail store offering [a] wide assortment of general goods,” and that it has previously employed cost accountants, and that all of them held at least a bachelor’s degree in accounting, or the equivalent. Ms. [REDACTED] mentioned no common ownership interest between her company and the petitioner. However, as noted by the director in his February 26, 2013 decision denying the petition, publicly-available information indicates that the petitioner’s president, [REDACTED] is also president of the [REDACTED]. It is therefore not clear that this letter qualifies as the type of attestation from a firm in the petitioner’s industry that it “routinely employ[s] and recruit[s] only degreed individuals.” See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165.

Even if this were not the case, Ms. [REDACTED] letter would still not satisfy the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the record contains no evidence supporting any of her assertions. For example, the record contains no evidence establishing that that [REDACTED] is in fact a retail store, that it has previously employed individuals in positions similar to the one proffered here, or that, if so, those individuals held a bachelor’s degree in a specific specialty, or the equivalent. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm’r 1972)). Even a more fundamental and compelling reason for not according any significant weight to Ms. [REDACTED] letter is the fact that there is no documentary evidence in the letter that establishes that the hiring practices that Ms. [REDACTED] attributes to [REDACTED] are representative of recruiting and hiring practices common to the industry with regard to positions parallel to the one proffered here that are found among organizations similar to this petitioner. Still further, the letter does not outline the standards by which [REDACTED] determined the degree-equivalency of those hired without a bachelor’s degree. Thus, the letter leaves to speculation how degree-equivalency was determined and whether the degree-equivalency determinations were objectively accurate.

Nor do the five job vacancy announcements contained in the record of proceeding satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

First, the petitioner has not submitted any evidence to demonstrate that the positions described in these announcements are “parallel” to the one being proffered here. Each of these five positions requires work experience: the [REDACTED] requires four years of work experience; [REDACTED] requires three years of work experience; Actuant requires three years of work experience; the unnamed “large company” located in [REDACTED] Wisconsin requires three years of work experience; and the unnamed company located in [REDACTED] Illinois requires four years of work experience. However, as noted above, the petitioner indicated by the wage-level in the LCA that its proffered position is a comparatively low, entry-level position relative to others within

⁷ See Florida Department of State, Division of Corporations, “Business Entity Search,” <http://www.sunbiz.org/corinam.html> (accessed Oct. 3, 2013). It is noted that the [REDACTED] which was incorporated in 2005, filed for voluntary dissolution with the Florida Department of State, Division of Corporations, on August 20, 2013. *Id.*

its occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation. It is therefore difficult to envision how these attributes assigned to the proffered position by the petitioner by virtue of its wage-level designation on the LCA would be parallel to the positions described in these job vacancy announcements

The AAO notes further that the four years of accounting experience required by the Precision [redacted] must have been “in a manufacturing environment,” and that Actuant requires “a minimum of 3 years of relevant manufacturing experience.” The petitioner indicates no such requirements for its proffered position.

Accordingly, the petitioner has failed to establish that the positions described in these announcements are “parallel” to the one being proffered here.

Second, the petitioner has not submitted any evidence to demonstrate that any of these five advertisements are from companies “similar” to the petitioner in size, scope, and scale of operations, business efforts, expenditures, or other fundamental dimensions. Although the petitioner claimed to be a three-employee supermarket on the Form I-129, it did not submit any evidence to establish similarity between it and any of the five companies which placed these announcements. Again, simply 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.

Nor does the petitioner submit any evidence regarding how representative these advertisements are of the usual recruiting and hiring practices of the industries in which these advertisers operate. *See id.*

Finally, according to the according to the *Handbook* there were approximately 1,898,300 persons employed as bookkeeping, accounting, and auditing clerks in 2010. *Handbook* at <http://www.bls.gov/ooh/office-and-administrative-support/bookkeeping-accounting-and-auditing-clerks.htm#tab-6> (accessed Oct. 7, 2013). There were 1,216,900 persons employed as accountants in 2010. *Handbook* at <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-6> (last visited Oct. 7, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the six submitted vacancy announcement with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that these 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 these five job-vacancy announcements established that the employers that issued them routinely recruited and hired for the advertised positions only persons with at least a bachelor’s degree in a specific specialty closely related to the positions, it cannot be found that these five job-vacancy announcements 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 normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

Therefore, 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), 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.

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. Rather, the AAO finds that the petitioner has not distinguished either the proposed duties, or the position that they comprise, from generic bookkeeping or accounting work, neither of which, the *Handbook* indicates, necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Additionally, the AAO incorporates here by reference and reiterates its earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that he will receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor's degree, or the equivalent, in a specific specialty.

