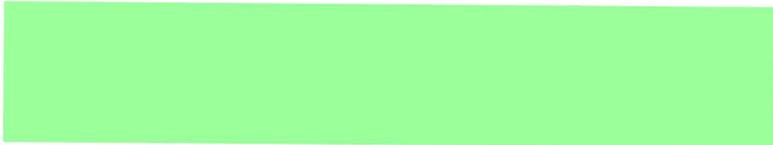




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **AUG 13 2014** 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.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on April 5, 2013. In the Form I-129 visa petition and supporting documents, the petitioner describes itself as a law firm established in 1992. In order to employ the beneficiary in what it designates as a director of sales and client development 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 on June 12, 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 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 us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. We reviewed the record in its entirety before issuing our decision.<sup>1</sup>

For the reasons that will be discussed, we agree with the director's decision that the record of proceeding does not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Accordingly, the director's decision will not be disturbed.

We will also discuss two additional, independent grounds, not identified by the director's decision, that we find also preclude approval of this petition. Specifically, beyond the decision of the director, we find 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.

## I. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner states in the Form I-129 that it seeks the beneficiary's services as a full-time director of sales and client development at a rate of pay of \$54,000 per year. In a letter dated April 3, 2013, the petitioner articulated the following duties and requirements for the proffered position:

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<sup>1</sup> We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- Confer with lawyers to develop methods and procedures necessary to increase revenues, expand markets, locally and internationally, and promote the firm's taxation, business and international practice;
- Work closely with attorneys to understand the firm's business processes and offer strategic guidance for developing and executing marketing and promotional plans;
- Conceptualize, develop and implement firm's marketing plan and oversee its activities;
- Analyze details of target markets to assess growth potential;
- Collect, review and analyze gathered information and analysis of the firm's operating procedures to devise the most efficient methods of accomplishing work;
- Gather and organize information on problems and procedures including present operating procedures;
- Develop and implement methods and procedures for anticipating and monitoring the strength of our market environment;
- Analyze the firm's operations to devise ways to increase profits;
- Evaluate and propose various ways to improve the firm's structure, efficiency, and profits;
- Improve efficiency of the staff by suggesting more effective means of management and better use of resources;
- Prepare reports and recommend alternatives for enhancing operating efficiency;
- Analyze results, evaluate facts and prepare reports for presentation to the lawyers;
- Utilize quantitative skills to interpret and assess financial and demographical data to provide recommendations for expansion and develop marketing programs, including building a firm website;
- Interpret and analyze financial and market trends to ensure effective avenue of marketing strategies;
- Continually develop new business by identifying target clients through networking and meeting with target clients to market legal services;
- Cultivate and expand existing business relationships through frequent communications;
- Support firm's goals by participating in strategy meetings.

\* \* \*

Due to the complexity of the duties, specialized knowledge and application of a theoretical and practical knowledge, [the petitioner] has determined that the minimum requirement for the position is a baccalaureate degree in business administration or equivalent in marketing, management, or a related field.

The petitioner stated that the beneficiary is qualified to perform services in the proffered position "by virtue of his international business management and marketing skills and his practical training." In support of this statement, the petitioner provided a copy of the work experience evaluation report prepared by [REDACTED] which states that the beneficiary's work experience is equivalent to the U.S. degree of Bachelor of Business Administration with a concentration in management and marketing awarded by a regionally accredited university in the United States. The petitioner also provided a letter from the beneficiary's current employer.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner indicates on the LCA that the proffered position corresponds to the occupational category "First-Line Supervisors of Non-Retail Sales Workers" – SOC (ONET/OES Code) 41-1012, at a Level I (entry level) wage.

In regard to its business operations, the petitioner submitted a printout from the Florida Department of State Division of Corporations regarding its corporate status.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 14, 2013. The director outlined the evidence to be submitted.

Counsel responded to the RFE by submitting a letter and additional evidence in support of the H-1B petition. The additional evidence includes an excerpt from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* regarding "Sales Managers"; a printout of the Occupational Information Network (O\*NET) OnLine Summary Report for the occupation "First-Line Supervisors of Non-Retail Sales Workers"; and several job advertisements.

The director reviewed the record of proceeding, and determined that the petitioner did not establish eligibility for the benefit sought. The director denied the petition on June 12, 2013. Thereafter, counsel submitted an appeal of the denial of the H-1B petition.

