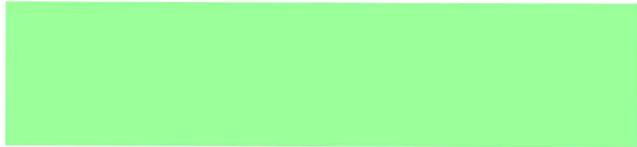




U.S. Citizenship  
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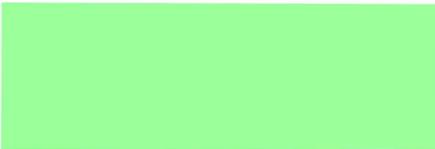


DATE: **OCT 29 2013** OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:   
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition and supporting documents, the petitioner describes itself as a specialty/compounding pharmacy and drug store established in 1995. In order to employ the beneficiary in what it designates as a regulatory and compliance analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner 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; (5) the Form I-290B and supporting materials; (6) the AAO's request for additional and missing evidence; and (7) the petitioner's response to the AAO's request for additional and missing evidence. 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's decision. 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 October 29, 2012, the petitioner indicates that it is seeking the beneficiary's services as a regulatory and compliance analyst on a full-time basis at the rate of pay of \$54,392 per year. In the October 22, 2012 letter of support, the petitioner states that the beneficiary will be responsible for the following duties:

- Develops and periodically reviews and updates Standards of Conduct to ensure continuing currency and relevance in providing guidance to management and employees.
- Collaborates with other departments (e.g., Risk Management, Internal Audit, Employee Services, etc.) to direct compliance issues to appropriate existing channels for investigation and resolution. Consults with the corporate attorney as needed to resolve difficult legal compliance issues.
- Responds to alleged violations of rules, regulations, policies, procedures, and Standards of Conduct by evaluating or recommending the initiation of investigative procedures. Develops and oversees a system for uniform handling of such violations.
- Monitors, and as necessary, coordinates compliance activities of other departments to remain abreast of the status of all compliance activities and to identify trends.
- Identifies potential areas of compliance vulnerability and risk; develops/implements corrective action plans for resolution of problematic issues, and provides general guidance on how to avoid or deal with similar situations in the future.
- Provides reports on a regular basis, and as directed or requested, to keep the Corporate Compliance Committee of the Board and senior management informed of the operation and progress of compliance efforts.

Further, the petitioner states, "We unequivocally state that the position of a Regulatory and Compliance Analyst is a professional level one and that the performance of the above mentioned duties and [sic] require an individual with advanced education and experience in the field." The AAO observes that the petitioner does not indicate that the minimum academic requirement for the position is a *bachelor's degree in a specific specialty*, or its equivalent.<sup>1</sup>

With the initial petition, the petitioner submitted a copy of the beneficiary's [REDACTED] awarded on May 21, 2009, and transcript from the [REDACTED] in New Jersey. In addition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcript.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Compliance Officers" – SOC (ONET/OES Code) 13-1041, 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 November 21, 2012. The petitioner was asked to submit documentation to establish 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.

On November 30, 2012, counsel submitted a brief and additional evidence. Specifically, counsel submitted (1) the petitioner's flyer; (2) a printout of the petitioner's website; (3) articles and a brochure mentioning the petitioner; (4) the petitioner's business plan; (5) an organizational chart; (6) a foreign diploma and pay statements issued to [REDACTED] (7) [REDACTED] resume and pay statements; (8) a list of the petitioner's job positions, along with the educational requirements and job duties; (9) a printout from [www.diplomaguide.com](http://www.diplomaguide.com); (10) a printout from [www.ehow.com](http://www.ehow.com); and (11) a job announcement.

In addition, counsel submitted three job descriptions from the petitioner.<sup>2</sup> The AAO observes that the duties of the proffered position, as described by the petitioner, have been stated in generic terms

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<sup>1</sup> 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 duties and responsibilities of the position. See 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

<sup>2</sup> It must be noted for the record that the job description for the position "Compliance and Regulatory analyst/Compliance Officer" is not probative evidence. The job description is not on the petitioner's letterhead and it is not endorsed by the petitioner. The record of proceeding does not indicate the source of the duties and responsibilities that are attributed to the "Compliance and Regulatory analyst/Compliance Officer" position.

