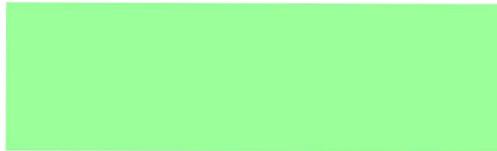




U.S. Citizenship
and Immigration
Services

(b)(6)



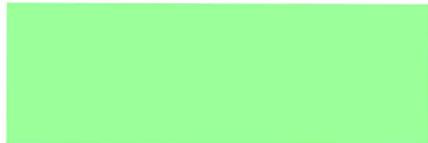
Date: **OCT 04 2013** Office: CALIFORNIA SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

for
Ron Rosenberg
Chief, Administrative Appeals Office

(b)(6)

DISCUSSION: The Director, California Service Center ("the director"), denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner describes itself as a "Vending Machine Operator." The petitioner indicates it was established in 2011, employs one individual and had a projected gross annual income of \$200,000 when the petition was filed. In order to employ the beneficiary in what it designates as a part-time accountant position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, determining the petitioner had not provided a credible offer of employment for specialty occupation work.

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 director's denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, counsel's brief, and additional documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition.¹ Accordingly, the appeal will be dismissed, and the petition will remain denied.

The issue to examine in this matter is whether the petitioner issued a credible offer of specialty occupation employment to the beneficiary for the requested validity period.

Facts and Procedural History

On the Form I-129 petition filed April 23, 2012, the petitioner indicated that it wished to employ the beneficiary as an accountant on a part-time basis beginning October 1, 2012 and ending September 26, 2015. The petitioner also provided a Labor Condition Application (LCA) certified on April 11, 2012, valid for a period beginning October 1, 2012 to September 30, 2015, for a Level I (entry-level), accountant SOC (ONET/OES) code 13-2011.

In its April 17, 2012 letter of support, the petitioner indicated that it was established in August 2011, owned two vending machines in the beginning, and within six months had recorded a significant growth in sales together with an increase in the number of its locations. The petitioner noted that in addition to operating the vending machine service it also provided service and repair to vending machines located on the island of Oahu. The petitioner projected its gross annual income for the 2012 year as \$200,000. The petitioner stated that in the proffered position of part-time accountant, the beneficiary will be responsible for the following duties:

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

- Prepare, analyze and reconcile the company's monthly and annual income statements and balance sheets, including bank, account receivables, account payables, assets, and accruals;
- Prepare and analyze financial statements and budgets via spreadsheets to anticipate potential short falls;
- Develop, implement, modify, and document recordkeeping and accounting systems, making use of current computer technology;
- Develop, maintain, and analyze budgets, preparing periodic reports that compare budgeted costs to actual costs[;]
- Post journal entries and process payroll; [and]
- Monitor cash flow and apply inventory control.

The petitioner stated that the minimum requirements for this position are a Bachelor's Degree in Accounting, Finance, or a related discipline. The petitioner provided excerpts from the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* and O*NET Online regarding the occupation of accountant. The petitioner further included three advertisements: (1) from an insurance company headquartered in Hawaii for an accountant that required a bachelor's degree in business administration – accounting, finance, or related degree; (2) from a rental car company for an accountant that required a bachelor's degree in accounting, economics, or finance; and (3) from "The Resort Group" for an accountant that required "college-level education."

Upon review of the initial record, the director requested further detail regarding the proposed position in an RFE. In response, the petitioner noted that the company had grown and that now it employed two people and projected its annual revenue will exceed \$200,000 by the 2012 year end. The petitioner asserted that to manage its business effectively it needed the services of a part-time accountant. The petitioner expanded on the duties of the proposed position adding that the beneficiary's specific duties will include:

- Develop and implement an accounting system:
 - Examine our current record keeping procedures, recommend the proper commercially available accounting software, create table of accounts and assign entries to each category. The reports generated by the system are essential for my ability to manage the business successfully.
 - Initial input into accounting system
 - Prepare payroll journal entries
 - Train administrative support staff if necessary
- Prepare, examine and analyze our financial records, budget and other documentation, prepare and file our corporate tax returns and advise the ownership of the overall financial stability of the company:
 - Prepare and submit annual 1099, W-2 filings
 - Prepare and file federal and state business tax returns
 - Represent the company at an audit if necessary

- Review for accuracy and completeness and categorize supporting documentation
 - Prepare payroll forecasts
 - Prepare quarterly profit and loss statements
 - Analyze, organize, and present financial data as requested by me for future expansions and investment
- Monitor the budget and recommend budget adjustments:
 - Compile and assess vendor and product specific data
 - Recommend expenditures and advise on equity and efficiency.