The issue before us 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, and for the specific reasons described below, we agree with the director and find that the evidence fails to establish that the position as described constitutes a specialty occupation.

## II. 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.

### A. The Law

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 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.

## B. Analysis

We will first review 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.

As previously referenced, the petitioner asserts in the LCA that the proffered position falls under the occupational category "First-Line Supervisors of Non-Retail Sales Workers." We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>2</sup> However, we note there are occupational categories which are not

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<sup>2</sup> All of our references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

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**

Although employment for hundreds of occupations are covered in detail in the *Occupational Outlook Handbook*, this page presents summary data on additional occupations for which employment projections are prepared but detailed occupational information is not developed. For each occupation, the Occupational Information Network (O\*NET) code, the occupational definition, 2012 employment, the May 2012 median annual wage, the projected employment change and growth rate from 2012 to 2022, and education and training categories are presented.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Data for Occupations Not Covered in Detail," <http://www.bls.gov/ooh/About/Data-for-Occupations-Not-Covered-in-Detail.htm> (last visited August 8, 2014).

Thus, the narrative of the *Handbook* indicates that there are many occupations for which only brief summaries are presented. That is, detailed occupational profiles for these occupations are not developed.<sup>3</sup> The occupation of "First-Line Supervisors of Nonretail Sales Workers" is an occupation for which the *Handbook* does not provided detailed data. The text of the *Handbook* regarding this occupational category is as follows:

### **First-Line Supervisors of Nonretail Sales Workers**

(O\*NET 41-1012.00)

Directly supervise and coordinate activities of sales workers other than retail sales workers. Duties also may include budgeting, accounting, and personnel work.

- 2012 employment: **394,400**
- May 2012 median annual wage: **\$70,060**
- Projected employment change, 2012-22:
  - Number of new jobs: **-3,200**
  - Growth rate: **-1 percent (little or no change)**
- Education and training:
  - Typical entry-level education: **High school diploma or equivalent**
  - Work experience in a related occupation: **Less than 5 years**

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<sup>3</sup> The 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 and home management advisors; 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.

- o Typical on-the-job-training: **None**

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 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 August 8, 2014).

The *Handbook* summary data indicates that the "[t]ypical entry-level education" of this occupational category is a "[h]igh school diploma or equivalent." We note that the petitioner has characterized the proffered position as a Level I (entry level) position on the LCA.<sup>4</sup> Thus, the *Handbook* does not support the petitioner's assertion that the proffered position, as attested to on the LCA, qualifies as a specialty occupation.

In response to the RFE, and again on appeal, counsel asserts that the occupational category of "Sales Managers" is relevant to the proffered position.<sup>5</sup> We reviewed the chapter of the *Handbook* entitled "Sales Managers," including the sections regarding the typical duties and requirements for

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<sup>4</sup> The petitioner has indicated on the LCA that the proffered position corresponds to a Level I wage. The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

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

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

This designation is indicative of a comparatively low, entry-level position relative to others within the occupation. That is, 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 and carries expectations that the beneficiary will perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. Furthermore, DOL guidance indicates that a Level I designation is appropriate for a position (within the occupational category) as a research fellow, a worker in training, or an internship.

<sup>5</sup> The occupational category "Sales Managers" has its own ONET/OES Code (11-2022). Notably, the petitioner elected to classify the proffered position under SOC (ONET/OES Code) 41-1012, "First-Line Supervisors of Non-Retail Sales Workers," which, as will be discussed later in this decision, corresponds to a lower prevailing wage than the occupational category of "Sales Managers."

this occupational category. However, the *Handbook* does not indicate that "Sales Managers" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

The subchapter of the *Handbook* entitled "How to Become a Sales Manager" states the following about this occupational category:

Most sales managers have a bachelor's degree and work experience as a sales representative.

#### **Education**

Most sales managers have a bachelor's degree; some have a master's degree. Educational requirements are less strict for job candidates who have significant experience as a sales representative. Courses in business law, management, economics, accounting, finance, mathematics, marketing, and statistics are advantageous.

#### **Work Experience**

Work experience is typically required for someone to become a sales manager. The preferred duration varies, but employers usually seek candidates who have at least 1 to 5 years of experience.

