



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **APR 01 2014** OFFICE: VERMONT SERVICE CENTER

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.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on August 10, 2012. In the Form I-129 visa petition, the petitioner describes itself as a professional cleaning services company established in 2001. In order to continue to employ the beneficiary in what it designates as an operations manager position, the petitioner seeks to extend her classification 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 on April 17, 2013, 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 asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. Counsel submitted a brief in support of this assertion.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. 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.

Later in this decision, the AAO will also discuss two additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the applicable statutory and regulatory provisions; and (2) failed to submit a Labor Condition Application (LCA) that corresponds to the petition. Thus, the petition cannot be approved for these reasons as well. They are considered independent and alternative bases for denial of the petition.¹

I. FACTUAL AND PROCEDURAL BACKGROUND

In this matter, the petitioner stated in the Form I-129 petition that it seeks the beneficiary's services as an operations manager to work on a full-time basis. In a support letter dated July 23, 2012, the petitioner stated that the following regarding the position:

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

As the Operations Manager, [the beneficiary] is in charge of managing the daily operations and human resources, purchasing and planning the use of materials, as well as formulating company policies in order to increase efficiency, while maximizing revenue. . . . In this capacity and utilizing her knowledge of business administration, [the beneficiary] will continue to be responsible of planning, directing and coordinating the operations of the company and its resources. Duties include human resources management and cleaning crew scheduling overview, procurement of materials, approving purchasing[,] and developing customer care policies. During the past three years, [the beneficiary] has helped to develop and manage information systems for the fulfillment of her duties and the operations of the company. Based upon our growing needs and industry standards, we have determined that the position of Operations Manager requires a Masters in Business Administration, or its equivalent.

The petitioner also submitted a document entitled "Operations Manager." The document is not on company letterhead and is not endorsed by the petitioner. The petitioner and its counsel did not state the purpose of the document or how it relates to the petitioner's proffered position. The document provides the following information:

OPERATIONS MANAGER

The Operations Manager will be responsible for planning, directing and coordinating the day to day operations of the company and its resources. Managing the organization's Human Resources, helping and creating organizational and program budgets collaborating with the President, data entry, accounts payable, payroll, among other related tasks.

This position's primary responsibility is ensuring organizational effectiveness by providing leadership for the organization's financial functions. Working with the management team, the position also contributes to the development and implementation of organizational strategies, policies and practices.

Responsibilities:

- Improve the operational systems, processes and policies in support of organization's mission statement; specifically, support better management practices, information flow and management, business process and organizational planning.
- Manage and increase the effectiveness and efficiency of crew services, through improvements to each function as well as coordination and communication between support and business functions.
- Play a significant role in long-term planning, including an initiative geared toward operational excellence.
- Oversee overall financial management, planning, systems and controls.
- Management of agency budget in coordination with the President.
- Development of individual program budgets

- Directs the invoicing process
- Payroll management, including tabulation of accrued employee benefits.
- Disbursement of checks for expenses.
- Monitors and evaluates compliance with federal/state and local regulations and mandates.
- Regular meetings with President around fiscal planning.
- Supervise and coach office manager on a weekly basis
- Elaborates the company's Business Plan
- Formulates employees' policies in order to increase efficiency, while maximizing revenue.

Responsibilities by Function Financial Management

- Develops and manage annual budget
- Oversee monthly and quarterly assessments and forecasts of organization's financial performance against budget, financial and operational goals. Oversee short and long-term financial and managerial reporting.
- Supervise accounting activities, review financial statements and sales to measure productivity.
- Managing day to day processing of accounts receivable and payable using QuickBooks, producing reports as requested.
- Reconciling monthly activity, generating year-end reports to fulfill tax related requirements.
- Monitors daily cash flow.
- Managing contracts and reimbursement requests.
- Administering payroll and employee benefits and organizational insurance.
- Develop long-range forecasts and maintain long-range financial plans.
- Coordinate pricing of cleaning services, as well as the planning of sales and promotions

Organizational Effectiveness

- Manage functions.
- Increase the effectiveness and efficiency of Crew Services through improvements to each function as well as coordination and communication between functions.
- Drive initiatives in the management team and organizationally that contribute to long-term operational excellence.
- Providing consulting services on matters related to business structure and growth.
- Selects, direct, and evaluates the performance e of direct reports and when necessary initiates performance improvement plans and corrective actions in the cleaning services.