The petitioner indicated that the company is still small and as such he, the president, must juggle many duties including administrative, managerial, and bookkeeping. The president noted that his goal is to gradually delegate some of these duties and hire additional help. The petitioner indicated that it is looking to hire an administrative assistant and a technician but that it needs the services of a dedicated professional accountant to help sustain its growth.

The petitioner also provided its organizational chart showing it employed an individual in the position of president and an individual in the position of route driver. The organizational chart also depicted an additional four projected positions, including the proffered position. The petitioner further included its profit and loss statement for the time period between January and August 2012, as well as a copy of its Internal Revenue Service (IRS) Form 1120S, Federal Income Tax for an S Corporation, Excise Tax returns, payroll records, and contracts with clients. The petitioner also provided an October 3, 2012 letter authored by [REDACTED] President of [REDACTED]. Mr. [REDACTED] stated that his company had been in the vending service industry since 1961 and that a successful vending business required two things, one, good locations, and two, an accountant to track the monies.

Upon review, the director determined that the record is insufficient to establish that the proffered position requires the services of an accountant or that the proffered position included complex or advanced accounting duties. The director concluded that the petitioner had not provided a credible offer of employment for specialty occupation work.

On appeal, counsel for the petitioner asserts that the director failed to consider the documentation submitted in support of the petitioner's claim that it is growing. Counsel contends that the newly available IRS Form 1120S for 2012 confirms that the petitioner has grown exponentially. Counsel avers that the director failed to consider the petitioner's statement that the accountant will be required to prepare and submit annual 1099, W-2 filings, federal and state tax returns, reports that are currently prepared by an outside accounting service. Counsel claims that the petitioner's need for an accountant is justifiable and explainable. Counsel also notes that the director did not consider the letter submitted by [REDACTED] which explains the complexity of the vending machine business and the need for an in-house accountant. Counsel submits the petitioner's profit and loss statement for 2012 and a statement of income for 2011 and 2012, to demonstrate the petitioner's growth.

Analysis

The AAO reviewed the record in its entirety and concurs with the director's ultimate determination. Preliminarily, we observe that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). As the petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought, the eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed and not based on what were merely speculative facts not then in existence. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Accordingly, the director properly considered the evidence establishing the nature of the petitioner's business and the proffered position at the time the petition was filed in April 2012.

For H-1B approval, the petitioner must demonstrate that a legitimate need for an H-1B employee exists when the petition is filed and must substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. That is to say, it is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or the equivalent, to perform duties at a level that require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

As previously noted, when the petition was filed, the petitioner indicated that it was established in 2011, employed one individual and had a *projected* gross annual income of \$200,000. With the petition, the petitioner provided a copy of its 2011 Form 1120S, U.S. Income Tax Return for an S Corporation, which indicates that the petitioner's 2011 gross receipts totaled \$24,273, its cost of goods sold was \$12,354, its total income was \$11,919, and its ordinary business income was -\$8,275. Notably, the tax return does not show that any salaries and wages were paid.

The AAO observes that it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's business is relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in or its equivalent in a specific specialty. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-specialty occupation duties.

Upon review of the record, the AAO finds that the petitioner provided insufficient probative documentation to substantiate its claims regarding its business activities and the actual work that the beneficiary will perform to establish eligibility for this benefit. That is, at the time the

petition was filed, there was a lack of substantive, documentary evidence that the petitioner was a viable entity (e.g., an enterprise engaged in regular, systematic and continuous operations which produces services or goods) and that it was able to substantiate its claim that it had H-1B caliber work for the beneficiary for the period of employment requested in the petition.²

In this matter, the AAO finds that, as reflected in the description of the position as quoted above, the petitioner describes the proposed duties in terms of generalized and generic functions that fail to convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. Such generalized information does not in itself establish a necessary correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. The petitioner's assertions with regard to the position's educational requirement are conclusory and unpersuasive, as they are not credibly supported by the job descriptions or substantive evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The petitioner has not established that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the demands of the proffered position.

Without further information, the petitioner has failed to credibly convey how it would sustain an employee performing specialty occupation duties for the H-1B petition to be granted for the entire period requested. Again, without documentary evidence the petitioner has not met its burden of proof. *Id.* United States Citizenship and Immigration Services' (USCIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(1).

