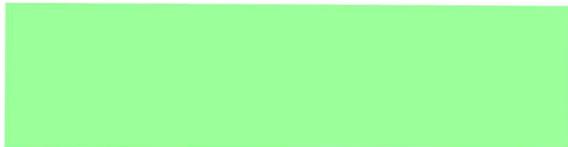




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **NOV 27 2013** OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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

Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a physical therapy office established in 2007. In order to employ the beneficiary in what it designates as a healthcare account executive position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner: (1) failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions; and (2) failed to establish that the beneficiary is qualified to perform services in a specialty occupation. On appeal, counsel for the petitioner asserts that the director's bases for denial of the petition were erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

The primary issue for consideration is whether the petitioner's proffered position qualifies as 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 applicable statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics,

physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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 simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In the petition signed on March 15, 2012 and supporting documentation, the petitioner indicates that it wishes to employ the beneficiary in a healthcare account executive position on a full-time basis at the rate of pay of "\$40,000/year (\$19.64/hr, 39/wk)."¹ In the support letter dated March 13, 2012, the petitioner states that the beneficiary will be employed to perform the following duties:

- Must understand physical therapy treatment techniques and core products and working closely with doctors, patients and other professionals of the health care team and building, networking, and managing day-to-day relationships with them; Responsible for understanding business needs and building relationships with healthcare providers including hospitals, doctor's offices, and insurance companies. The Beneficiary will directly deal with many major health insurance companies such as [REDACTED]
- Conducting internal and external environmental assessment, competitor analysis, and methods for evaluating strategic alternatives and then developing clinic's account strategies and setting short and long-term strategic accounts direction.
- Tracking and coordinating all activities occurring for each account; Leading negotiation process and ensuring acceptable outcome from a pricing, profitability, liability, operational, and SLA perspective for healthcare accounts.
- Developing, maintain, and improving patient relationships and identifying and

¹ It must be noted for the record that 39 hours per week at the rate of \$19.64 per hour is \$39,829.92 per year.

developing strategic relationships in the health care industry that will enhance patient care.

- Counseling and evaluating patients by using professional techniques such as interview, standardized evaluation, projective procedure and non-verbal behavior assessment, assessing a patient's needs and design, developing rehabilitation plans that fit clients' aptitudes, education levels, physical abilities, and career goals, and implementing rehabilitation programs that may include personal and vocational counseling, training, and job placement and monitoring and recording the patient's progress to ensure that goals and objectives are met or revised as appropriate.
- Preparing and maintaining records and case files, including documentation such as patients' personal and eligibility information, services provided, narratives of patient contracts, and relevant correspondence.
- Responsible for existing account management including [sic] accurately input patient information, patient treatment, health history, diagnosis, and related information and submission of paper and electronic claims to an insurance on behalf of a patient and researching denied claims, denied procedures and outstanding accounts receivable daily to insure center benchmarks are met. Whether in dealing with insurance companies or understanding treatment plans, health accountant strives to make the process easier for patients.
- Negotiating and closing contracts, maintain excellent client relationships, and continually build opportunity pipeline.
- Submitting proposed program and estimated budget fro [sic] management's approval.
- Forecasting and justifying potential project/revenue possibilities for each account over a six-month period on a monthly basis.
- Recruiting and retaining healthcare professional for strategic account management.
- Supervising and coordinating employee assistance program trainings and collaborating with other staff to ensure coherent and consistent messaging to patients, hospitals, insurance providers, and prospects.
- Researching available training materials relevant to the business; supporting, organizing and developing instructional programs and materials utilizing available technology and multimedia equipment to enhance learning.

- Actively partnering with Asian/Korean American community-based organizations and healthcare providers (such as [REDACTED] and [REDACTED] and other clinics) and participating in advocating for the unique and diverse health needs of the Asian/Korean American community to educate the community about adequate health information, preventive health services, and health rights and to promote healthier living and healthy lifestyles.
- Be responsible for the development and implementation of marketing strategies and promotional communication channels to introduce and promote the Petitioner's products and services to potential markets in order to open up new opportunities and increase potential profitability. This will include leading the proposals process, preparing presentations and showing initiative and visible leadership when mining new business within existing accounts.
- Preparing account activity reports and attending meetings/conference calls to advance communications programs.
- Maintaining awareness of overall development in the field of health and clinic management and administration, including application of new medical technologies through related literature, professional meetings, etc.
- Assisting in administrating fiscal year operations such as budget planning, accounting and establishing rates for health care services.