Sales managers typically enter the occupation from other sales and related occupations, such as sales representatives or purchasing agents. In small organizations, the number of sales manager positions is often limited, so advancement for sales workers usually comes slowly. In large organizations, promotion may occur more quickly.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Sales Managers, on the Internet at <http://www.bls.gov/ooh/management/sales-managers.htm#tab-4> (last visited August 8, 2014).

When reviewing this section of the *Handbook*, we again note that that the petitioner designated the proffered position under this occupational category at a Level I (entry-level) wage on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and will perform routine tasks that require limited, if any, exercise of judgment. In accordance with the relevant U.S. Department of Labor (DOL) explanatory information on wage levels, the beneficiary will be closely supervised and his work closely monitored and reviewed for accuracy. Furthermore, he will receive specific instructions on required tasks and expected results. DOL guidance indicates that a Level I designation is appropriate for a research fellow, a worker in training, or an internship. This designation suggests that the beneficiary will not serve in a high-level or leadership position relative to others within the occupational category.

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. Rather, the *Handbook* states that while most sales managers have a bachelor's degree (no specific specialty is stated) and some have a master's degree, the educational requirements are less strict for job candidates who have significant experience as a sales representative.<sup>6</sup> Notably, the *Handbook* does not state that such experience must be equivalent to a bachelor's degree in a specific specialty. The *Handbook* also reports that work experience is typically required for someone to become a sales manager. Furthermore, the *Handbook* indicates that the preferred duration of work experience varies, but employers usually seek candidates who have at least one to five years of experience.

The *Handbook* does not indicate that employers normally require a degree in a *specific specialty* (or its equivalent) for entry into the occupation. The *Handbook* reports that courses in business law, management, economics, accounting, finance, mathematics, marketing, and statistics are advantageous for sales manager positions. A statement that various courses are *advantageous* is not an indication that such courses are *required*.

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 statement that it is advantageous to take courses in disparate fields, such as business law, management, economics, accounting, finance, mathematics, marketing, and statistics, would not meet the statutory requirement that the degree be "in *the specific specialty*."<sup>7</sup> Section 214(i)(1)(B) (emphasis added). The text suggests that a baccalaureate degree or higher may be a preference among employers of sales managers in some environments, but that some employers hire employees with less than a bachelor's degree. For employers requiring a degree, it appears that a degree in any field and/or in an unrelated field is acceptable. The narrative of the *Handbook*

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<sup>6</sup> The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of sales managers have a degree (no specific specialty), it could be said that "most" sales managers have such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement (of at least a bachelor's degree in a specific specialty, or its equivalent) for that occupation, much less for the particular position proffered by the petitioner. As previously noted, the petitioner designated the proffered position in the LCA as a low-level, entry position relative to others within the occupation. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act.

<sup>7</sup> Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty.

emphasizes the importance of work experience. The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the 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 objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. 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, we 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 (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) 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 objective, authoritative source), reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate 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 support of the petitioner's assertion that the proffered position is a specialty occupation position, the record of proceeding contains six job announcements. However, upon review of the evidence, we find that the petitioner's reliance on the job announcements is misplaced.

In the Form I-129 the petitioner represents that it is a law firm established in 1992, and has 13 employees. In its support letter dated April 3, 2013, the petitioner indicated that it specializes in U.S. and international tax law.<sup>8</sup> The petitioner reported its gross annual income as approximately

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<sup>8</sup> 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. The petitioner designated its business operations under NAICS code 541100, which is not a valid code. We note that NAICS code 541110 corresponds to "Offices of

\$3.3 million, and its net annual income as approximately \$226,000

For the petitioner to establish that an organization is similar, it must demonstrate that it shares the same general characteristics with the advertising organization. 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 to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

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

The advertisements submitted are from organizations that do not appear to be similar to the petitioner. For example, the petitioner submitted advertisements from organizations that are substantially larger in size than the petitioner. These include postings from [REDACTED] (an organization of over 1,100 employees); an unnamed "Large National Law Firm"; and [REDACTED]. Again, the petitioner represented in the Form I-129 that it employs only 13 people. Thus, these large organizations cannot be considered similar to the petitioner.