Organizational Leadership

- Contribute to short and long-term organizational planning and market strategic position.

- Communicate expectations to Field/Crew Supervisor, and Office Manager, delegating authority as appropriate. Promotes practices and processes that contribute to success; directs that effective management of barriers that impede achieving targeted results
- Contributes to create a work environment that encourages employees at all levels to have an opportunity to express ideas and suggestions about ways to better perform
- Foster an environment that promotes respect, teamwork, excellence and commitment to personal best.

Risk Management

- Serve as primary liaison to legal counsel in addressing legal issues.
- Oversee organizational insurance policies
- Plans business growth strategy and diversification²

The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of her academic credentials. The petitioner provided a copy of the beneficiary's transcripts and diplomas from [REDACTED] as well as related documents. The documentation indicates that the beneficiary was granted a [REDACTED] Business Administration in December 2008 and a Bachelor of Science in October 2006.

The petitioner 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 "General and Operations Managers" - SOC (ONET/OES) code 11-1021, at a Level I (entry level) wage.

The petitioner provided evidence in support of the petition, including a list of the petitioner's clients,

² The majority of these duties are recited verbatim (along with the same formatting) from an Internet source that provides sample job descriptions; however, the information has not been properly attributed or cited. See Supporting Advancement, "Sample Job Descriptions – Operations Manager," on the Internet at http://www.supportingadvancement.com/employment/job_descriptions/advancement_services/operations_manager.htm (last visited March 31, 2014). Notably, the Internet source includes a heading entitled "Qualifications" and indicates that three years of experience is needed. The document does not indicate that a master's in business administration is required as claimed by the petitioner in the letter of support (in fact, it does not indicate any academic requirements).

Although the petitioner bears the burden to establish eligibility for the benefit sought, USCIS has the right to verify information submitted to meet that burden. See generally sections 103, 204, 205, 214, 291 of the Act; 8 U.S.C. §§ 1103, 1154, 1155, 1184, 1361; 8 C.F.R. § 103.2(b)(7); Form I-129 Instructions (10/07/11) Y Page 23 (incorporated into the regulations by 8 C.F.R. § 103.2(a)(1)), available at <http://www.uscis.gov/sites/default/files/files/form/i-129instr.pdf>. Agency verification methods may include but are not limited to: review of public records and information; contact via written correspondence, the Internet, facsimile or other electronic transmission, or telephone; unannounced physical site inspections of residences and places of employment; and interviews. *Id.*

an organizational chart, selected pay statements in the name of the beneficiary, a printout indicating the petitioner's active corporate status, and printouts from the petitioner's website.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on November 20, 2013. The director requested that the petitioner submit probative evidence to establish that the proffered position qualifies as a specialty occupation.

On February 14, 2013, the petitioner and counsel responded to the director's RFE. The petitioner provided a letter with the following description of the proffered position:

The following is a detailed list of duties, which you would agree that can only be dutifully performed by an individual with at least a bachelor's degree in administration:

Operations/Policy Duties:

- Manages and improves the effectiveness and efficiency of our services crews by developing policies and procedures tailored to the size and scope of each specific project.
- Produces date-based statistical charts that tracks and compares each project's productivity levels and rate of return to improve cost cutting objectives.
- Supports better management practices by evaluating productivity matrixes after completion of each cleaning project.
- Frequently monitors receivables.
- Formulates employees' best safety practices and procedures, and particularly cleaning chemical's usage policies for best safety.

Procurement Duties:

- Tracks and studies monthly materials inventory levels and establishes minimal/maximum on hand quantities.
- Negotiates material prices with vendors and controls procurement costs to meet monthly budget allowances.

