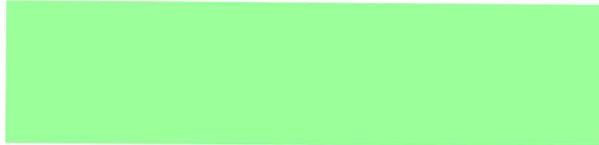




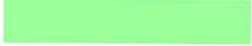
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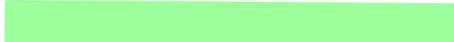


DATE: OCT 24 2013

OFFICE: VERMONT SERVICE CENTER

FILE: 

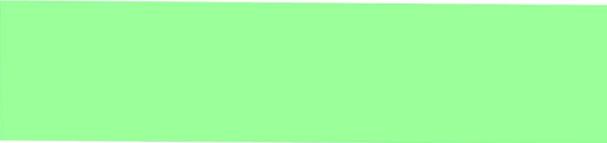
IN RE:

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 THE 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 and supporting documents, the petitioner describes itself as a retail company established in 2007. In order to employ the beneficiary in what it designates as an 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, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was 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, and 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 July 10, 2012, the petitioner indicates that it is seeking the beneficiary's services as an accountant on a full-time basis at the rate of pay of \$44,595 per year.<sup>1</sup> In the July 10, 2012 letter of support, the petitioner states the following:

In this position, [the beneficiary's] specific duties will include: (i) compiling and analyzing financial information and preparing financial reports by applying principles of generally accepted accounting standards; (ii) preparing entries and reconciling general ledger accounts, documenting transactions, and summarizing current and projected financial position; (iii) maintaining payable and receivable records, detailing assets, liabilities, capital, and preparing detailed balance sheet, profit & loss, and cash flow statement; (iv) auditing orders, contracts, individual transactions and preparing depreciation schedules to apply to capital assets; (v) preparing compliance reports for taxing authorities; and (vi) analyzing operating statements, review cost control programs, and make strategy recommendations to management.

The AAO notes that the petitioner has described the duties of the beneficiary's employment in the same general terms as those used from various sources on the Internet, including excerpts from the *Dictionary of Occupational Titles (DOT)*. That is, the AAO notes that the wording of the above duties as provided by the petitioner for the proffered position is recited almost verbatim from other sources. This type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but it fails to adequately convey the

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<sup>1</sup> It must be noted for the record that on the Form I-129 (page 5) and Labor Condition Application (LCA) the petitioner indicates that the beneficiary will be compensated at the rate of \$44,595 per year. However, on the Form I-129 (page 17), the petitioner indicates that the beneficiary's rate of pay is \$43,451 per year, which is below the prevailing wage. No explanation for the variance was provided. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence.

substantive work that the beneficiary will perform within the petitioner's business operations and, thus, cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Moreover, the AAO notes that the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

In the petitioner's letter of support, the petitioner continues by stating that it "require[s] a skilled professional with a Bachelor's degree in Business Administration, Accounting, Finance, or a related field." The petitioner claims that this represents its minimum job requirement for the proffered position.

With the Form I-129 petition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcripts. The petitioner states that "[o]n the basis of the credibility of the [the university], the number of years of course work, the nature of the course work, and related areas, it is apparent that [the beneficiary] has attained the equivalent of a Bachelor's degree in Business Administration." The petitioner also submitted a letter from [redacted] of the [redacted]. In the letter, Mr. [redacted] states that the beneficiary's foreign education and work experience amount to "the equivalent of a Bachelor's Degree in Accounting from an accredited institution of higher education in the United States."

The petitioner also 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 "Accountants and Auditors" - SOC (ONET/OES Code) 13-2011, at a Level I (entry level) wage.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought and issued an RFE on October 18, 2012. The petitioner was asked to submit probative evidence to establish (1) that the beneficiary maintained a valid nonimmigrant status during the previous H-1B approval period; and (2) that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted. The AAO notes that the director specifically requested the petitioner to provide a detailed description of the proffered position, including the approximate percentages of time for each duty the beneficiary will perform. In addition, the director requested evidence to establish how the beneficiary would be relieved from performing non-qualifying duties (as the petitioner employs six employees).