The petitioner also states that "[w]e require a minimum [of a] Bachelor's degree in health science, business administration, or related fields because the nature of the job duties requires theoretical and practical application of a body of highly specialized knowledge."

With the initial petition, the petitioner submitted a copy of the beneficiary's Certificate of Graduation and transcript from [REDACTED] in Korea, as well as a credential evaluation from [REDACTED]. The credential evaluation indicates that the beneficiary's foreign education is equivalent to a "Bachelor's degree in physical therapy from an accredited institution."

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "First-Line Supervisors of Office and Administrative Support Workers" - SOC (ONET/OES Code) 43-1011, at a Level I (entry level) wage.

The petitioner also submitted several documents in support of the petition, including the following: (1) photographs of its business; (2) a copy of its Certificate of Incorporation; (3) tax returns; (4) copies of the president's physical therapist license and registration from New York; (5) copies of the previous healthcare account executive's, [REDACTED] physical therapist license and registration from New York; (6) Form W-2, Wage and Tax Statements, for five employees; (7) lease agreement; (8) copies of patient sign-in and invoices; (9) health insurance documents; (10) job posting for the

proffered position in [REDACTED] and (11) other documents relating to the petitioner's business operations.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on September 26, 2012. The petitioner was asked to submit probative evidence: (1) to establish that a specialty occupation position exists for the beneficiary; and (2) to establish that the beneficiary is qualified to serve in a specialty occupation position. The director outlined the specific evidence to be submitted.

On November 30, 2012, the petitioner and counsel responded by submitting further information regarding the proffered position and additional evidence. In response to the director's RFE, the petitioner submitted a revised description of the duties of the proffered position, along with the percentage of time that the beneficiary will spend performing each duty. Specifically, the document stated that the beneficiary will perform the following duties:

Monday

< Strategic Account Management: 46% >

9:30 ~ 11:30

- Conducting internal and external environmental assessment, competitor analysis, and methods for evaluating strategic alternatives.
- Collecting data on patients [sic] demographics, characteristics, needs, diagnosis, treatment, health history, health insurance, factors affecting service demand.

2 hours 5.1%

11:30 ~ 13:30

- By utilizing health statistics, performing research design, quantitative (correlation, regressions) analysis, nonparametric tests, single subject design, and qualitative analysis.
- Interpreting and developing information and consider available solutions or alternate methods of proceeding.

2 hours 5.1%

13:30 ~ 15:30

- Responsible for driving new business from named healthcare accounts and developing and growing business within identified accounts through consultative and effective relationship building. This will include leading the proposal process, preparing presentations and showing initiative and visible leadership when mining new business within existing accounts.

- Assisting the management team with plans and outlines for new projects to create opportunities to communicate with and build relationships with external partners.
- Recommending new procedures, solutions, and services by evaluating current services and products.

2 hours 5.1%

15:30 ~ 17:30

- Be responsible for the development and implementation of marketing strategies and promotional communication channel to introduce and promote the Petitioner's products and services to potential markets in order to open up new opportunities and increase potential profitability.
- Creating concise and compelling marketing copy of news paper [sic] ads, magazine ads, presentations, product/service briefs, and solution.
- Writing and editing informative brochures and booklets regarding the following topics to assist the patients, public, and community with their knowledge of certain medical applications as it pertains to them;
 - [The Petitioner's] Profile and Service and Products
 - Role of Physical Therapist in Patient Care
 - Treatment Options
 - Therapeutic Exercise (Biomechanical and neurophysiological approaches to exercise based on concepts of human development)
 - Introduction to the Profession of Rehabilitation Services
 - Physical Therapy Diagnosis with Musculoskeletal System
 - Applied Exercise [T]herapy (use of various exercise techniques, as well as practical application and hands-on experience performing and completing these exercise techniques and applications correctly)
 - Oriental Physical Therapy (concept of [O]riental medicine and [O]riental pain control methods)
 - Emergency Treatment
 - Health Care System
 - Integrated summaries of efficacy and safety

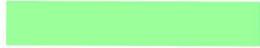
2 hours 5.1%

Tuesday

9:30 ~ 10:30

- No information provided by the petitioner.

1 hour 2.6%



10:30 ~ 14:30

- Actively partnering with Asian/Korean American community-based organizations and healthcare providers (such as [redacted] and [redacted] and other clinics) and participating in advocating for the unique and diverse health needs of the Asian/Korean American community to educate the community about adequate health information, preventive health services, and health rights and to promote healthier living and healthy lifestyles.
- In particular, on behalf of [the petitioner][,] the Beneficiary will make an effort to improve the health status of Korean women and families.