Financial Duties:

- Formulates and executes the company's master budget annually.
- Controls the overall financial management of the company by producing quarterly financial statements and analysis.
- Produces financial management best practices parameters to aid in budget balancing.
- Supervises and coaches office manager on a weekly basis.
- Advices the company's president on financial opportunities and risks.

Planning and Strategic Management Duties:

- Maintains current the company's business plan and corporate strategy.

- Forecasts cleaning services market demands and works together with the president to evaluate and calibrate corporate strategy.
- Meets with president on a regular basis to discuss the company's financial position.
- Main advisor to President in the planning of business diversification.

Human Resource Management Duties:

- Manages payroll and accrued employee benefits.
- Monitors federal/state/local regulations and mandates.
- Studies the market cleaning services pay-rate annually and makes corrections at employees' annual evaluations.
- Produces team schedules weekly in compliance with work load, and makes adjustments as necessary.
- Formulates employee policies and best practices.
- Forecasts hiring needs based on project proposals and overall estimated cleaning services market demand.
- Aids in the hiring process.

Risk Management Duties:

- Serves as primary liaison to legal counsel in addressing legal issues.
- Oversees organizational insurance policies and works proactively to reduce claim risks by better training and coaching of cleaning teams.

In addition to the revised description of the proffered position, the petitioner and counsel provided additional documents, including: (1) a letter dated February 11, 2013 from the petitioner indicating that the petitioner has 23 employees, a total income YTD of \$385,045, a gross profit of \$366,297, and a net loss of \$26,289;³ (2) articles regarding the construction industry in Southwest Florida; (3) a letter and supporting documents from [REDACTED] University; (4) a letter from [REDACTED]; (5) printouts of pages from the [REDACTED] websites; (6) printouts of several online job advertisements; (7) a printout of the Department of Labor's (DOL) *Occupational Outlook Handbook's (Handbook)* section on the occupational category "Top Executives"; and (8) previously submitted documents.

The director reviewed the information provided in the initial H-1B petition and in response to the RFE. Although the petitioner and counsel 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, or its equivalent. The director denied the petition on April 17, 2013. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition. In support of the appeal,

³ On the Form I-129 petition, the petitioner stated that it has 10 employees and a gross annual income of approximately \$753,400. Although specifically requested in the Form I-129, the petitioner did not provide its net annual income.

counsel submitted a brief.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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.

II. BEYOND THE DECISION OF THE DIRECTOR

To ascertain the intent of a petitioner, U.S. Citizenship and Immigration Services (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."

A. Academic Requirements for the Proffered Position

In the instant case, the petitioner has provided inconsistent information regarding the requirements for the proffered position. In a letter submitted with the Form I-129 petition, the petitioner initially asserted that the minimum requirement for the proffered position is a master's degree in business administration, or its equivalent.⁴ Notably, in a letter dated January 10, 2013, which was provided in response to the RFE, the petitioner changed the minimum education requirement for the proffered position claiming that the duties can only be performed by an individual with at least a bachelor's degree in administration. The petitioner did not provide an explanation for the inconsistency in the claimed degree requirements.

Moreover, the AAO notes that a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the duties and responsibilities of the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a general-purpose degree (or 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

⁴ In response to the RFE, the petitioner submitted a letter from [REDACTED] stating that he "believe[s] that a person without a Masters degree in Business Administration will find very difficult to fulfill his or her responsibilities [in the proffered position]."

its equivalent. 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 degree (including 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 139, 147 (1st Cir. 2007).⁵ The petitioner's assertions that a general purpose degree is sufficient to perform the duties of the position strongly suggests that the proffered position is not in fact a specialty occupation.

B. Required Wages

The record of proceeding contains discrepancies between what the petitioner claims about the level of responsibility inherent in the proffered position set against the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of petition. That is, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "General and Operations Managers" at a Level I (entry level) wage. The LCA was certified on August 2, 2012 and signed by the petitioner's president on August 3, 2012.