On November 23, 2012, counsel responded to the RFE by submitting a brief and additional evidence.<sup>2</sup> The AAO observes that in the brief, counsel claims that the proffered position requires "a minimum of a Bachelor's Degree in Business Administration, Accounting, or the equivalent." However, further in the letter, counsel states that the proffered position requires a "Bachelor's Degree in Business Administration, Accounting, Finance or a related area studies." No explanation for the variance was provided. In addition, in the brief, counsel provided a revised description of the duties of the proffered position, along with the approximate percentage of time that the beneficiary will spend performing each duty.<sup>3</sup>

Further, counsel submitted, in part, (1) a printout from the Foreign Labor Certification (FLC) Data Center, Online Wage Library (OWL) for the occupational category "Accountants and Auditors"; (2) an excerpt entitled "Accountants and Auditors" from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (hereinafter the *Handbook*), 2012-13 Edition; (3) the petitioner's bank statements for August 2012 to October 2012;<sup>4</sup> (4) job vacancy announcements;<sup>5</sup> (5) the petitioner's tax documents, including its income tax return for 2011 and quarterly reports for 2012 (which are not signed by the petitioner); (6) a list of the petitioner's employees, along with a copy of the president's foreign diploma (bachelor in engineering); (7) copies of the petitioner's job postings;

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<sup>2</sup> It must be noted for the record that in the brief, counsel mistakenly and repeatedly referenced the beneficiary in the masculine pronoun case. The record provides no explanation for this inconsistency. Thus, the AAO must question the accuracy of the letter and whether the information provided is correctly attributed to this particular position and beneficiary.

<sup>3</sup> It is noted that the revised job description provided by counsel is not probative evidence. The description was submitted by counsel, not the petitioner, and counsel's brief was not endorsed by the petitioner. The record of proceeding does not indicate the source of the expanded duties and responsibilities (and the percentages of time allocated to each duty) that counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Moreover, the expanded description provided by counsel describes duties common to the occupational category rather than the specific duties of this particular position (i.e., "[c]ommon duties for accountants..."; "[t]hey monitor..."; "[t]heir duties..."; "[a]ccountants are responsible . . ."; "[t]he majority of an accountant's day is spent . . ."; "[t]hese managers and supervisors oversee . . ."; "[t]hey must oversee all aspects of the accounting department . . .").

<sup>4</sup> Notably, the bank statement for 08/01/2012 to 09/03/2012 indicates that the petitioner's "current balance" was \$6,510.81 for the first account and \$111.48 for the second account. The bank statement for 09/04/2012 to 09/30/2012 indicates the "current balance" was \$12,297.00 for the first account and \$98.98 for the second account.

<sup>5</sup> The AAO observes that the petitioner provided poor photocopies that are partially or completely illegible. The AAO will not attempt to decipher or "guess" the meaning or the probative value of information provided in poor, illegible photocopies.

(8) copies of the beneficiary's pay statements from July 2012 to October 2012; and (9) a copy of the beneficiary's Form W-2, Wage and Tax Statement, for 2010 and 2011.

The director reviewed the information provided by counsel to determine whether the petitioner had established eligibility for the benefit sought. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on December 5, 2012. Counsel submitted an appeal of the denial of the H-1B petition. With the brief, counsel submitted copies of financial documents (including the previously submitted 2011 tax return and 2012 quarterly wage reports, along with bank statements).<sup>6</sup>

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. The AAO will first make some preliminary 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.

To determine whether this accountant position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline. The AAO finds that the petitioner has not done so.

Upon review of the job duties of the proffered position, the AAO finds that 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. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will be responsible for "compiling and analyzing financial information and preparing financial reports." However, the statement fails to provide any insight into the beneficiary's actual duties, nor does it include any information regarding the specific tasks that the beneficiary will perform. Additionally, the petitioner claims that the beneficiary will be responsible for "preparing entries and reconciling general ledger accounts, documenting transactions, and summarizing current and projected financial position." Notably, the petitioner fails to demonstrate how the performance of these duties, as described in the record, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

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<sup>6</sup> It must be noted for the record that counsel mistakenly and repeatedly referenced the beneficiary in the brief in the masculine pronoun case. Again, the AAO observes that the record provides no explanation for this inconsistency. Thus, the AAO must question the accuracy of the brief and whether the information provided is correctly attributed to this particular position and beneficiary.