4 hours 10.2%

14:30 ~ 17:30

- Write or translate informative reports, brochures, and pamphlets in easily understandable language regarding medical terminology, medical and surgical procedures, medical care instructions, drug information, etc.; Writing or revising or translating a referential material and guidebook to educate patients and community.

3 hours 7.7%

Wednesday

< Account Management: 35.9% >

9:30 ~ 11:30

- Taking proactive steps to channel market feedback around multiple dimensions including the competitive environment and relevant voice of the patients.
- Preparing account activity reports and attending meetings/conference calls to advance communication programs.

2 hours 5.1%

11:30 ~ 14:30

- Responsible for account management of existing patients, hospitals, physicians, clinics, and other providers and maintaining their satisfaction.
- Tracking and coordinating all activities occurring for each account and reviewing related communications.
- At [the petitioner] existing account management include [sic]:

- accurately input patient information, patient treatment, health history, diagnosis, and related information
- submission of paper and electronic claims to an insurance on behalf of a patient and researching denied claims, denied procedures and outstanding accounts receivable daily to insure center benchmarks, are met. Whether in dealing with insurance companies or understanding treatment plans, health account strives to make the process easier for patients
- Beneficiary will directly deal with many major health insurance companies such as

[REDACTED]
[REDACTED]
[REDACTED] etc.

3 hours 7.7%

14:30 ~ 15:30

- Preparing and maintaining records and case files, including documentation such as patients' personal and eligibility information, services provided, narratives of patient contracts, and relevant correspondence.

1 hours [sic] 2.6%

15:30 ~ 17:30

- Discovering and customizing a program for each patient, hospital, or other clinic' [sic] needs and proposing appropriate solutions to them to stay abreast of competition and identifying emerging trends.
- Submitting proposed program and estimated budget fro [sic] management's approval.

2 hours 5.1%

Thursday

9:30 ~ 10:30

- Maintaining and improving existing relationships and identifying network relationship in the healthcare industry that will enhance patient services.
- Creating and managing opportunities within an assigned base of named healthcare accounts.

1 hour 2.6%

10:30 ~ 12:30

- Preparing account activity reports and attending meetings/conference calls to advance communications programs.
- Forecasting and justifying potential project/revenue possibilities for each account over a six-month period on a monthly basis.

2 hours 5.1%

12:30 ~ 14:30

- Leading negotiation process and ensuring acceptable outcome from a pricing, profitability, liability, operational, and SLA perspective for healthcare accounts.
- Closing contract and maintain excellent and strategic client relationships, and continually build opportunity pipeline.

2 hours 5.1%

14:30 ~ 17:30

- Preparing and maintaining records and case files, including documentation such as patients' personal and eligibility information, services provided, narratives of patient contracts, and relevant correspondence.
- Submitting paper and electronic claims to an insurance on behalf of a patient and researching denied claims, denied procedures and outstanding accounts receivable daily to insure center benchmarks, are met. Whether in dealing with insurance companies or understanding treatment plans, health account strives to make the process easier for patients.

3 hours 7.7%

< Administration Support: 18% >

9:30 ~ 12:30

- If necessary, recruiting and retaining healthcare professional for strategic account management.
- Supervising medical biller, physical therapy aid, and receptionist and coordinating employee assistance program trainings and collaborating with other staff to ensure coherent and consistent messaging to patients, hospitals, insurance providers, and prospects.

3 hours 7.7%

12:30 ~ 15:30

- Coordinating the design, development and implementation of a staff/employee development plan; providing recommendations to management regarding the implementation of their training goals.
- Researching available training materials relevant to the business; supporting, organizing and developing instructional programs and materials utilizing available technology and multimedia equipment to enhance learning.

3 hours 7.7%

15:30 ~ 16:30

- Assisting in administering fiscal year operations such as budget planning, accounting and establishing rates for health care services.

1 hour 2.6%

39 hours 100%²

The AAO observes that the document also stated:

In order to carry out the duties below that entice our business it is important and necessary to have [an] academic background [sic] of physical therapy [sic], [O]riental physical therapy, rehabilitation therapy, therapeutic exercise, health industry, the health care process, rehabilitation medicine, health statistics, and research methodology with counseling and clinical and practical skills. The bachelor degree or equivalent is essential to this position and the position is absolutely related to the Beneficiary's studies of physical therapy.