Wage levels should be determined only after selecting the most relevant 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.⁶

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other

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

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

Id.

⁶ For additional information on wage levels, *See* DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁷ 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 "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

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

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

DOL guidance further indicates that a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones would be an indication that a wage determination at Level II would be proper classification for a position.⁸ The occupational category

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

⁸ A Level I wage rate is described by DOL as follows:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

"General and Operations Managers," has been assigned an O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, most occupation in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." See O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3.

In the instant case, the petitioner designated the proffered position as a Level I position. This suggests that the petitioner's academic and/or professional experience requirements for the proffered position would be *less than* "training in vocational schools, related on-the-job experience, or an associate's degree" as stated for occupations designated as O*NET Job Zone 3. However, in its letter of support dated July 23, 2012, the petitioner claims that the proffered position requires a master's degree in business administration, or its equivalent.

Further, the petitioner claims that the beneficiary is responsible for planning, directing, and coordinating the operations of the company and its resources. In addition, the petitioner states that the beneficiary is responsible for formulating company policies, managing daily operations and resources, and purchasing and planning the use of materials. The petitioner also attributes its success in a challenging economic environment to its "highly qualified" operations manager. The petitioner's president writes that the company's "business survival strategy" was to "entrust the [petitioner's] operations" to the beneficiary. The petitioner references the complexity and uniqueness of the skill requirements of the proffered position. The petitioner claims that the beneficiary serves as the owner's "business advisor and right hand employee." According the petitioner, the beneficiary is entrusted to "direct [the petitioner's] business." Furthermore, in the appeal, counsel claims that "the Operations Manager is a position that supervises an Administrative Services Manager."⁹

It appears that the petitioner's academic requirements and reliance on the beneficiary to perform the duties as described in the record surpass the appropriate expectations for a position designated at a Level I entry-level wage. Thus, upon review of the assertions made by the petitioner, 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 requirements 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

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

⁹ Notably, the organizational chart submitted in response to the RFE does not depict the operations manager as having any subordinates. Further, the organizational chart does not indicate that the petitioner employs an "Administrative Services Manager."

monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

Notably, if the proffered position had been designated at a higher level, the prevailing wage at that time would have been significantly higher. More specifically, a Level I wage is \$57,387, a Level II wage is \$79,206, a Level III wage is \$101,005, and a Level IV wage is \$122,824.¹⁰ Moreover, it must be noted that the petitioner indicated on the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement (pages 17) that the beneficiary would be paid \$55,229 per year for full-time employment.¹¹ Notably, this is \$2,158 less than the prevailing wage for a Level I position for the occupational category in the area of intended employment.¹²

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.¹³ It is incumbent upon the petitioner to resolve any inconsistencies in the

¹⁰ The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See U.S. Dep't of Labor, Bureau of Labor Statistics, on the Internet at <http://www.bls.gov/oes/> (last visited March 31, 2014). The OES All Industries Database is available at the Foreign Labor Certification 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/>.

¹¹ The instructions to the Form I-129 (10/07/11), the version of the form completed by the petitioner, state, in pertinent part, the following:

Rate of pay per year. The "rate of pay" is the salary or wages paid to the beneficiary. Salary or wages must be expressed in an annual full-time amount and do not include non-cash compensation or benefits. For example, an H-1B worker is to be paid \$6,500 per month for a 4-month period including a health benefits package and transportation. The yearly rate of pay if he or she were working for a full year would be 12 times the monthly rate or \$78,000. This amount does not include health benefits or transportation costs. The figure \$78,000 should be entered on this form as the rate of pay.

See Instructions for Form I-129, Petition for a Nonimmigrant Worker, available at <http://www.uscis.gov/files/form/i-129instr.pdf>. The H-1B petition must be executed and filed in accordance with the form instructions, with the instructions being incorporated into the regulations. 8 C.F.R. § 103.2(a)(1).