The petitioner further claims that the beneficiary will be responsible for "preparing compliance reports for taxing authorities" and "analyzing operating statements, review cost control programs, and make strategy recommendations to management." The petitioner's statements fail to convey any pertinent details as to the actual work involved in these tasks. The petitioner does not explain the beneficiary's specific role and how her work will be conducted and/or applied within the scope of the petitioner's business operations. Furthermore, the petitioner fails to convey how a baccalaureate level of education (or higher) in a specific specialty, or its equivalent, would be required to perform these tasks. Thus, the overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations.

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 AAO also observes, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested, so as to persuasively support the claim 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 duties and responsibilities of the proffered position.

As such, the description of the job duties provided by the petitioner conveys only generalized functions of the occupational category at a generic level. The petitioner failed to convey either the substantive nature of the work that the beneficiary would actually perform in the context of the petitioner's business operations, any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform the duties, or the educational level of any such knowledge that may be necessary. The responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations.

Although the beneficiary has served in the proffered position for over two years, the petitioner did not provide sufficient documentation to establish the job duties and responsibilities of the proffered position. The petitioner did not submit probative evidence to substantiate the beneficiary's work product, nor did the petitioner submit financial documentation regarding the company's business operations aside from the above referenced unsigned tax return, unsigned quarterly wage reports and bank statements. Notably, the 2011 tax return submitted by the petitioner indicates that it was prepared by [REDACTED] a self-employed Certified Public Accountant, rather than by the beneficiary. The record of proceeding lacks documentation regarding the petitioner's business activities and the actual work that the beneficiary will perform to substantiate the claim that the petitioner has H-1B caliber work for the beneficiary for the period of employment requested in the petition. 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. 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)).

That is, for H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. 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 its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

In the instant case, the petitioner claims that the beneficiary has served in the proffered position since 2010, however, the petitioner failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or substantive evidence regarding the actual work that the beneficiary performs. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described fail to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner's assertion with regard to the educational requirement is conclusory and unpersuasive, as it is not supported by the job description or substantive evidence.

Furthermore, the AAO notes 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 a specific specialty, or its equivalent. 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-qualifying duties. In the instant case, the director specifically noted this issue; however, the petitioner and counsel elected not to address or provide probative documentation as to how the beneficiary will be relieved from performing non-qualifying duties.

In addition, upon review of the record of proceeding, the AAO notes that the petitioner and counsel have provided inconsistent information regarding the minimum requirements for the proffered position. In the July 10, 2012 letter of support, the petitioner stated that the proffered position requires "a Bachelor's degree in Business Administration, Accounting, Finance, or a related field." However, in response to the director's RFE, counsel stated that the position requires "a minimum of

a Bachelor's Degree in Business Administration, Accounting, or the equivalent." In addition, the petitioner provided a letter from [REDACTED] of the [REDACTED] who stated that the position requires "a minimum of a Bachelor's Degree in Accounting or a related area, or the equivalent." No explanation for the variances was provided.<sup>7</sup>

Moreover, the petitioner and counsel state that a bachelor's degree in business administration is acceptable for the proffered position. 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. USCIS has consistently stated that, 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.<sup>8</sup> Again, the petitioner and counsel in this matter claim that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is 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.

Furthermore, based upon a review of the record of proceeding, the AAO finds that there are additional discrepancies and inconsistencies with regard to the proffered position that preclude the approval of the petition. For instance, there are discrepancies between what the petitioner claims about the occupational classification and level of responsibility inherent in the proffered position set against the contrary occupational classification and level of responsibility conveyed by the wage level indicated on the LCA submitted in support of the petition.

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<sup>7</sup> The record of proceeding contains inconsistent information as to the academic 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. at 591-92 (BIA 1988).

<sup>8</sup> 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.

As previously discussed, the petitioner submitted an LCA in support of the petition that designated the proffered position to the corresponding occupational category of "Accountants and Auditors" - SOC (ONET/OES) code 13-2011. The wage level for the proffered position in the LCA corresponds to a Level I (entry) position. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.<sup>9</sup> The LCA was certified on August 14, 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.<sup>10</sup>

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) position 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.<sup>11</sup> 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.

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<sup>9</sup> 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 Office of 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.flcdatcenter.com/>.

<sup>10</sup> For additional information regarding prevailing wage determinations, 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>11</sup> 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 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

The AAO acknowledges that the petitioner and its counsel may believe that the duties of the proffered position are complex, unique and/or specialized. For instance, the AAO notes that in the July 10, 2012 letter of support, the petitioner references the "complex and demanding requirements of the position" and claims that "only a person of exceptional ability and skills in business administration is capable of qualifying [as] an Accountant for [the petitioner]."