Notably, in a letter dated November 19, 2012, counsel stated that "the Petitioner normally requires a minimum [of a] Bachelor's degree in Health Science, a related field to the business (Physical Therapy), or a closely related field (such as marketing in [the] Healthcare Industry) or an equivalent combination of education and directly related work experience." Further in the letter, counsel stated that "the duties of a healthcare account executive can only be performed with the practical application of specialized knowledge gained through a baccalaureate-level education or higher in physical therapy, health science, or a closely related field, or an equivalent combination of education and directly related work experience."

In response to the RFE, the petitioner and counsel submitted, in part, (1) a brochure; (2) an organizational chart; (3) the petitioner's Quarterly Tax Summary for 2012 (quarter 3); (4) a newspaper advertisement for the petitioner; (5) documents regarding the petitioner's health programs;³ (6) health insurance documents; (7) Doctor of Physical Therapy degree awarded to [REDACTED]

² The AAO observes that the total percentage of time amounts to 99.9%.

³ It must be noted for the record that the documents are in a foreign language, and they are not accompanied

(8) the petitioner's internet job posting for the proffered position; (9) a letter from [redacted] President of [redacted] P.C., along with an H-1B approval notice, credential evaluation, and Certificate of Graduation for [redacted] (10) a letter from [redacted] President of [redacted] along with a Certificate of Bachelor's Degree and pay stub for [redacted] and (11) a letter from [redacted] President of [redacted] along with a Bachelor of Science degree in Heath Science, transcript, and Form 1099 for [redacted]

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on December 14, 2012. Counsel submitted an appeal of the denial of the H-1B petition.

On appeal, counsel states that the "preponderance of the evidence" standard is applicable in this matter, and that the petitioner submitted sufficient evidence to establish that "more likely than not" the proffered position qualifies as a specialty occupation.

The AAO notes that with respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

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

* * *

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

* * *

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

by an English translation. Any document submitted containing a foreign language must be accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English. *See* 8 C.F.R. § 103.2(b)(3). Because the petitioner failed to comply with the regulations by submitting a certified translation of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *Id.* Accordingly, the evidence that is in a foreign language is not probative and will not be accorded any weight in this proceeding. The AAO will not attempt to decipher or "guess" the meaning of documents that are not accompanied by a full, certified English language translation.

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

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

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To make this determination, the AAO turns to the record of proceeding. To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

The AAO reviewed the record in its entirety and will make some findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

It must be noted that the petitioner has provided inconsistent information regarding the minimum requirements for the proffered position. In the March 13, 2012 letter of support, the petitioner stated that the proffered position requires a "Bachelor's degree in health science, business administration, or related fields." Further in the letter, the petitioner stated that "[o]ur clinic requires a candidate to have at least a bachelor [sic] degree of Health Science, Business Administration, or related field (Physical Therapy) to our business." Thereafter, in response to the RFE, the petitioner submitted an internet job posting for the proffered position that indicates that a "[m]in. [of a] Bachelor's degree in Health Science, Physical Therapy, or a closely related field (such as marketing in [the] Healthcare Industry) or an equivalent combination" is required for the position. Notably, in the November 19, 2012 letter, counsel stated that "the Petitioner normally requires a minimum [of a] Bachelor's degree in Health Science, a related field to the business (Physical Therapy), or a

closely related field (such as marketing in [the] Healthcare Industry) or an equivalent combination of education and directly related work experience." No explanation for the variances was provided.⁴

Furthermore, the AAO observes that the petitioner and counsel indicate that various disciplines are acceptable for the proffered position. More specifically, the petitioner and counsel have indicated that a degree in health science, business administration, physical therapy, or marketing is acceptable.⁵ In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Again, the petitioner and counsel claim that the duties of the proffered position can be performed by an individual with a degree in health science, business administration, physical therapy, and/or marketing. The issue here is that it is not readily apparent that all of these fields of study are closely related or that the fields are directly related to the duties and responsibilities of the particular position proffered in this matter.⁶

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding,

⁴ The petitioner and its counsel have provided inconsistent information as to the requirements of the proffered position. 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. 591-92.

⁵ Furthermore, the field of health science is a very broad category that covers numerous and various disciplines, some of which are only related through the basic principles of applied science dealing with human and animal health.