¹² In the instant case, the petitioner does not claim, nor has it submitted any documentation to demonstrate that within its regular course of business, less than 40 hours per week is full-time employment. See 20 C.F.R. § 655.736(a)(2)(iii)(A).

¹³ Fundamentally, it appears that (1) the petitioner previously claimed to DOL that the proffered position is a Level I, entry-level position to obtain a lower required wage; and (2) the petitioner is now claiming to USCIS that the position is a higher-level and more complex position in order to support its claim that the position qualifies as a specialty occupation. The petitioner cannot have it both ways. Either the position is more senior and complex (based on a comparison of the employer's job requirements to the standard

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).

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).

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

Certification by the Department of Labor [DOL] of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

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

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation . . . 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.¹⁴ Here, the petitioner has failed to submit a

occupational requirements) and thereby necessitates a higher required wage or it is an entry-level position for which the lower wage offered to the beneficiary in this petition is acceptable. To permit otherwise would be directly contrary to the U.S. worker protection provisions contained in section 212(n)(1)(A) of the Act and its implementing regulations.

¹⁴ To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between DOL and DHS, a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2). Upon receiving DOL's certification, the prospective

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 petitioner's statements indicate that the claimed level of complexity, independent judgment and understanding, as well as the requirements for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. 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. Furthermore, the petitioner has failed to establish that it will pay the beneficiary the required wage. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial (which it has not), the petition could not be approved.

III. SPECIALTY OCCUPATION

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, and for the specific reasons described below, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To 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:

employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition. 20 C.F.R. § 655.705(b); *see generally* 8 C.F.R. § 214.2(h)(4)(i)(B).

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 at 147 (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.

The AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). As explained earlier in this decision, the petitioner has failed to establish nature of the proffered position and in what capacity the beneficiary will actually be employed.¹⁵ 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 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, assuming, *arguendo*, that the petitioner had adequately and accurately described the duties of the proffered position, the AAO provides the below analysis of the evidence of record to further describe why the proffered position does not qualify as specialty occupation in accordance

¹⁵ Further, in the Form I-129 and LCA, the petitioner indicated that the basis of classification is "[c]ontinuation of previously approved employment without change with the same employer." While the petitioner's statements regarding the proffered position may provide some insight into the beneficiary's duties, the AAO observes that the beneficiary had been employed by the petitioner for approximately three years when the H-1B petition was submitted. The petitioner, however, failed to submit probative evidence to establish the actual day-to-day duties performed by the beneficiary and to corroborate the tasks being performed by the beneficiary were in accordance with the job description. There is a lack of substantive, documentary evidence to substantiate the petitioner's claim that the beneficiary was performing H-1B caliber work.

with the applicable statutory and regulatory provisions. The AAO will first discuss the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

The AAO recognizes DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹⁶ As previously discussed, the petitioner designated the proffered position in the LCA under the occupational category "General and Operations Managers." The AAO observes that this occupational category is included in the *Handbook* under the occupational designation entitled "Top Executives."

The AAO reviewed the chapter of the *Handbook* entitled "Top Executives," including the section regarding the requirements for this occupational category.¹⁷ However, the *Handbook* does not indicate that "Top Executives" comprise an occupational group that requires at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation.

The subchapter of the *Handbook* entitled "How to Become a Top Executive" states, in part, the following about this occupation:

Education

Many top executives have a bachelor's or master's degree in business administration or in an area related to their field of work. Top executives in the public sector often have a degree in business administration, public administration, law, or the liberal arts. Top executives of large corporations often have a master of business administration (MBA). College presidents and school superintendents typically have a doctoral degree in the field in which they originally taught or in education administration.

Work Experience in a Related Occupation

Many top executives advance within their own firm, moving up from lower level managerial or supervisory positions. However, other companies may prefer to hire qualified candidates from outside their organization. Top executives that are promoted from lower level positions may be able to substitute experience for education to move up in the company. For example, in industries such as retail trade or transportation, workers without a college degree may work their way up to higher levels within the company to become executives or general managers.