Moreover, in the November 20, 2012 letter, submitted in response to the director's RFE, counsel claims that the specific responsibilities and knowledge of the position is "specialized and complex." Further, counsel states that the beneficiary "handles all the financial dealings of the Petitioner" and "has to utilize [a] high scale [of] knowledge in the field of budgeting, forecasting, taxation, asset allocation, etc." In addition, counsel references "the complexity of the voluminous transactions taking place [by the petitioner]." Additionally, counsel claims that the beneficiary's "responsibilities primarily include managing and directing the financial activities, rather than performing day-to-day bookkeeping function." Counsel also states, "In addition to supervising individuals who perform routine bookkeeping services, [the beneficiary] will spend [the] bulk of his time in establishing operational and financial security procedures and advising upper management with cost saving and investment strategies."

On appeal, counsel asserts that the beneficiary's "job will coordinate activities involved with management of the entire financial operation." Counsel references the "challenging tasks of the position." According to counsel, the petitioner seeks new opportunities and it "fears that it may not be able to meet the aggressive goals without assistance of an Accountant." According to counsel, the beneficiary's "job will coordinate activities involved with management of the entire financial operation." Counsel claims that the proffered position involves specialized and complex tasks and that the beneficiary will be "setting up financial goals for the petitioner, planning strategies to reach these goals" as well as "advising the rest of on [sic] mergers and acquisitions" and "establishing lending criteria." Counsel asserts that the beneficiary "handles all the financial dealings of the

Petitioner." Counsel continues by stating that the "[b]eneficiary will decide on how much of the company's profits should be returned into investment and also how much should be reinvested into the organization." Additionally, counsel states that the beneficiary "has to utilize high scale knowledge in the field of budgeting, forecasting, taxation, asset allocation, etc." Counsel reports that the position involves "complex responsibilities" and "challenging tasks." In the appeal, counsel reiterates that the beneficiary will "supervise individuals who perform routine bookkeeping services."<sup>12</sup> Counsel states that it is "vital for the company to employ a properly-trained individual to perform complex analysis of market trends, consumer preferences, competitor strengths and weaknesses, and economic conditions" and that the petitioner is "largely dependent on the ability and expertise of an Accountant . . . as the specialized duties of this individual directly and indirectly affect the company's operations, revenue and profits, and ultimately the overall success of the company."

The AAO observes that the petitioner and counsel indicate that the petitioner will be relying heavily on the beneficiary to make critical decisions regarding the petitioner's business. Such reliance on the beneficiary's work appears to surpass the expectations of a Level I position, as described above, in which the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and has limited exercise of judgment. Here, rather than the beneficiary's work being "monitored and reviewed for accuracy," counsel indicates that the beneficiary will be supervising others and claims that the petitioner is relying on the beneficiary services to ensure the growth and success of the petitioner's business.

Thus, 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 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. As noted above, a job offer for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

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

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<sup>12</sup> The Form I-129 indicates that the petitioner's business operations consist of six employees. No specific information was provided as to the identity or positions of the "individuals who perform routine bookkeeping services" that the beneficiary will purportedly supervise.

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 AAO notes that the prevailing wage of \$44,595 per year on the LCA corresponds to a Level I for the occupational category of "Accountants and Auditors" for [REDACTED] Texas).<sup>13</sup> The petitioner stated in the Form I-129 petition and LCA that the offered salary for the proffered position was \$44,595 per year. Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$59,446 per year for a Level II position, \$74,298 per year for a Level III position, and \$89,149 per year 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. Thus, even if it were determined that the petitioner overcame the director's ground for denying the petition (which it has not), for this reason also the H-1B petition cannot be approved. It is considered an independent and alternative basis for denial.

The AAO 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. 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 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.

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<sup>13</sup> For additional information regarding the prevailing wage for accountants in Fort Bend County, see the All Industries Database for 7/2012 - 6/2013 for Accountants and Auditors at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=13-2011&area=26420&year=13&source=1> (last visited September 25, 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 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 knowledge required for the proffered position, along with the petitioner's claimed requirements, 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. 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 reason for the director's denial, the petition could still not be approved for this reason.

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. 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 efficiency's sake, the AAO hereby incorporates the above discussion and analysis into the record of proceeding regarding the beneficiary's proposed employment.