⁶ Moreover, it is not apparent that a degree in any health science field is directly related to the duties and responsibilities of the particular position proffered in this matter.

simply fails to establish either (1) that the fields (health science – all disciplines, business administration, physical therapy, and/or marketing) are closely related fields, or (2) that the fields are directly related to the duties and responsibilities of the proffered position. As the evidence of record fails to establish how these dissimilar fields of study form either a body of highly specialized knowledge in a specific specialty, or its equivalent, the petitioner's assertion that the job duties of this particular position can be performed by an individual with a degree in any of these fields suggests that the proffered position is not in fact a specialty occupation. Therefore, absent probative evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires at least a bachelor's degree in a specific specialty.

Moreover, the petitioner claims that a degree in business administration is sufficient for the proffered position. The claimed requirement of a degree in business administration for the proffered position, without specialization, is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.⁷

Again, the petitioner claims that the duties of the proffered position can be performed by an

⁷ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. Upon review of the record of proceeding, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty*, or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion. The petitioner's assertions regarding its requirements for the proffered position are tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Moreover, upon review of the record of proceeding, the AAO finds that there are additional discrepancies and inconsistencies in the record of the proceeding with regard to the proffered position. This is exemplified by the wage level chosen by the petitioner in the LCA for the proffered position.

As previously stated, the petitioner submitted an LCA in support of the instant petition that designated the proffered position to the corresponding occupational category of "First-Line Supervisors of Office and Administrative Support Workers" - SOC (ONET/OES Code) 43-1011. The wage level for the proffered position in the LCA corresponds to a Level I (entry). The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.⁸ The LCA was certified on March 9, 2012. The petitioner signed the LCA on March 15, 2012. The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount

⁸ The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

and level of supervision, and the level of understanding required to perform the job duties.⁹ The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

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

DOL guidance indicates that a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones would be an indication that a wage determination at Level II would be proper classification for a position. The occupational category "First-Line Supervisors of Office and Administrative Support Workers," has been assigned an O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, most occupation in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." See O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3.

In the instant case, the petitioner designated the proffered position as a Level I position. This suggests that the petitioner's academic and/or professional experience requirements for the proffered position would be *less than* the preparation listed for Job Zone 3 occupations (i.e., "training in vocational schools, related on-the-job experience, or an associate's degree"). However, the AAO

⁹ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

observes that the petitioner claims in its letter of support (dated March 13, 2012) that a "Bachelor's degree in health science, business administration, or related fields" is required for the proffered position.¹⁰ Counsel claims that the proffered position requires a degree and directly related work experience.

The petitioner and counsel claim that the duties of the proffered position are complex, unique and/or specialized. In the March 13, 2012 letter of support, the petitioner states that the beneficiary will be "[s]upervising and coordinating employee assistance program trainings." In response to the director's RFE, the petitioner claims that the beneficiary will be responsible for "[s]upervising [the] medical biller, physical therapy aid, and receptionist." In the internet job posting, submitted in response to the RFE, the petitioner indicates that the incumbent "[m]ust have specialized knowledge of physical therapy [sic], [O]riental physical therapy, rehabilitation therapy, therapeutic exercise, health industry, the health care process, rehabilitation medicine, health statistics, and research methodology with counseling and clinical and practical skills" for the proffered position.

This information is reiterated in the November 19, 2012 letter, submitted in response to the director's RFE, when counsel claims that "the actual performance [of the proffered position's duties] involves practical and theoretical application of highly specialized knowledge of physical therapy [sic], [O]riental physical therapy, rehabilitation therapy, therapeutic exercise, health industry, the health care process, rehabilitation medicine, health statistics, and research methodology with counseling and clinical and practical skills." Further, counsel states that "[w]e believe that the proffered duties are of such complexity as to require that only an individual with a degree can perform the work associated with the position." Additionally, throughout the record, the petitioner repeatedly emphasizes that "[the beneficiary's] Korean-English bilingual ability will be very useful to perform the duties."¹¹ On appeal, counsel claims that "the Beneficiary's administration support duties come from his supervision responsibility." In addition, counsel asserts that the duties of the position involve "complexity, uniqueness, or specialization."

Upon review of the assertions made by the petitioner and counsel, the AAO must question the level of complexity, independent judgment and understanding actually required for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described in the record of proceeding conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

¹⁰ The AAO notes that as previously discussed, the petitioner has provided inconsistent information as to the requirements of the proffered position.

¹¹ The AAO notes that a language requirement other than English in a job offer generally is considered a special skill for all occupations (with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers) and must be reflected in the wage-level.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A). The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment.

The AAO notes that the prevailing wage on the LCA corresponds to a Level I position for the occupational category of "First-Line Supervisors of Office and Administrative Support Workers" for Queens County (Flushing, New York).¹² Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$24.50 per hour for a Level II position, \$29.36 per hour for a Level III position, and \$34.22 per hour for a Level IV position.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted.