¹⁶ All of the AAO's references are to the 2013-2014 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The AAO hereby incorporates the excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational categories into the record of proceeding.

¹⁷ For additional information regarding the occupational category "Top Executives," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Top Executives, on the Internet at <http://www.bls.gov/ooh/management/top-executives.htm#tab-1> (last visited March 31, 2014).

Chief executives typically need extensive managerial experience. Executives are also expected to have experience in the organization's area of specialty. Most general and operations managers hired from outside an organization need lower level supervisory or management experience in a related field.

Some general managers advance to higher level managerial or executive positions. Company training programs, executive development programs, and certification can often benefit managers or executives hoping to advance. Chief executive officers often become a member of the board of directors.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2013-14 ed.*, Top Executives, available on the Internet at <http://www.bls.gov/ooh/management/top-executives.htm#tab-4> (last visited March 31, 2014).

The *Handbook* indicates that there are many avenues of preparation for a career as a top executive. The *Handbook* reports that "[m]any top executives have a bachelor's or master's degree in business administration or in an area related to their field of work." As previously discussed, while a general-purpose degree, such as a degree in business administration, may be useful for some positions, such a degree is an insufficient requirement to qualify a position as a specialty occupation, which requires a degree in a *specific specialty*. Further, while "many" top executives may have a degree, the *Handbook* does not indicate that such a degree is normally the minimum requirement for entry into this occupational category. Rather, the *Handbook* describes an array of preparatory paths to the occupational category of top executives, including the reality that in some industries "workers without a college degree may work their way up to higher levels in the company to become executives or general managers." Upon review, 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 this occupational category.

Moreover, in response to the director's RFE, counsel stated that "the information the OOH [the *Handbook*] gives involves several occupations and is not specific to General and Operations Manager, it is inconclusive and cannot be used for the purpose of determining if the occupation is a specialty occupation under 8 C.F.R. Section 214.2(h)(4)(iii)(A)." The AAO agrees that 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 independent, authoritative/persuasive 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.

In support of the assertion that the proffered position qualifies as a specialty occupation, the petitioner and counsel provided information from three universities describing the importance of

hiring degreed individuals in today's business environment. Specifically, the letter from [REDACTED] director of academic advising at [REDACTED] states, "Today's challenging business environment requires professionals with at least a bachelor's degree, and managers with a graduate degree, in order to provide the competitive advantage that companies seek to be competitive." The printout from the website of the [REDACTED] states, "To take up the challenges of the 21st century will require an education that promotes innovative thinking and generates multi-dimensional problem solving." A printout from the [REDACTED] mission statement indicates that the college strives to "prepare [students] to succeed in a rapidly changing, technology-driven global business environment."

The AAO reviewed the printouts and the letter. The AAO observes that while it is reasonable for universities in the course of marketing academic programs to state that such programs will prepare students for certain positions, such generalized statements cannot be considered probative evidence with regard to the particular position proffered in the instant matter. USCIS must examine the claimed duties of a proffered position within the context of the specific business operations of the petitioner to determine whether a particular position indeed requires the services at a level requiring the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry.

As previously mentioned, 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." 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)).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other independent, authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding by the petitioner 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)).

As previously 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 the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

In the Form I-129, the petitioner stated that it is a professional cleaning services company that was established in 2001, and has 10 employees. The petitioner stated its gross annual income as approximately \$753,400. Although requested on the Form I-129, the petitioner did not provide its net annual income. The petitioner did not provide an explanation for failing to provide this information. In response to the RFE, the petitioner provided a letter indicating a net annual loss of approximately \$26,000.¹⁸

In response to the RFE, the petitioner and counsel submitted several job announcements and a letter from [REDACTED]. However, the documentation does not establish the proffered position qualifies as specialty occupation.

The AAO reviewed the job advertisements submitted by the petitioner. The petitioner 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.