Notably, the document indicates the educational requirement for the position is a bachelor's degree or higher (no specific specialty). In the appeal brief, counsel duplicates this job description but now claims that the

that fail to convey the actual tasks the beneficiary will perform on a day-to-day basis. That is, the AAO notes that the wording of the above duties and two of the job descriptions submitted in response to the RFE as provided by the petitioner for the proffered position are taken almost verbatim from widely used Internet websites. These types of generalized descriptions may be appropriate when defining the range of duties that may be performed within an occupational category, but they fail to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, generally cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, 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.

The AAO notes that the petitioner's job descriptions for the proffered position are generalized and generic as the petitioner fails to convey either the substantive nature of the work that the beneficiary would actually perform, or any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform the proffered position.

The petitioner failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or any substantive evidence regarding the actual work that the beneficiary would perform. 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.

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 14, 2012. Counsel submitted an appeal of the denial of the H-1B petition. With the appeal brief, counsel submitted a brief, along with a copy of previously submitted documentation and new evidence.<sup>3</sup>

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educational requirement is a bachelor's degree in business administration and pharmaceutical field. No explanation was provided for altering the job requirements.

<sup>3</sup> With regard to the new documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been

Based upon a complete review of the record of proceeding, the AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

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 at least a baccalaureate degree in a specific discipline, or its equivalent. The AAO finds that the petitioner and counsel have not done so. There are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

For instance, the AAO observes that in response to the director's RFE, the petitioner provides three, new descriptions of proffered position. Specifically, the petitioner expands the job duties (to include new, generic tasks), some of which appear irrelevant to the proffered position. For instance, the petitioner claims that the beneficiary will "ensur[e] through the human resources office, the *dean's office*, the purchasing department and the *credentialing office* that the Cumulative Sanction Report and GSA Excluded Parties System have been checked with respect to all employees, medical staff, and independent contractors (emphasis added)." The petitioner claims to be a

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established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533. If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not consider the sufficiency of such evidence requested in the RFE but submitted for the first time on appeal. Nevertheless, the AAO reviewed the documentation but finds that it fails to establish eligibility that the proffered position qualifies as a specialty occupation under the applicable statutory and regulatory provisions.

specialty/compounding pharmacy and drug store. The petitioner provides no explanation as to the reason that the beneficiary would work with a *dean's office* or a *credentialing office*. Thus, the AAO must question whether the information provided is correctly attributed to this particular position and beneficiary.

In addition, the petitioner and counsel have provided inconsistent information regarding the minimum requirements for the proffered position. In the initial submission, the petitioner stated that the position requires "an individual with advanced education and experience in the field."<sup>4</sup> In response to the RFE, the petitioner submitted a job description of the proffered position that indicates that the position requires a "**Bachelor of Science or equivalent in regulatory compliance**" or a "**Bachelor of Science or equivalent in Manufacturing.**" However, in a list of the petitioner's positions, submitted in response to the RFE, the petitioner indicates that the proffered position requires a "**Bachelor [sic] Degree or Higher.**" In the appeal brief, counsel claims that the proffered position requires a "**Bachelor [sic] Degree in Business Administration and Pharmaceutical field.**" However, further in the appeal brief, counsel states that the job duties of the proffered position "are on [sic] an advanced and sophisticated nature customarily associated with one who has completed at least a **baccalaureate** degree in **Pharmacy, Pharmaceutical Science, or related field.**" (Emphasis added in all examples.) No explanation was provided for the variances.

Further, the petitioner's claimed entry requirement of at least a bachelor's degree in regulatory compliance, manufacturing, business administration, pharmacy and/or pharmaceutical science for the proffered position, without more, is inadequate to establish that the proposed position qualifies as a specialty occupation. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as

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<sup>4</sup> As previously mentioned, 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 duties and responsibilities of the position. See 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Further, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Again, the petitioner claims that the duties of the proffered position can be performed by an individual with a bachelor's degree in regulatory compliance, manufacturing, business administration, pharmacy or pharmaceutical science. The issue here is that it is not readily apparent that these fields of study are closely related or that all of the fields are directly related to the duties and responsibilities of the particular position proffered in this matter.