The AAO also notes that this aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the 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. 591-92.

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

Certification by the Department of Labor 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.

¹² For additional information regarding the prevailing wage for this occupation in Queens County, see the All Industries Database for 7/2011 - 6/2012 for First-Line Supervisors of Office and Administrative Support Workers at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=43-1011&area=35644&year=12&source=1> (last visited November 26, 2013).

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.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I position. This conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

For the foregoing reasons, a review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the other independent reasons for the director's denial, the petition could still not be approved.

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the inconsistencies and discrepancies in the record of proceeding regarding the beneficiary's proposed employment. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria

at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether DOL's *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹³ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "First-Line Supervisors of Office and Administrative Support Workers."

The AAO reviewed the *Handbook* regarding the occupational category "First-Line Supervisors of Office and Administrative Support Workers." However, the *Handbook* simply describes this category as "[s]upervise and coordinate the activities of clerical and administrative support workers." The *Handbook* does not provide a detailed narrative account nor does it provide summary data for the occupational category "First-Line Supervisors of Office and Administrative Support Workers." More specifically, the *Handbook* does not provide the typical duties and responsibilities for this category. Moreover, the *Handbook* does not provide any information regarding the academic and/or professional requirements for these positions.

The AAO notes there are occupational categories which are not covered in detail by the *Handbook*, as well as occupations for which the *Handbook* does not provide any information. The *Handbook* states the following about these occupations:

Data for Occupations Not Covered in Detail

Employment for the hundreds of occupations covered in detail in the *Handbook* accounts for more than 121 million, or 85 percent of all, jobs in the economy. [The *Handbook*] presents summary data on 162 additional occupations for which employment projections are prepared but detailed occupational information is not developed. These occupations account for about 11 percent of all jobs. For each occupation, the Occupational Information Network (O*NET) code, the occupational definition, 2010 employment, the May 2010 median annual wage, the projected

¹³ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

employment change and growth rate from 2010 to 2020, and education and training categories are presented. For guidelines on interpreting the descriptions of projected employment change, refer to the section titled "Occupational Information Included in the OOH."

Approximately 5 percent of all employment is not covered either in the detailed occupational profiles or in the summary data given here. The 5 percent includes categories such as "all other managers," for which little meaningful information could be developed.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Data for Occupations Not Covered in Detail, on the Internet at <http://www.bls.gov/ooH/About/Data-for-Occupations-Not-Covered-in-Detail.htm> (last visited November 26, 2013).

Thus, the narrative of the *Handbook* indicates that there are over 160 occupations for which only brief summaries are presented. (That is, detailed occupational profiles for these 160+ occupations are not developed.) The *Handbook* continues by stating that approximately five percent of all employment is not covered either in the detailed occupational profiles or in the summary data. The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed.

Accordingly, in certain instances, the *Handbook* is not determinative. When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise qualifies as a specialty occupation under this criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that indicates whether the position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider all of the evidence presented to determine whether a beneficiary qualifies to perform in a specialty occupation. Upon review of the record, the petitioner has failed to do so in the instant case. That is, the petitioner has failed to submit probative evidence that normally the minimum requirement for positions falling under the occupational category "First-Line Supervisors of Office and Administrative Support Workers" is at least a bachelor's degree in a specific specialty, or its equivalent.

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

Next, the AAO will now review the record regarding the first of the two alternative prongs of

8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here, and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. The record does not contain any letters from the industry's professional association, indicating that it has made a degree a minimum entry requirement.

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

In the Form I-129 petition, the petitioner describes itself as a physical therapy office established in 2007, with nine employees. The petitioner claims that it has a gross annual income of "\$931,611 (2010) and a net annual income of "\$31,855 (2010)." The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 621310 – Offices of Chiropractors. The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments of health practitioners having the degree of D.C. (Doctor of Chiropractic) primarily engaged in the independent practice of chiropractic. These practitioners provide diagnostic and therapeutic treatment of neuromusculoskeletal and related disorders through the manipulation and adjustment of the spinal column and extremities, and operate private or group practices in their own offices (e.g., centers, clinics) or in the facilities of others, such as hospitals or HMO medical centers.

See U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 621310 – Offices of

Chiropractors, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited November 26, 2013).