For example, the agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly

² The regulation at 8 C.F.R. § 214.2(h)(11)(ii) addresses the grounds for automatic revocation of the approval of a petition and states, in pertinent part, that the "approval of any petition is immediately and automatically revoked if the petitioner goes out of business". It logically flows that a petitioner must be in business for the director to grant the petition. If the petitioner were not in business and the director granted the petition, it would require the absurd result of the approved petition immediately and automatically being revoked. See 8 C.F.R. § 214.2(h)(11)(ii). As such, it is reasonable to request evidence from the petitioner to establish that it is a bona fide business prior to the adjudication of the H-1B petition.

classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998).

Although the petitioner requested that the beneficiary be granted H-1B classification for a three-year period, the evidence does not establish that the petitioner would be able to sustain an employee performing the duties of an accountant at the specialty occupation level required for the H-1B petition to be granted for any or all of the entire period requested. The petitioner failed to establish that the petition was filed on the basis of employment for the beneficiary as an accountant (as designated on the LCA) that, at the time of the petition's filing, was definite and non-speculative for the entire period of employment specified in the Form I-129. As will be discussed in detail below and even considering that the petitioner stated that the beneficiary would be employed on a part-time basis, the petitioner has not established that the beneficiary's overall day-to-day duties, for the entire period requested, would require at least a baccalaureate degree in a specific specialty or the equivalent, as required for classification as a specialty occupation.

To reiterate, a position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the filing, definite, non-speculative specialty occupation work would exist for the beneficiary for the period of employment specified in the Form I-129. The record of proceeding does not contain such evidence. As stated above, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp., supra.*

For these reasons, the AAO determines that the petitioner has not provided a credible offer of employment for specialty occupation work. Accordingly, we affirm the director's determination on this issue.

Moreover, 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. In that regard, the evidence fails to establish that the position as described constitutes a specialty occupation. It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis of the proffered position into the discussion below.

To meet its burden of proof, that the proffered position is a specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the

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

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

The petitioner seems to assert that a position labeled "accountant" is categorically a specialty occupation. However, 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 this matter, the petitioner has not provided evidence that the proffered position as described constitutes a specialty occupation. We note that the director is incorrect, if by his reference that a "bona fide position of an Accountant" requires a baccalaureate degree, he meant to convey that all accountants by virtue of their occupational classification qualify as specialty occupations. The AAO's first point with regard to its analysis of the proffered position is that accountants do not comprise an occupational group that require, as a category, at least a bachelor's degree in a specific specialty, or the equivalent.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³ As will now be discussed, the *Handbook* indicates that accountants do not constitute an occupational group that requires, as a category, a specialty-occupation level of education, that is, at least a U.S. bachelor's degree in a specific specialty, or its equivalent.

The "Accountants and Auditors" chapter in the 2012-2013 edition of the *Handbook* indicates that not every accountant position requires at least a bachelor's degree level of knowledge in accounting or a related specialty. U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Accountants and Auditors," <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-4> (last visited Sept. 30, 2013). The introduction to "How to Become an Accountant or Auditor" section of the *Handbook* states that "[m]ost accountants and auditors need at least a bachelor's degree in accounting, or a related field." *Id.* This, however, does not support the view that any accountant job qualifies as a specialty occupation. "Most" is not indicative that a particular position within the wide spectrum of accountant jobs normally requires at least a bachelor's degree, or its equivalent, in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)), or that a particular accountant position is so specialized and complex as to require knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)).⁴

Further, the "Education" subsection of the aforementioned section of the *Handbook* includes this statement:

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

Id. In this context, the fact that a person may be employed in a position designated as that of an accountant and may apply accounting principles in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. Thus, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers here would necessitate accounting services at a level requiring the theoretical and

³ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁴ For instance, the first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of accountant positions require at least a bachelor's degree in accounting or a related field, it could be said that "most" accountant positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist.

practical application of at least a bachelor's degree level of knowledge in accounting. This, the petitioner has failed to do.

The AAO reiterates that, as reflected in the job descriptions quoted above in this decision, the petitioner described the duties of the proffered position in terms of generalized and generic functions, which, the AAO finds, do not convey either the substantive nature of either the specific matters upon which the beneficiary would focus or the practical and theoretical level of accounting knowledge that the beneficiary would have to apply to those matters. The petitioner initially indicated the beneficiary would: prepare, analyze and reconcile the company's monthly and annual accounting records, prepare and analyze financial statements and budgets, develop recordkeeping and accounting systems, post journal entries and process payroll and monitor cash flow and apply inventory control. These duties do not include the requisite detail to establish that the duties require accounting knowledge beyond that of a junior accountant or bookkeeper.