In the instant case, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the

focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation the AAO will now discuss in detail the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 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.<sup>14</sup> As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Accountants and Auditors."

The AAO reviewed the chapter of the *Handbook* entitled "Accountants and Auditors," including the sections regarding the typical duties and requirements for this occupational category.<sup>15</sup> However, the *Handbook* does not indicate that "Accountants and Auditors" comprise an occupational group that requires at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation.

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<sup>14</sup> 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.

<sup>15</sup> For additional information regarding the occupational category "Accountants and Auditors," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Accountants and Auditors, on the Internet at <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-1> (last visited September 25, 2013).

The subchapter of the *Handbook* entitled "How to Become an Accountant or Auditor" states, in part, the following about this occupation:

Most accountants and auditors need at least a bachelor's degree in accounting or a related field. Certification within a specific field of accounting improves job prospects. For example, many accountants become Certified Public Accountants (CPAs).

**Education**

Most accountant and auditor positions require at least a bachelor's degree in accounting or a related field. Some employers prefer to hire applicants who have a master's degree, either in accounting or in business administration with a concentration in accounting.

A few universities and colleges offer specialized programs, such as a bachelor's degree in internal auditing. 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.

Work experience is important for getting a job, and most states require experience before an accountant can apply for a CPA license. Many colleges help students gain practical experience through summer or part-time internships with public accounting or business firms.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Accountants and Auditors, on the Internet at <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-4> (last visited September 25, 2013).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the wage level of the proffered position as a Level I position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. DOL guidance indicates that a job offer for a research fellow, a worker in training, or an internship is an indicator that a Level I wage should be considered.

The *Handbook* reports that certification may be advantageous or even required for some accountant positions. However, the AAO notes that there is no indication that the petitioner requires the beneficiary to have obtained the designation CPA, Certified Management Accountant (CMA) or any other professional designation to serve in the proffered position.

The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Rather, the occupation accommodates other paths for entry, including less than a bachelor's degree in a specific specialty. The *Handbook* reports that most accountants and auditors need at least a bachelor's degree in accounting or a related field. However, this statement does not support the view that any accountant job, within the wide spectrum of accountant positions, qualifies as a specialty occupation as "most" is not indicative that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.<sup>16</sup> More specifically, "most" is not indicative that a position normally requires at least a bachelor's degree in a specific specialty, or its equivalent (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)), or that a 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)).

The *Handbook's* narrative states that some graduates from junior colleges or business or correspondence schools obtain junior accounting positions and advance to accountant positions by showing their accounting skills on the job. Accordingly, individuals who have less than a bachelor's degree in a specific specialty, or its equivalent, can obtain junior accounting positions and advance to accountant positions. Furthermore, the *Handbook* reports that bookkeepers and accounting clerks meeting education and experience requirements set by employer can also advance to accountant positions by demonstrating their accounting skills. The *Handbook* does not indicate that this education and experience must be the equivalent to at least a bachelor's degree in a specific specialty. Therefore, even if the proffered position were determined to be an accountant position, the *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

The AAO also reviewed the sections of the *Handbook* relating to "Bookkeeping, Accounting, and Auditing Clerks," and finds that the *Handbook* does not indicate that bookkeeping, accounting, and auditing clerks comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree, in a specific specialty, or the equivalent. The *Handbook* provides the following information in the subsection entitled "How to Become a Bookkeeping, Accounting or Auditing Clerk" for this occupational category:

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<sup>16</sup> 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 the positions need at least a bachelor's degree in accounting, it could be said that "most" of the positions need 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. (The AAO notes that the proffered position has been designated by the petitioner in the LCA as a low, entry-level position relative to others within the occupation.) Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

Most bookkeeping, accounting, and auditing clerks need a high school diploma, and they usually learn some of their skills on the job. They must have basic math and computer skills, including knowledge of spreadsheets and bookkeeping software.

### **Education**

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

### **Training**

Bookkeeping, accounting, and auditing clerks usually get on-the-job training. Under the guidance of a supervisor or another experienced employee, new clerks learn how to do their tasks, including double-entry bookkeeping. (Double-entry bookkeeping means that each transaction is entered twice, once as a debit (cost) and once as a credit (income) to ensure that all accounts are balanced.)