In support of the assertion that the proffered position is a specialty occupation under this criterion of the regulations, counsel submitted letters from [REDACTED].⁴ The AAO reviewed the letters in their entirety. However, contrary to the purpose for which the letters were submitted, they are not persuasive in establishing the proffered position as a specialty occupation position under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The letter from [REDACTED] is dated October 19, 2012. [REDACTED] states that the company has six employees and was established in 2005. Further, [REDACTED] indicates that the company has employed a healthcare account executive since October 2012 (the same month as the letter was written – thus, at most for 19 days).¹⁵ The letter from [REDACTED] is dated November 26, 2012. [REDACTED] states that the company has five full-time and three part-time employees, and was established in 2005. [REDACTED] indicates that the company currently employs one individual in a healthcare account executive position. The writers did not provide the total number of people they currently or in the past have been employed to serve in a healthcare account executive position.¹⁶ Consequently, it cannot be determined how representative the writers' claim regarding *two individuals over a seven year period* are of their normal hiring practices.

¹⁴ The AAO reviewed all of the letters and observes that the wording of portions of the letters match virtually verbatim, including grammatical and punctuation errors. When affidavits are worded the same (and include identical errors), it indicates that the words are not necessarily those of the affiant and may cast some doubt on the affidavits' validity.

¹⁵ The AAO observes that counsel submitted an H-1B approval notice for [REDACTED] employee, [REDACTED]. The AAO reviewed the Foreign Labor Certification Data Center website regarding the case. For employer-specific case information that appears on FLCDataCenter.com, *see* Foreign Labor Certification Data Center available on the Internet at <http://www.flcdatacenter.com/CaseH1B.aspx>.

Notably, the [REDACTED] business operations are not classified under the same industry as the petitioner (as noted above, the petitioner designated its business operations under the NAICS code 621310 – Offices of Chiropractors). In addition, the position does not fall under the same occupational category as the proffered position (which the petitioner designated as a "First-Line Supervisors of Office and Administrative Support Workers" in the LCA). In addition, Ms. [REDACTED] is being paid at the rate of \$58,000 per year. The rate of pay for Ms. [REDACTED] is significantly higher than the offered salary to the beneficiary of \$19.64 per hour (\$39,829.92 per year). It appears that Ms. [REDACTED] may be employed in a more senior position. Without further information, the petitioner has not established that the organization is similar to the petitioner, and that the position is parallel to the proffered position.

¹⁶ In the letter dated March 3, 2011 (thus, over a year prior to the submission of the instant H-1B petition), [REDACTED] states that the company has seven employees. [REDACTED] does not indicate when the company was established. [REDACTED] states that one individual has been employed as a healthcare account executive since September 6, 2010. However, there is no information regarding the total number of people that currently or in the past have been employed to serve the position.

Further, while all of the writers provided general statements regarding their employees' duties, the writers failed to provide the specific job duties and day-to-day responsibilities of the positions that they claim are the same as the proffered position. That is, the writers did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, aside from job title and a few general statements regarding the duties, it is unclear whether the duties and responsibilities of these individuals are the same or parallel to the proffered position. The letters do not establish that a degree requirement in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations to the petitioner.¹⁷

Thus, based upon a complete review of the record, the petitioner has not established 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. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

The AAO acknowledges that the petitioner and its counsel may believe that the proffered position is so complex and/or unique that it can be performed only by an individual with at least a bachelor's degree. In support of this assertion, the petitioner provided documents regarding its business operations, including photographs of its business; financial and tax documents; its lease agreement; copies of patient sign-in and invoices; health insurance documents; a brochure/marketing materials; an organizational chart; a newspaper advertisement for the business; and documents regarding the petitioner's health programs.¹⁸ However, upon review of the record of proceeding, the AAO finds

¹⁷ The petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from three letters 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 the organizations were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the letters supported the finding that the position of healthcare account executive for companies similar to the petitioner required a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that three letters that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States.

¹⁸ As previously mentioned, the documentation includes information in a foreign language and it is not accompanied by a certified English translation. For the reasons already discussed the information that is in a

that the petitioner has failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. That is, the AAO reviewed the record in its entirety and finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. Further, the AAO hereby incorporates into this analysis the earlier comments and findings regarding the information and evidence provided with regard to the proposed duties and requirements and the position that they are said to comprise. As reflected in those earlier comments and findings, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent.