We observe that in the petitioner's response to the director's RFE, the petitioner reiterated that the beneficiary will develop and implement an accounting system. The petitioner, however, noted that beneficiary will initially input information into the accounting system, prepare payroll journal entries and will at some point in the future train administrative support staff if necessary. We note that monitoring and verifying the accuracy of documentation, as well as preparation of financial statements and filing tax returns, are duties that may be performed by a bookkeeper or an accounting clerk.⁵ As the petitioner does not employ a bookkeeper or an accounting clerk and states that the president was previously responsible for these duties, it appears more likely than not that the beneficiary is being hired to perform, at least in substantive part, the company's general financial record keeping.

The petitioner, in response to the RFE, expanded upon its description of duties by noting that the beneficiary will be responsible for filing corporate tax returns, annual 1099 and W-2 filings, profit and loss statements, payroll forecasts, and will review for accuracy and completeness the supporting documentation. However, the petitioner does not provide specific information or examples demonstrating what advanced theories are necessary to perform these routine tasks. We observe as well that organizing and presenting financial data and compiling and assessing vendor and product specific data, as well as recommending expenditures and advising on equity and efficiency are general duties that are insufficiently described to conclude that the duties incorporate tasks that require an advanced knowledge of accounting. Upon review of the general

⁵ The *Handbook* identifies the typical duties of a bookkeeping, accounting, and auditing clerk as: using bookkeeping software; posting financial transactions; receiving and recording cash, checks, and vouchers; producing reports and income statements; and checking figures, reports and postings for accuracy and reconciling discrepancies. The *Handbook* notes that these workers have a wide range of tasks and some maintain an entire organization's books. The *Handbook* reports that most bookkeeping, accounting and auditing clerks need a high school diploma although some employers prefer candidates who have some postsecondary education, particularly coursework in accounting. U.S. Dept of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Bookkeeping, Accounting, and Auditing Clerks," <http://www.bls.gov/ooh/office-and-administrative-support/bookkeeping-accounting-and-auditing-clerks.htm#tab-4> (last visited Sept. 30, 2013).

information in the record regarding the beneficiary's duties in the proffered position and the petitioner's explanation of its business operations, the record is insufficient to establish the educational attainment actually required to perform the proffered position.

Turning to the criteria set out at 8 C.F.R. § 214.2(h)(4)(iii)(A), the AAO first reviews the record of proceeding in relation to 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). To satisfy this criterion, the evidence must establish that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition. As related in this decision's earlier discussion of the proposed duties in the context of the *Handbook's* information about accountants, the record of proceeding fails to establish that any accounting duties to be performed by the beneficiary would require the practical and theoretical application of highly specialized accounting knowledge attained by at least a bachelor's degree in accounting, or the equivalent, as required by the Act and its implementing regulations regarding a position's qualification as an H-1B specialty occupation.

Our review has found that the occupations of a bookkeeper/accounting clerk or an accountant who is responsible for the basic and general duties as described in this matter are not occupations that normally impose a normal minimum entry requirement of a bachelor's degree in a specific field of study. For the reasons discussed above, the AAO finds that the petitioner has not satisfied the requirements of the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

As discussed *supra*, the petitioner has not established that its proposed position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Nor has the petitioner submitted evidence that the industry's professional associations have made a degree in a specific specialty a minimum requirement for entry.

The three job vacancy announcements submitted also do not satisfy the first alternative prong described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The petitioner has not submitted any evidence to establish that these advertisers conduct business in the petitioner's industry and that they are also similar to the petitioner in size, scope, scale of operations, business efforts, and expenditures. Nor does the petitioner submit any evidence of how representative these advertisements are of the advertisers' usual recruiting and hiring practices. Simply going on record without supporting

documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.⁶

The October 3, 2012 letter authored by the president of [REDACTED] also fails to establish that organizations similar to the petitioner only hire individuals with baccalaureate degrees in a specific discipline to perform duties in a position with parallel duties. First, the letter-writer does not indicate that it employs an accountant and second, if [REDACTED] employs an accountant, the letter-writer does not indicate that its accountant must have a baccalaureate degree in a specific field of study directly related to the accounting position. The letter-writer, although emphasizing the necessity of scrutiny of bank statements and cash and tracking product movement, does not identify why an accountant with a baccalaureate degree in a specific accounting discipline is required to perform these highly important but routine tasks.