¹⁸ The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 561790. According to the U.S. Census Bureau, 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 March 31, 2014). The AAO notes that the NAICS code specified by the petitioner is designated for "Other Services to Buildings and Dwellings," and is defined on the U.S. Department of Commerce, Census Bureau the following:

This industry comprises establishments primarily engaged in providing services to buildings and dwellings (except exterminating and pest control; janitorial; landscaping care and maintenance; and carpet and upholstery cleaning).

U.S. Dep't of Commerce, U.S. Census Bureau, 2002 NAICS Definition, 561790 – Other Services to Buildings and Dwellings, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited March 31, 2014).

The AAO observes that the printouts from the petitioner's website indicate that it provides both janitorial services and carpet and upholstery cleaning. Thus, it is not apparent why the petitioner designated its business operations under a category that specifically excludes these services.

Upon review of the job announcements, the petitioner has not established that at least a bachelor's degree in a specific specialty (or its equivalent) is common to the industry in parallel positions among similar organizations. For instance, the petitioner has not established that the advertising organizations are similar to the petitioner. The record of proceeding contains job postings for [REDACTED] (an industrial and manufacturing company that imports and exports goods); [REDACTED] (an accounting firm); a posting for what appears to be a branch manager for an unnamed bank; [REDACTED] (a company involved in the large scale production of food); [REDACTED] an independent living community for seniors); and [REDACTED] (a real estate/property management company). None of the postings appear to be for organizations similar to the petitioner.

In response to the RFE, counsel stated that the job postings are from organizations in the services industry that are located in the same city as the petitioner. When determining whether the petitioner and an organization share the same general characteristics, such factors may include information regarding the nature or type of organization, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). 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 information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. 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. Beyond the general assertion that the advertising companies provide services and are located in the same city as the petitioner, neither counsel nor the petitioner have specified what characteristics they believe the petitioner shares with these organizations.

Additionally, some of the advertisements appear to be for dissimilar positions and/or for more senior positions. For example, the posting from Anthrex indicates that a bachelor degree plus 10 years of manufacturing work experience are required. The posting further states that "[a] minimum of 10 years of management experience [is] required." The posting from [REDACTED] requires a minimum of 7-10 years of prior experience in a similar role with management experience in an area that has a strong emphasis on gerontology. Besides being dissimilar positions, these advertisements appear to be for more senior positions than the instant proffered position. As previously discussed, the petitioner has classified the proffered position as a Level I (entry level) position, the lowest of four possible designations. According to DOL guidance, a Level I wage is appropriate for a worker in training or an internship. 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. The petitioner also provided a posting for a global trade operations manager (who will oversee the importation and exportation of goods) and an advertisement for a bank branch manager. The job duties of these positions do not appear to be parallel to the proffered position.

Further, contrary to the purpose for which they were submitted, the advertisements do not demonstrate that a bachelor's degree in a specific specialty (or its equivalent) is common in the petitioner's industry

in parallel positions among similar organizations. For instance, the posting from [REDACTED] indicates that a "Bachelor degree plus 10 years of manufacturing work experience [is] required." The posting from [REDACTED] requires a "BA/BS" degree (plus ten years of experience in import and export regulatory compliance). These advertising organizations do not specify that any particular discipline is required and they appear to accept a bachelor's degree in any field. The posting from [REDACTED] indicates that a "[b]achelor[']s degree or equivalent knowledge" is required; however, no information is provided as to how the "equivalent knowledge" requirement is met.

Furthermore, the petitioner fails to establish the relevancy of the provided examples to the issue here.¹⁹ That is, 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 organizations.²⁰

In response to the RFE, the petitioner provided a letter from [REDACTED] adjunct professor at [REDACTED] claims that, based on his review of the petitioner's January 10, 2013 description of the proffered position (which was included with the letter as supporting documentation), "it is [his] opinion that only an individual with a four year bachelor's degree in Business Administration could attain an entry level position in any industry." Upon review of Mr. [REDACTED] general statement suggesting that a bachelor's degree in Business Administration is required to obtain an entry-level position in any industry, the AAO notes that the job postings provided by the petitioner appear to contradict [REDACTED] statement. For instance, some of the advertising organizations are willing to accept an undisclosed amount of experience in lieu of a bachelor's degree. The posting from [REDACTED], while not advertising for an entry-level position, indicates that a degree in a variety of specialized fields is required; however, business administration is not one of them.