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

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

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (1st Cir. 2007).<sup>5</sup>

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<sup>5</sup> Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

Upon review of the record of proceeding, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty*, or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion. The petitioner's assertions regarding its requirements for the proffered position are tantamount to an admission that the proffered position is not in fact a specialty occupation. As such, even if the substantive nature of the work had been established, the instant petition could not be approved for this reason.

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.

As previously discussed, the petitioner submitted an LCA in support of the petition that designated the proffered position to the corresponding occupational category of "Compliance Officers" - SOC (ONET/OES) code 13-1041. 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 having been obtained from the OFLC (Office of Foreign Labor Certification) Online Data Center.<sup>6</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.

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

*Id.*

<sup>6</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 Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (O\*NET) occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.<sup>7</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>8</sup> The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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

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

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<sup>7</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>8</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.

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).

In the October 22, 2012 letter of support, the petitioner claims the beneficiary will consult with the corporate attorney "to resolve difficult legal compliance issues." The petitioner states that it is "very selective" and has "high criteria" for the proffered position. In the November 27, 2012 letter, submitted in response to the director's RFE, counsel states that "[t]he beneficiary will be performing specialized duties only for the petitioner." In addition, in the job description, submitted in response to the RFE, the petitioner claims that the beneficiary "manages [the] day-to-day operation of the [Compliance] Program." The petitioner further states that the beneficiary will be responsible for "[o]verseeing and monitoring the implementation of the compliance program." On appeal, counsel claims that "the proposed job duties related to the position of a Regulatory and Compliance Analyst [sic] are on an advanced and sophisticated nature."

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 by the petitioner and counsel conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupational category of "Compliance Officers." In accordance with the relevant DOL explanatory information on wage levels, the selected wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

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

The AAO notes that the prevailing wage of \$54,392 per year on the LCA corresponds to a Level I position for the occupational category of "Compliance Officers" for Essex County (Newark, New Jersey).<sup>9</sup> Notably, if the proffered position were designated as a higher level position, the prevailing

<sup>9</sup> For additional information regarding the prevailing wage for this occupation in Essex County, see the All Industries Database for 7/2012 - 6/2013 for Compliance Officers at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?code=13-1041&area=35084&year=13&source=1> (last visited October 23, 2013).

wage at that time would have been \$65,894 per year for a Level II position, \$77,418 per year for a Level III position, and \$88,920 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.

Furthermore, the AAO finds that the claimed level of complexity, independent judgment and understanding is materially inconsistent with the LCA certification for a Level I entry-level position. Given that the LCA submitted in support of the petition is for a Level I wage, it must therefore be concluded that the LCA does not correspond to the petition.

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.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

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

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations. Thus, for this reason as well, the petition cannot be approved.

The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict, along with the discrepancies in the job description and academic requirements, 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 petitioner actually intended to employ the beneficiary. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. As previously mentioned, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

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 regarding the inconsistencies and discrepancies in 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 discussion of whether the proffered position qualifies as a specialty occupation the AAO will now provide an in detail analysis of 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 DOL's *Occupational Outlook Handbook* (hereinafter

the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>10</sup> However, the AAO notes there are occupational categories which are not covered in detail by the *Handbook*, as well as occupations for which the *Handbook* does not provide any information. The *Handbook* states the following about these occupations:

#### **Data for Occupations Not Covered in Detail**

Employment for the hundreds of occupations covered in detail in the *Handbook* accounts for more than 121 million, or 85 percent of all, jobs in the economy. [The *Handbook*] presents summary data on 162 additional occupations for which employment projections are prepared but detailed occupational information is not developed. These occupations account for about 11 percent of all jobs. For each occupation, the Occupational Information Network (O\*NET) code, the occupational definition, 2010 employment, the May 2010 median annual wage, the projected employment change and growth rate from 2010 to 2020, and education and training categories are presented. For guidelines on interpreting the descriptions of projected employment change, refer to the section titled "Occupational Information Included in the OOH."

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

Thus, the narrative of the *Handbook* indicates that there are over 160 occupations for which only brief summaries are presented. (That is, detailed occupational profiles for these 160+ occupations are not developed.)<sup>11</sup> The *Handbook* continues by stating that approximately five percent of all

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<sup>10</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. The AAO hereby incorporates into the record of proceeding the excerpt of the *Handbook* regarding "Compliance Officers."