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 accountants, there is no evidence for consideration under this criterion. As the petitioner has failed to demonstrate a history of recruiting and hiring only individuals with a bachelor's degree, or the equivalent, in a specific specialty for the proffered position, it has not satisfied 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). In response to a similar finding made by the director in his decision denying the petition, counsel makes the following argument on appeal:

The Service stated [that] "the offer of employment to one person with a baccalaureate or higher degree in a particular field of study is not conclusive evidence that the petitioner normally requires a degree or its equivalent for the proffered position[.]" This is ridiculous. How would the petitioner establish that the employment normally requires a baccalaureate degree or equivalent if not by demonstrating employment to one person. Has the Service set a standard that an employer must show [that] more than one person was employed in the capacity with a bachelor's degree by the petitioner?

The AAO does not find counsel's argument persuasive. First, the AAO does not consider a single previous hire sufficient evidence of a past history of employing only persons with at least a bachelor's degree, or the equivalent, in a specific specialty to establish eligibility under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). Furthermore, in the petitioner's case, that single previous hire was the beneficiary of this position. If simply extending an offer of employment to an H-1B applicant were adequate, nearly any position could satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) and the H-1B adjudicatory process would be rendered meaningless.

Even if this were not the case, the AAO would still find that the petitioner failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) because the record does not, as indicated above, establish that its degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position, a determination which is strengthened by the petitioner's indication in the LCA that its proffered position is a comparatively low, entry-level position relative to others within its occupation.

As the petitioner has failed to demonstrate a history of recruiting and hiring only individuals with a bachelor's degree in a specific specialty, or the equivalent, for the proffered position, it has failed to satisfy 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.

The AAO incorporates into the analysis of this criterion this decision's earlier comments and findings with regard to the generalized level at which the duties are described in the record. The evidence of record does not develop the duties in sufficient detail to establish their nature as so

specialized and complex that their performance would require knowledge usually associated with the attainment of at least a bachelor's degree in a specific specialty.

While the just-discussed lack of substantive development of the nature of the duties precludes satisfaction of this criterion, the AAO also finds that, 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, and, therefore, is materially inconsistent with the level of complexity and specialization required to satisfy this criterion.

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).

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 petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

IV. Beneficiary Qualifications

As noted at the outset of this discussion, the AAO also finds, beyond the decision of the director, that the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation. Thus, even if the petitioner had overcome the director's ground for denying

the petition, which it did not, the petition still could not be approved because the petitioner has not demonstrated the beneficiary's qualifications to perform the duties of a specialty occupation.

The statutory and regulatory framework that the AAO must apply in its consideration of the evidence of the beneficiary's qualification to serve in a specialty occupation follows below.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In addition, 8 C.F.R. § 214.2(h)(4)(v)(A) states the following:

General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H

classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

As the beneficiary did not earn a baccalaureate or higher degree from an accredited college or university in the United States, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(1). As he does not possess a foreign degree that has been determined to be equivalent to a baccalaureate or higher degree from an accredited college or university in the United States, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), either. As the petitioner has not demonstrated that the beneficiary holds an unrestricted state license, registration or certification to perform the duties of a specialty occupation, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(3), either. Accordingly, 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) remains as the only avenue for the petitioner to demonstrate the beneficiary's qualifications to perform the duties of the proffered position.

To qualify under the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) the beneficiary must (1) “[h]ave education, specialized training, and/or progressively responsible experience” that is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and (2) “[h]ave recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equivalence to completion of a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) is determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which

specializes in evaluating foreign educational credentials;⁸

- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The record contains an evaluation of the beneficiary's work experience prepared by [REDACTED] an evaluator employed by the [REDACTED]. In her May 6, 2009 evaluation, Ms. [REDACTED] found the beneficiary's work experience equivalent to a U.S. bachelor's degree in business administration, with a specialization in accounting.

However, this evaluation does not demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), as the petitioner has not demonstrated that, at the time that she rendered her assessment, Ms. [REDACTED] possessed the authority to grant college-level credit for training and/or experience at an accredited college or university which had a program for granting such credit based on an individual's training and/or work experience. Again, simply 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.

Accordingly, the beneficiary does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

No evidence has been submitted to establish, and the petitioner does not assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires submission of the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI).

Nor does the beneficiary qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(3) by virtue of an "evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials."