¹⁹ 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.

²⁰ The petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these few job postings with regard to 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").

As such, even if the job announcements supported the finding that the position (for organizations similar to the petitioner) required 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.

Further, [REDACTED] subsequently states that, based on the financial duties of the description of proffered position that he reviewed, he "believes that a person without a Masters degree in Business Administration will find very difficult to fulfill his or her responsibilities as they would lack the academic acquired knowledge to perform their duties at a professional level." However, in the same letter containing the description of duties that [REDACTED] reviewed, the petitioner states that the minimum education requirement for the proffered position is a "bachelor's degree in administration." No explanation was provided by the petitioner or Mr. [REDACTED]

Upon review of the opinion letter, there is no indication that Mr. [REDACTED] possesses any knowledge of the petitioner's proffered position and its business operations beyond that which was provided in the petitioner's January 10, 2013 letter. 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. He 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.

Furthermore, it does not appear that Mr. [REDACTED] is aware that the petitioner designated the proffered position as a Level I (entry) position in 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. It appears that Mr. [REDACTED] would have found this information relevant for the opinion letter. 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.

The AAO may, in its discretion, use an advisory opinion or statement 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 the AAO discounts 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 the opinion letter into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Thus, based upon a complete review of the record of proceeding, 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 in 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), 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 submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted a partial list of its clients, printouts from its website, an organizational chart, and related materials. In addition, the petitioner provided printouts regarding industry growth in Southwest Florida. The AAO reviewed the record of proceeding in its entirety. However, upon review of the record, the AAO finds that the petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position.

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 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. Furthermore, the petitioner has not established why a few related courses or industry experience alone is insufficient preparation for the proffered position. 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 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.

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 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.

Without further evidence, it is 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 III (qualified) or 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."²¹ Thus, based

²¹ For additional information regarding wage levels as defined by DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at <http://www.foreignlaborcert.doleta.gov/>

upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline (or its equivalent) that directly relates to the proffered position.

The AAO observes that the petitioner has indicated that the beneficiary's educational background and her prior experience with the petitioner 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 of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty, or its equivalent. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner fails to demonstrate 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. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 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, as well as any other documentation submitted by a petitioner in support of this criterion of the regulations.

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. Upon review of the record of proceeding, the petitioner has not established that it normally requires a bachelor's or higher degree in a specific specialty (or its equivalent) for the proffered position.

In the instant case, the petitioner initially claimed that the proffered position requires a master's degree in business administration, or its equivalent. Thereafter, the petitioner stated that it requires at least a bachelor's degree in administration. No explanation for the variance was provided by the petitioner. 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.

The petitioner indicated that, prior to hiring the beneficiary, the proffered position was a new position at the petitioner's organization.²² Upon review of the record, the petitioner has not provided probative 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 claims that the nature of the specific duties of the position in the context of its business operations 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 reviewed all of the evidence in the record, including the partial list of the petitioner's clients, the articles regarding the growth in Southwest Florida, printouts from the petitioner's website, the organizational chart, and the letters submitted in support of the instant petition. The AAO also considered the petitioner's statements regarding the proffered position. However, the AAO finds that the submitted documentation fails to support the assertion that the proffered position satisfies this criterion of the regulations. More specifically, in the instant case,

²² The AAO notes that prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of eligibility for the benefit sought. See *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). In the instant case, although the beneficiary has served in the proffered position for approximately three years, there is a lack of substantive, documentary evidence to substantiate the petitioner's claim that the beneficiary has been performing H-1B caliber work.

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 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 III (experienced) or 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.²³

IV. CONCLUSION AND ORDER

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

²³ A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner has failed to establish that the proffered position requires a baccalaureate or higher degree in a specific specialty or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications.

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

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