<sup>11</sup> The AAO notes that occupational categories for which the *Handbook* only includes summary data includes a range of occupations, including for example, postmasters and mail superintendents; agents and business managers of artists, performers, and athletes; farm labor contractors; audio-visual and multimedia collections specialists; clergy; merchandise displayers and window trimmers; radio operators; first-line supervisors of police and detectives; crossing guards; travel guides; agricultural inspectors, as well as others.

employment is not covered either in the detailed occupational profiles or in the summary data. The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed.

Accordingly, in certain instances, the *Handbook* is not determinative. When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise qualifies as a specialty occupation under this criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that indicates whether the position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider all of the evidence presented to determine whether a beneficiary qualifies to perform in a specialty occupation.

As previously mentioned, the petitioner asserted in the LCA that the proffered position falls under the occupational category "Compliance Officers." The AAO reviewed the information in the *Handbook* regarding the occupational category "Compliance Officers" and notes that this occupation is one for which the *Handbook* does not provide detailed data.

Upon review of the entry for "Compliance Officers," the AAO observes that the *Handbook* does not indicate that these positions comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. The text of the *Handbook* regarding this occupational category is as follows:

#### Compliance Officers

(O\*NET 13-1041.00, 13-1041.01, 13-1041.02, 13-1041.03, 13-1041.04, 13-1041.06, and 13-1041.07)

Examine, evaluate, and investigate eligibility for or conformity with laws and regulations governing contract compliance of licenses and permits. Perform other compliance and enforcement inspection and analysis activities not classified elsewhere. Excludes "Financial Examiners" (13-2061), "Tax Examiners and Collectors, and Revenue Agents" (13-2081), "Occupational Health and Safety Specialists" (29-9011), "Occupational Health and Safety Technicians" (29-9012), "Transportation Security Screeners" (33-9093), "Agricultural Inspectors" (45-2011), "Construction and Building Inspectors" (47-4011), and "Transportation Inspectors" (53-6051).

- 2010 employment: 216,600
- May 2010 median annual wage: \$58,720
- Projected employment change, 2010-20:
  - Number of new jobs: 32,400
  - Growth rate: 15 percent (about as fast as average)

- Education and training:
  - Typical entry-level education: Bachelor's degree
  - Work experience in a related occupation: None
  - Typical on-the-job-training: Moderate-term on-the-job training

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Data for Occupations Not Covered in Detail, on the Internet at <http://www.bls.gov/ooh/About/Data-for-Occupations-Not-Covered-in-Detail.htm> (last visited October 23, 2013).

When reviewing the *Handbook*, the AAO must note that the petitioner designated the proffered position as a Level I position in the LCA. 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. This is further signified by the fact that the offered salary of \$54,392 per year is over \$4,300 less than the 2010 median annual wage of \$58,720 (as listed in the *Handbook*).

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty is normally required for entry into this occupational category. The *Handbook* summary data provides "education and training categories" for occupations. The occupational category "Compliance Officers" falls into the group of occupations for which a bachelor's degree (no specific specialty) is the typical entry-level education.

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 duties of the position. See 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Even if the petitioner established that its proffered position falls under the occupational category "Compliance Officers," the AAO observes that the *Handbook* does not establish that the occupation requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's degree or higher in the *specific specialty*, or its equivalent, as a minimum for entry into the occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Thus, the *Handbook* is not probative evidence of the occupational category "Compliance Officers" being a specialty occupation.

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

In response to the RFE, counsel submitted a printout from the [REDACTED] website for an article entitled, '[REDACTED]'. The AAO reviewed the printout in its entirety. The printout states a degree requirement for compliance analyst jobs, however, it does not indicate that a baccalaureate or higher degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry into these positions. Notably, the document does not provide any information regarding the source of the information on this particular issue. That is, there is no information to support the conclusions, such as references/citations to statistical surveys, authoritative industry publications, or professional studies. Moreover, the article does not credit anyone with writing the article. Thus, for the reasons discussed, the printout cannot be found to be probative evidence to establish the proffered position as qualifying as a specialty occupation.