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the healthcare account executive position. Specifically, the petitioner failed to demonstrate how the healthcare account executive duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. The petitioner claims that the beneficiary will utilize his knowledge from various courses (and provides a list of the courses); however, the petitioner did not establish how such a curriculum is necessary to perform the duties of the proffered position. While a few related courses may be beneficial, or even essential, in performing certain duties of a healthcare account executive position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level at a Level I (entry level) wage. The wage level of the proffered position indicates that (relative to others within the occupational category "First-Line Supervisors of Office and Administrative Support Workers") the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.¹⁹ Thus, the wage level designated by the petitioner in the LCA is not consistent with claims that the position would entail any particularly complex or unique duties. It

foreign language is not probative evidence in establishing the proffered position as qualifying as a specialty occupation. *See* 8 C.F.R. § 103.2(b)(3).

¹⁹ As previously discussed, DOL guidance indicates that a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones would be an indication that a wage determination at Level II would be proper classification for a position. The occupational category "First-Line Supervisors of Office and Administrative Support Workers," has been assigned an O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, most occupation in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." *See* O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3.

appears that such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."²⁰

The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has thus failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

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

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher

²⁰ For additional information on Level IV wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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

As previously discussed, the petitioner has provided inconsistent information as to the academic requirements of the proffered position. With the initial petition, the petitioner submitted a job posting for the proffered position from [REDACTED]. Notably, the posting states "[m]in. Bachelor [sic] Degree of Health Science, Business administration, or related fields."²¹

In response to the director's RFE, the petitioner and counsel submitted an advertisement for the proffered position from www.4jobsinusa.com, posted on February 6, 2012. The posting states "[m]in. Bachelor's degree in Health Science, Physical Therapy, or a closely related field (such as marketing in Healthcare Industry) or an equivalent combination." As previously discussed, since there must be a close correlation between the required "body of highly specialized knowledge" and the position, a minimum entry requirement of a degree in disparate fields would not meet the

²¹ The AAO notes that the posting includes two positions: rehabilitation manager and healthcare account executive. The requirements for the rehabilitation manager are stated as "Min. Bachelor Degree of Physical Therapy, Rehabilitation Medicine, Public Health or related fields." The advertisement indicates that the requirements for the healthcare account executive are "Min. Bachelor Degree of Health Science, Business administration, or related fields." Someone has handwritten near the job posting "include physical therapy." The petitioner did not provide an explanation for stating a degree in physical therapy is acceptable for the rehabilitation manager position, but failing to state that such a degree was acceptable for the healthcare account executive.

statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added). Further, as discussed *supra*, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

Additionally, in response to the RFE, counsel claims that the petitioner hired ██████████ "in the same position of Healthcare Account Executive in November 2011." In support of this assertion, the petitioner and counsel submitted copies of Ms. ██████████ Doctor of Physical Therapy degree from ██████████ physical therapist license and registration from New York, and a Form W-2 for 2011 (indicating that she was compensated \$11,538 in 2011).²² Notably, the petitioner failed to provide the job duties and day-to-day responsibilities of the position that it claims is the same as the proffered position. The petitioner did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, it is unclear whether the duties and responsibilities of this individual were the same or related to the proffered position.²³

It must be noted that the petitioner stated in the Form I-129 petition that it has nine employees and that it was established in 2007 (approximately five years prior to the submission of the H-1B petition). Consequently, it cannot be determined how representative the petitioner's claim regarding *one individual over a five year period* is of the petitioner's normal recruiting and hiring practices. It must be noted that without further information, the submission of *the educational credentials of one individual* is not persuasive in establishing that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

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

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature

²² The petitioner states that Ms. ██████████ was hired in November 2011 and the Form W-2 indicates that Ms. ██████████ was compensated \$11,538 in 2011 (thus a period of approximately two months). It appears that Ms. ██████████ salary is significantly higher than the salary offered to the beneficiary. This suggests that Ms. ██████████ was employed in a more senior or different position.

²³ On appeal, counsel states that "[a]t the beginning of [the] business operations, the owner and physical therapist, ██████████ assumed all marketing and administrative responsibilities including account executive duties." The petitioner did not submit any documentation regarding the owner's academic credentials. Further, the owner's credentials are not probative evidence in establishing that the petitioner *normally requires* at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position in accordance with this criterion.

of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

As previously noted, the petitioner provided documents regarding its business operations, including photographs of its business; financial and tax documents; its lease agreement; copies of patient sign-in and invoices; health insurance documents; a brochure; an organizational chart; a newspaper advertisement for the business; and documents regarding the petitioner's health programs. The AAO acknowledges that the petitioner and its counsel may believe that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

Furthermore, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category of "First-Line Supervisors of Office and Administrative Support Workers." The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.

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

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

The director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, a

beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a baccalaureate or higher degree in a specific specialty or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

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* 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.