Based upon a complete review of the record, the petitioner has not established that at least a bachelor's degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations 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 petitioner also has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The record does not demonstrate any complexity or unique nature of the proffered position that distinguishes it from similar but non-specialty degreed or even non-degreed employment under the second prong of the criterion. A review of the record indicates that the petitioner has failed to credibly demonstrate what duties the beneficiary will be responsible for or perform on a day-to-day basis. Nevertheless, even assuming the beneficiary will perform the duties of an accountant, these duties do not entail such complexity or uniqueness as to constitute a position

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

As such, even if the job announcements supported the finding that the position of part-time accountant for a 1-employee vending machine operator required a bachelor's or higher degree in a specific specialty or its equivalent, which they do not, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

that it can be performed only by a person with at least a bachelor's degree in a specific specialty or its equivalent. In that regard and as will be discussed in more detail below, the petitioner has provided an LCA that indicates the proffered position is a low-level, entry position relative to others within the occupation. Based upon the wage-level set out in the LCA, the beneficiary is only required to have a basic understanding of the occupation and is only expected to perform routine tasks that require limited, if any, exercise of independent judgment. Submitting an LCA for a Level 1 (entry-level) prevailing wage is at odds with the petitioner's claim that the proffered position is complex or unique.

Further, the petitioner has not identified any specific duties that elevate the position to one that would require the education obtained through at least a four-year university program in a specific discipline or its equivalent. Thus, the petitioner has not established that a baccalaureate or higher degree in a specific specialty or its equivalent is common to the industry in parallel positions among similar organizations or, in the alternative, that the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific discipline or its equivalent. The petitioner has therefore failed to establish the alternative prongs of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the petitioner does not claim and the record of proceeding does not establish that the petitioner has 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 the equivalent. Rather, the petitioner initially indicated that it is a new company with only one employee.

Further, while a petitioner may believe or otherwise assert that a proffered position requires a 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 employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner, supra*. In other words, if a petitioner's degree requirement is only symbolic and 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"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Here, the AAO again incorporates by reference and reiterates its earlier discussions about the generalized nature of the petitioner's descriptions of the proposed duties. In addition, it is not credible that the position is one with specialized and complex duties as the petitioner identified the position on the LCA as an entry-level position. As will be discussed in detail below, a position with specialized and complex duties would likely be classified at a higher-level,

requiring a significantly higher prevailing wage, on the LCA. The petitioner has failed to establish that the duties of the proffered position are sufficiently specialized and complex that their performance would require knowledge of accounting at a level usually associated with at least a bachelor's degree in accounting or a related specialty, or the equivalent. Insufficient evidence was provided to demonstrate that the proffered position reflects a higher degree of knowledge and skill than other types of employees, including those bearing the title "accountant," who engage in some accounting duties and employ some accounting principles, but not at a level of an accountant applying theoretical and practical knowledge of accounting that is usually associated with at least a bachelor's degree in accounting or a closely related specialty, or its equivalent.

The AAO, therefore, concludes that the proffered position 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 the proffered position qualifies as a specialty occupation under any one of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Beyond the decision of the director, the record of proceeding contains a discrepancy between what the petitioner claims the level of responsibility inherent in the proffered position is and the contrary level of responsibility conveyed by the wage level indicated on the LCA submitted in support of petition.

Wage levels should be determined only after selecting the most relevant Occupation Information Network (O*NET) occupational 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. It is important to note that prevailing wage determinations start with an entry level wage (i.e. Level I) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁷ The 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

⁷ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

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

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

In the instant matter, the petitioner claims that the nature of the proffered position involves specialized and complex knowledge. However, the AAO must question the level of complexity, independent judgment and understanding required for the proffered position as the LCA is certified for a Level I entry-level position. The characterization of the position and the claimed duties and responsibilities as described by the petitioner and counsel 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 she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

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. 582, 591-92 (BIA 1988). 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 [DOL] of a labor condition application in an occupational classification does not constitute a determination by that

agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether 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 entry-level position. This conflict undermines the overall credibility of the petition. As the submitted LCA does not correspond to the duties ascribed to the proffered position, even if it were determined that the petitioner overcame the director's determination that the petitioner had failed to provide a credible offer of employment for specialty occupation work, the petition could still not be approved for this reason.

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

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.