Counsel also submitted a printout from the [REDACTED] website for an article entitled, '[REDACTED]' by [REDACTED] Contributor. The article states that "[a] job as a compliance analyst usually requires, at a minimum, a bachelor's degree from an accredited 4-year college or university in a field related to the industry you are applying to, or at least 2 years of experience." The article indicates that 2 years of experience is sufficient for entry into this occupation, thus, the article does not indicate that a baccalaureate or higher degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry into compliance analyst positions. Further, the article references three "resources," but does not cite statistical surveys, authoritative industry publications, or professional studies. Moreover, the website states the following (emphasis added):

The Site is for general research, informational, and entertainment purposes only. We publish video, audio, articles, or other content from current and past contributors. The information on the Site represents the opinions and perspectives of a variety of contributors and users of the Site since its inception. **You should assume that we have not independently verified the accuracy, thoroughness, or relevance of the content available on the Site.**

[REDACTED] Therefore, despite counsel's assertion to the contrary, the petitioner has not established that the article is from an authoritative source, and thus, the article is not probative of the proffered position qualifying as a specialty occupation.

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will review the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to

the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

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

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, counsel provided several job postings in response to the RFE and on appeal.<sup>12</sup> The AAO reviewed the evidence submitted, but finds that the documentation does not establish that the petitioner has met this prong of the regulations.

In the Form I-129 and supporting documents, the petitioner stated that it is a specialty/compounding pharmacy and drug store established in 1995. The petitioner further stated that it has 30 employees and a gross annual income of \$16 million. Although requested in the Form I-129 petition, the petitioner did not state its net annual income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 446110.<sup>13</sup> The AAO notes that this NAICS code is designated for "Pharmacies and Drug Stores." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments known as pharmacies and drug stores engaged in retailing prescription or nonprescription drugs and medicines.

U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 446110 – Pharmacies and Drug Stores, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited October 23, 2013).

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<sup>12</sup> The AAO notes that counsel did not provide the entire job advertisement for the position with Walgreens. That is, portions of the text are missing or have been cut-off. Consequently, information regarding the requirements for the position cannot be ascertained.

<sup>13</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 October 23, 2013).

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

The AAO reviewed the job advertisements submitted by counsel. The petitioner and counsel did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documentation, the petitioner fails 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.

For instance, the advertisements include positions with [REDACTED] ("a \$12 billion growth oriented national managed health care company based in [REDACTED] with 14,000 employees in 48 states"); [REDACTED] (a company that "manages behavioral health benefits for vulnerable populations"); [REDACTED] (a company with "over 7,500 locations in all 50 states and Puerto Rico"); and [REDACTED] (a not-for-profit organization that "employs more than 51,000 employees, and operates 27 acute care hospitals, and more than 35 non-acute health care facilities, as well as physician clinics, health plans, and numerous other health and education services"). 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. Consequently, no legitimate comparison of the organizations to the petitioner may be made, as the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations. Again, the petitioner must demonstrate the degree requirement is **common to the industry** in parallel position **among similar organizations** (emphasis added).

Moreover, some of the advertisements do not appear to be for parallel positions. More specifically, counsel submitted a posting by [REDACTED] which requires a degree and "[p]revious (2-5 years) related experience." Counsel also provided a posting by [REDACTED] which requires a degree and "3-5 years of compliance and regulatory experience including licensure filings and contract review." In addition, counsel submitted a posting by [REDACTED] which requires a degree and "3-5 years in health care service field as a business analyst, project manager, compliance coordinator or pharmacy technician responsible for pharmacy benefit administration." 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.

Additionally, contrary to the purpose for which the advertisements were submitted, 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, most of the postings (specifically, the posting by [REDACTED] state that a bachelor's degree is required, but they do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required. In addition, the AAO notes that counsel submitted a posting by [REDACTED] indicating that a bachelor's degree in business is acceptable. As previously mentioned, although a general-purpose bachelor's degree, such as a degree in business, 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.

The AAO reviewed all of the advertisements submitted in support of the petition.<sup>14</sup> However, as discussed, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry for parallel positions in organizations similar to the petitioner.

It must be noted that even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. Moreover, although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *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").

Thus, based upon a complete review of the record, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry for positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, 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),

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<sup>14</sup> 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.