Some formal classroom training also may be necessary, such as training in specialized computer software. This on-the-job training typically takes around 6 months.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 Edition*, Bookkeeping, Accounting, or Audit Clerks, on the Internet at <http://www.bls.gov/ooh/Office-and-Administrative-Support/Bookkeeping-accounting-and-auditing-clerks.htm#tab-4> (last visited September 25, 2013).

The AAO notes that the *Handbook* does not report that, as an occupational group, "Bookkeeping, Accounting or Auditing Clerks" normally require at least a bachelor's degree in a specific specialty for entry. The *Handbook* explains that most bookkeeping, accounting, and auditing clerks need a high school diploma. The *Handbook* continues by stating that some employers prefer candidates who have some postsecondary education, particularly coursework in accounting (and that in 2009, about 25 percent of these workers had an associate's or higher degree). The *Handbook* further states that workers usually receive on-the-job training. The *Handbook* does not indicate that at least a baccalaureate degree in a specific specialty (or its equivalent), is normally the minimum requirement for entry into the occupation.

In response to the RFE, counsel submitted a copy of the FLC Data Center, OWL printout for the occupational category "Accountants and Auditors." The AAO reviewed the printout in its entirety. However, the AAO finds that it is insufficient to establish that the position qualifies as a specialty occupation for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. A designation of Job Zone 4 -- Education and Training Code: 5 indicates that a position requires considerable preparation. It does not, however, demonstrate that a bachelor's degree in any specific specialty is required, and does not, therefore, demonstrate that a position so designated qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). More specifically, the OWL statement is a condensed version of

what the O\*NET actually states about its Job Zone 4 designation. See the O\*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones> (explaining that Job Zone 4 signifies only that *most* but not all of the occupations within it require a bachelor's degree). Further, the Help Center's discussion confirms that Job Zone 4 does not indicate any requirements for particular majors or academic concentrations. *Id.* Therefore, despite counsel's assertions to the contrary, the OWL and O\*NET information is not probative of the proffered position qualifying as a specialty occupation.

The AAO will now discuss the letter from [REDACTED] which was submitted with the initial petition. The letter is dated March 16, 2010 (approximately two years prior to the submission of the H-1B petition). In the letter, Mr. [REDACTED] claims that the proffered position is "a professional position and would normally be filled by a graduate with a minimum of a Bachelor's Degree in Accounting or a related area, or the equivalent."

Mr. [REDACTED] provided a summary of his education and experience and attached a copy of his curriculum vitae. He described his qualifications, including his educational credentials and professional experience, as well as provided a list of the publications he has written. However, based upon a complete review of Mr. [REDACTED]'s letter and curriculum vitae, the AAO notes that he has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. Mr. [REDACTED] claims that he is qualified to comment on the position of accountant because of the position he holds at the [REDACTED] as well as his professional experience and academic training. Without further clarification, it is unclear how his education, training, skills or experience would translate to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of retail companies similar to the petitioner for *accountant* positions (or parallel positions).

Mr. [REDACTED] opinion letter and curriculum vitae do not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for *accountants* (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. The opinion letter contains no evidence that it was based on scholarly research conducted by Mr. [REDACTED] in the specific area upon which he is opining. In reaching this determination, Mr. [REDACTED] provides no documentary support for his ultimate conclusion regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies).<sup>17</sup> Mr. [REDACTED] asserts a general industry educational

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<sup>17</sup> Mr. [REDACTED] claims that "employers with openings for accountants and similar professional positions have recruited at [the] campus, always seeking graduates with the minimum of a Bachelor's Degree." Notably, it appears that Mr. [REDACTED]'s statement appears to deal exclusively with a limited group of people – college students/graduates of the [REDACTED]. Furthermore, he does not provide any documentary evidence to support his claim. Moreover, he indicates that employers seek graduates with a bachelor's degree, but he does not claim that such a degree must be in any specific specialty. Thus, it appears that a general-purpose degree is sufficient for such employers. Mr. [REDACTED]'s statement does not support the assertion that the proffered position qualifies as a specialty occupation.

standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement.

Upon review of the opinion letter, there is no indication that Mr. [REDACTED] possesses any knowledge of the petitioner's proffered position beyond the job description. The fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. Mr. [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. There is no evidence that Mr. [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Mr. [REDACTED] provides general conclusory statements regarding accountant positions, but he does not provide a substantive, analytical basis for his opinion and ultimate conclusions.