As already reflected in this decision, the findings and ultimate conclusion of the degree-equivalency opinions submitted by Ms. [REDACTED] are based upon assessments of training and work

⁸ The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

experience. To the extent that they are so based, those submissions and, most decisively, their ultimate opinions on educational equivalency, lie beyond consideration of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). That criterion is framed only for consideration of “[a]n evaluation of education [*not training and/or experience*] by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials.”⁹

No evidence has been submitted to establish, and the petitioner does not assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that the beneficiary submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) states the following with regard to USCIS analyzing an alien’s qualifications:

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien’s training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien’s experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;¹⁰
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

⁹ Again, the AAO accords no weight to Ms. [REDACTED] evaluation, as the petitioner failed to demonstrate that it was produced by an individual who, at the time of the assessment, was “an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual’s training and/or work experience,” as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

¹⁰ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority’s opinion must state: (1) the writer’s qualifications as an expert; (2) the writer’s experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. See 8 C.F.R. § 214.2(h)(4)(ii).

- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Although the record contains some information regarding the beneficiary's work history, it does not establish that this work experience included the theoretical and practical application of specialized knowledge required by the proffered position; that it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the field; and that the beneficiary achieved recognition of her expertise in the field as evidenced by at least one of the five types of documentation delineated in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i)-(v).

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i)-(v), either, and therefore does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). As such, the petitioner has failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation. Accordingly, the petition must also be denied on this basis. Thus, even if it were determined that the petitioner had overcome the director's grounds for denying this petition (which it has not), the petition could still not be approved.

V. Prior Grant of H-1B Status to Beneficiary

On appeal, the petitioner emphasizes that the proffered position is the same position in job title and duties as the previously approved H-1B petition filed by the petitioner on behalf of the beneficiary. Counsel also references an April 23, 2004 memorandum authored by William R. Yates (hereinafter Yates memo) as establishing that USCIS must give deference to those prior approvals or provide detailed explanations why deference is not warranted. Memorandum from William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3, (Apr. 23, 2004).

It must be first noted that the Yates memo specifically states the following:

[A]djudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology International*, 19 I&N 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. See 8 C.F.R. § 103.8(d). . . . Material error, changed circumstances, or new material information must be clearly articulated in the resulting request for evidence or decision denying the benefit sought, as appropriate.

Thus, the Yates memo does not advise adjudicators to approve an extension petition when the facts of the record do not demonstrate eligibility for the benefit sought. On the contrary, the memorandum's language quoted immediately above acknowledges that a petition should not be approved, where, as here, the petitioner has not demonstrated that the petition should be granted.

Again, as indicated in the Yates memo, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). If the two previous nonimmigrant petitions were approved based on the same description of duties and assertions that are contained in the current record, they would constitute material and gross error on the part of the director. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Second, the memorandum clearly states that each matter must be decided according to the evidence of record. On appeal, counsel implies that USCIS was required to look at the prior record of proceeding dealing with the separate adjudication of the approved H-1B petition filed on behalf of the beneficiary and provide a reason why deference is not warranted, arguing that "[t]he Service has to prove material error in denying an extension." However, a copy of the prior approved petition was not submitted and counsel's implicit claim is therefore without merit.

When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. There is no requirement either in the regulations or in USCIS procedural documentation requiring nonimmigrant petitions to be combined in a single record of proceeding.¹¹ Accordingly, the director was not required to request and obtain a copy of the prior H-1B petition.

¹¹ USCIS does not engage in the practice of reviewing previous nonimmigrant petitions when adjudicating extension petitions. Given the various and changing jurisdiction over various nonimmigrant petitions and applications, requiring previously adjudicated nonimmigrant petitions to be reviewed before any newly filed application or petition could be adjudicated would result in extreme delays in the processing of petitions and applications. Furthermore, such a suggestion, while being impractical and inefficient, would also be

Again, the prior H-1B petition and its respective supporting documents is not before the AAO, and the petitioner has not submitted a copy into the record. As such, there were no underlying facts to be analyzed and, therefore, no prior, substantive reason could have been provided to explain why deference to the approval of the prior H-1B petition was not warranted. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. For this additional reason, the Yates memorandum does not apply in this instance.

VI. Conclusion

As discussed above, the AAO agrees with the director's finding that the petitioner failed to demonstrate that the proffered position is a specialty occupation. Beyond the decision of the director, the AAO finds additionally that the petitioner failed to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation. The AAO finds further that the conflict between the LCA and the petition adversely affects the merits of this petition, because it materially undermines the credibility of the petitioner's statements regarding the nature and level of work that the beneficiary would perform.

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 appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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

tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361.