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.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner and counsel submitted various documents, including documents related to the petitioner's business operations. For instance, the petitioner and counsel provided promotional materials such as pamphlets and a flyer; printouts from the petitioner's website; articles and a brochure mentioning the petitioner; the petitioner's business plan; and an organizational chart. The AAO reviewed the record of proceeding in its entirety. However, upon review of the record, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

That is, a review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis to constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. The petitioner has not established that the duties of the proffered position require at least a baccalaureate degree in a specific specialty, or its equivalent. Furthermore, the petitioner has not established why a few related courses or industry experience alone is insufficient preparation for the proffered position. Additionally, the AAO finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition.

More specifically, the LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. 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. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."<sup>15</sup>

The petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or is equivalent. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a

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<sup>15</sup> For additional information regarding wage levels as defined by DOL, 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)

curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, 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 proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background and professional experience in the field will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not 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. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must 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 underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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

In response to the RFE, counsel submitted a list of the petitioner's positions. Notably, the document indicates that the position of compliance and regulatory analyst/compliance officer requires a "Bachelor [sic] Degree or Higher." 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 duties and responsibilities of the position.

In addition, counsel claims that "the petitioner currently employs Mr. [REDACTED] in the position of Head of Compliance" and that he "possesses a Bachelor of Science degree." Counsel further claims that "the petitioner had hired Ms. [REDACTED] in the position of Regulatory and Compliance Analyst." In support of his assertions, counsel submitted a copy of Mr. [REDACTED] foreign diploma and pay statements, and copy of Ms. [REDACTED] resume and pay statements. The AAO observes that counsel did not submit an academic credential evaluation for Mr. [REDACTED] to establish that his foreign education is equivalent to a U.S. bachelor's degree in a specific specialty. In addition, the petitioner did not submit the academic credentials of Ms. [REDACTED] e.g., copies of diplomas, transcripts. The petitioner should note that the evidentiary weight of a resume is insignificant. It represents a claim by an individual, rather than evidence to support that claim. In the instant case, no further documentation was submitted of the individual's asserted credentials. 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).

On appeal, counsel states that "[p]rior to Ms. [REDACTED] employment the petitioner employed one more person whose degree they did not have at the time of the Request for Evidence." Counsel further states that "Ms. [REDACTED] worked for the petitioner as a Regulatory and Compliance Analyst from March, 2010 to February, 2011." In support of his assertions, counsel submitted a copy of Ms. [REDACTED] Master of Science degree, Form W-2, and pay statements. Notably, Ms. [REDACTED] Master of Science degree indicates that it was awarded to her on January 15, 2010 (approximately two

years prior to the issuance of the RFE). As previously discussed, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. The AAO is not required to consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Nevertheless, the AAO reviewed the document but finds that it is insufficient to establish eligibility.

That is, while counsel claimed that the petitioner employed two regulatory and compliance analysts, the petitioner and counsel failed to provide the job duties and day-to-day responsibilities of the employees that it claimed served in the position that is the same as the proffered position. The petitioner and counsel did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, aside from the job title, the petitioner has failed to establish that the duties and responsibilities of these individuals were the same or related to the proffered position.

Moreover, the petitioner stated in the Form I-129 petition that it has 30 employees and that it was established in 1995 (approximately 17 years prior to the submission of the H-1B petition). Consequently, it cannot be determined how representative the petitioner's submission of *one resume and the educational credentials of one individual over a 17 year period* is of the petitioner's normal recruiting and hiring practices. The petitioner has not persuasively established that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

The AAO reviewed the record of proceeding but finds that 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.

The AAO acknowledges that the petitioner and counsel may believe that the nature of the specific duties of the position in the context of the petitioner's business operations is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO reviewed the evidence, including the documents related to the petitioner's business operations (promotional materials such as pamphlets and a flyer; printouts from the petitioner's website; articles and a brochure mentioning the petitioner; the petitioner's business plan; and an organizational chart). The AAO finds that the petitioner's statements and the submitted documentation fail to support the assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, the AAO also reiterates its earlier comments and findings with regard to the

implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation 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 significantly higher prevailing wage. For instance, as previously mentioned, 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.

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

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

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

**ORDER:** The appeal is dismissed.