Also, it must be noted that there is no indication that the petitioner and counsel advised Mr. [REDACTED] that the petitioner characterized the proffered position as a low, entry-level position (as indicated by the wage-level on the LCA). As previously discussed, the wage-rate indicates that the beneficiary 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. It appears that Mr. [REDACTED] would have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that Mr. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine similar positions based upon job duties and responsibilities.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the advisory opinion rendered by Mr. [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by Mr. [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. There is an inadequate factual foundation established to support the opinion and the AAO finds that the opinion is not in accord with other information in the record.

The AAO may, in its discretion, use as advisory opinions or statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion, and for the reasons discussed above, the AAO finds the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding Mr. [REDACTED]'s opinion letter into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 its particular position would necessitate accounting services at a level requiring the theoretical and practical application of at least a bachelor's degree level of knowledge in accounting. This, the petitioner has failed to do.

The petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that there is normally a minimum requirement for at least a bachelor's degree in a specific specialty, or its equivalent, for entry. Furthermore, the duties 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 criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will 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.

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

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 a standard industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Thus, the AAO incorporates by reference its 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.

The AAO acknowledges that the record of proceeding contains an opinion letter from Mr. [REDACTED]. However, as previously discussed in detail, the AAO finds that the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, counsel submitted copies of advertisements in response to the RFE.<sup>18</sup> Upon review of the documentation, the petitioner fails to establish that a

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<sup>18</sup> The AAO notes that counsel did not provide the entire job advertisement for the positions with several of the companies. That is, portions of the text are missing or have been cut-off. In addition, many of the job

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. Thus, the AAO finds that counsel's reliance on the job announcements is misplaced.

More specifically, the AAO notes that counsel did not provide any independent evidence of how representative the job advertisements are of the advertising employers' recruiting history for the type of jobs advertised. As the advertisements are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Furthermore, in the Form I-129, the petitioner stated that it is a retail company established in 2007. The petitioner also stated that it has six employees and a gross annual income of approximately \$8.7 million, and that its net annual income is \$61,872. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 447110.<sup>19</sup> The AAO notes that this NAICS code is designated for "Gasoline Stations with Convenience Stores." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments engaged in retailing automotive fuels (e.g., diesel fuel, gasohol, gasoline) in combination with convenience store or food mart items. These establishments can either be in a convenience store (i.e., food mart) setting or a gasoline station setting. These establishments may also provide automotive repair services.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 447110 – Gasoline Stations with Convenience Stores, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited September 25, 2013).

For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and 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 the organizations are similar and in the same industry without providing a legitimate basis for such an

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advertisements are illegible. Consequently, information regarding the requirements for the positions cannot be ascertained.

<sup>19</sup> According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited September 25, 2013).

assertion. As previously mentioned, 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

The job postings do not establish eligibility under this criterion of the regulations. For instance, the advertisements include positions with [REDACTED] (a wireless service company); [REDACTED] (a company in the wholesale trade/import-export industry); [REDACTED] (a company in the electronics, components, and semiconductor manufacturing industry); [REDACTED] (a company in the electronics, components, and semiconductor manufacturing industry); [REDACTED] (a company in the telecommunications services industry); [REDACTED] (a "specialty retailer of women's apparel"); [REDACTED] (a company in the electronics, components, and semiconductor manufacturing industry); [REDACTED] ("[a] leader in the online private sale space"); and [REDACTED]. Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. Furthermore, the petitioner submitted job postings placed by staffing firms [REDACTED] for which little or no information regarding the employer is provided. Consequently, the record is devoid of sufficient information regarding the employers to conduct a legitimate comparison of the organization to the petitioner. The petitioner and counsel failed to supplement the record of proceeding to establish that the employers are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the organizations.

Moreover, some of the advertisements do not appear to be for parallel positions. More specifically, counsel provided several postings for financial analyst and/or finance manager positions. In addition, counsel provided a posting for a senior cost accountant position with [REDACTED], which requires a degree and "a minimum of 3+ years [of] relevant work experience." Additionally, counsel submitted a job posting for a senior accountant position with [REDACTED] which requires candidates to possess a degree and "2+ years [of] experience in either Retail, Apparel, Wholesale or Manufacturing accounting." In addition, counsel submitted a posting for a corporate accountant/analyst position with [REDACTED] which requires candidates to possess a degree and "2 – 4 years of accounting experience, (including experience with General Ledger)." Counsel also submitted a job posting for a bilingual senior accountant position with [REDACTED] which requires candidates to possess a degree and "[m]inimum [of] 3 years of CPA firm working experience with minimum [of] 2 years of working experience on filing business taxes." Additionally, counsel submitted a job posting for a senior accountant position with [REDACTED] which requires candidates to possess a degree and "[a] minimum of 3 years [of] accounting experience, preferably with a public accounting firm." Counsel also provided a job posting for a senior accountant position with [REDACTED] which requires candidates to possess a degree and "[t]wo or more years of experience in the Accounting/Finance field in corporate environment." As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) position. The advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently

established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Contrary to the purpose for which the advertisements were submitted, some of the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, some of the postings state that a bachelor's degree is required, but they do not provide any further specification. Thus, they do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required. The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the specialty occupation claimed in the petition. Moreover, the AAO observes that counsel submitted advertisements indicating that a bachelor's degree in business administration is acceptable. As previously mentioned, 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. Further, counsel submitted postings that do not specify the level of education required (e.g., associate's degree, vocational degree/diploma, baccalaureate, master's degree). The advertisements do not indicate that the employer requires at least a baccalaureate level of education.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. The evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.<sup>20</sup>

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

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<sup>20</sup> 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 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 accountant for companies that are similar to the petitioner requires a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

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 duties of the proffered position are complex or unique. However, in the instant case, the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. Furthermore, the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. The AAO hereby incorporates into this analysis this decision's earlier comments and findings regarding the generalized level of the information and evidence provided with regard to the proposed duties 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.

The petitioner failed to demonstrate how the duties of the position as 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. For instance, while related courses may be beneficial, or in some cases even essential, in performing certain duties of the 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 AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, the wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; her work will be closely supervised and monitored; she will receive specific instructions on required tasks and expected results; and her work will be reviewed for accuracy.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as 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. 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."<sup>21</sup>

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<sup>21</sup> For additional information on Level IV wage levels, see U.S. Dep't of Labor, Emp't & Training Admin.,

Therefore, the evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information to the effect that a bachelor's degree in a specific specialty, or its equivalent, is not required for entry into the occupation in the United States. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than 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 and experience in the accounting and finance field will assist her 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 and counsel do not sufficiently 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. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this 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. To this end, the AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. 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 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 under employ 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.

In response to the director's RFE, the petitioner provided a list of its employees, including their job titles and general education credentials.<sup>22</sup> According to the list, aside from the beneficiary, two employees (out of nine) possess bachelor's degrees: the president/account manager possesses a degree in engineering and the store manager possesses a degree in programming. (The AAO observes that, without further information, the degrees do not appear to be directly related to the duties of the positions.) There is no indication that the petitioner employs other accountants. The list does not indicate that the petitioner normally requires a degree in a specific specialty, or its equivalent, for the proffered position.

In response to the RFE, the petitioner submitted two undated copies of its job postings for the proffered position. As the postings are not dated, it cannot be determined when they were created.<sup>23</sup> Notably, one of the postings indicates that a "Bachelors Degree" is required for the position. The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of

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<sup>22</sup> It must be noted for the record that the list indicates that the petitioner has 10 employees. However, the Form I-129 (signed by the petitioner on July 10, 2012) indicates that the petitioner has six employees. 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.

<sup>23</sup> The AAO notes that evidence that the petitioner creates after an RFE is issued will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the specialty occupation claimed in the petition.

Moreover, the petitioner stated in the Form I-129 petition that it has six employees and was established in 2007 (approximately five years prior to the submission of the H-1B petition). The submission of *two advertisements over a five year period* 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 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.

As reflected in this decision's earlier comments and findings with regard to the generalized level at which the proposed duties are described, the petitioner has not presented the proposed duties with sufficient specificity and substantive content to even establish relative specialization and complexity as distinguishing characteristics of those duties, let alone that they are at a level that would require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent. 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 "Accountants and Auditors." 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."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are 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).

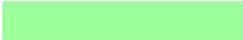
For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and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

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the 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 petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the combined evaluation of the beneficiary's education and work experience submitted by the petitioner is insufficient to establish that the beneficiary possesses the equivalent of a U.S. bachelor's degree in any specific specialty. Specifically, as the claimed equivalency was based in part on experience, there is no evidence that the evaluator has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience and that the beneficiary also has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. *See* 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and (D)(1). As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in any specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

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 1043, *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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



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

**ORDER:** The appeal is dismissed.