Other advertisements appear to be for positions that are more senior than the proffered position. For example, [REDACTED] seeks an individual with 10 years of progressively responsible business development experience at a multi-office global professional services organization. Similarly, the posting from [REDACTED] seeks an individual with 8 to 10 years of related experience. As previously discussed, the petitioner has certified the proffered position at a Level I entry-level wage. Thus, positions requiring substantial experience in the industry cannot be found parallel to the proffered position, based on the petitioner's representations.

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Lawyers." The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This industry comprises offices of legal practitioners known as lawyers or attorneys (i.e., counselors-at-law) primarily engaged in the practice of law. Establishments in this industry may provide expertise in a range or in specific areas of law, such as criminal law, corporate law, family and estate law, patent law, real estate law, or tax law.

See U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 541110 – Offices of Lawyers, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited August 8, 2014).

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, the job posting from [REDACTED] and the two postings from Axiom indicate that a bachelor's degree is required, but do not state that the degree must be in a specific specialty.

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, as the evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions, not every deficit of every job posting has been addressed.

The job advertisements do not establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions in the petitioner's industry. Further, it must be noted that even if all of the job postings indicated that 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.<sup>9</sup>

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

We 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

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<sup>9</sup> 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.

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 a letter of support with the initial submission in this matter. No additional supporting evidence regarding the proffered position and the petitioner's business operations was provided.

Upon review, we find that the petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of 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.<sup>10</sup>

The petitioner and counsel have indicated that the beneficiary's prior work experience and Portuguese language skills 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 qualifies as a specialty occupation. In the instant case, the petitioner has not established which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has not 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, we usually review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position. In addition, the petitioner may submit any other documentation it considers relevant to 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 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.

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<sup>10</sup> Again, we note that the petitioner designated the proffered position on the LCA at a Level I wage level. This designation indicates that the proffered position is a low-level, entry position relative to others within the occupational category.

While a petitioner may assert that a proffered position requires a specific degree, that statement 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.

The petitioner stated in the Form I-129 petition that it has 13 employees and was established in 1992 (approximately 21 years prior to the filing of the H-1B petition). The petitioner has not provided any evidence regarding the individuals that previously held the proffered position. In response to the RFE, counsel indicated that the proffered position is a new position.

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

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The petitioner and counsel claim 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. We reviewed the petitioner's statements regarding its business operations. However, upon review of the entire record of proceeding we find 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, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, we reiterate our 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, 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 the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has not established 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.

### III. ISSUES BEYOND THE DIRECTOR'S DECISION

#### A. Adequacy of LCA and Proposed Wage

Upon review of the record of proceeding, we find that there are additional issues not identified in the director's decision that preclude approval of this petition. Specifically, beyond the decision of the director, we find that the petitioner (1) failed to submit a Labor Condition Application (LCA) that corresponds to the petition; and (2) failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the applicable statutory and regulatory provisions. Thus, the petition cannot be approved for these reasons as well. They are considered independent and alternative bases for denial of the petition.

We note that the petitioner did not submit a certified Labor Condition Application (LCA) that properly corresponds to the petition. In the instant case, the petitioner has characterized the duties of the proffered position as pertaining to the occupational category of "First-Line Supervisors of Non-Retail Sales Workers." However, the petitioner has not indicated that the beneficiary will have any supervisory duties. In response to the RFE, counsel stated that the beneficiary will be "solely

responsible for sales and client development." Thus, it does not appear that the petitioner will have a sales staff that the beneficiary will supervise. As previously discussed, the *Handbook* states that individuals in this occupational category "[d]irectly supervise and coordinate activities of sales workers other than retail sales workers." It further states: "Duties also may include budgeting, accounting, and personnel work." The duties of the proffered position as described by the petitioner do not include these duties.

In response to the RFE and on appeal counsel claims that the proffered position is described in the *Handbook* under the occupational category of "Sales Managers." This occupational category has its own OES/SOC code (11-2022) and a different prevailing wage than the occupational category listed on the LCA.

When the duties of a proffered position involve more than one occupational category, DOL provides clear guidance for selecting the most relevant O\*NET code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O\*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification . . . . If the employer's job opportunity has worker requirements described in a combination of O\*NET occupations, the SWA should default directly to the relevant O\*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

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).

Thus, if the petitioner believed its position was described as a combination of occupations, or actually pertained to another occupational category, then according to DOL guidance the petitioner should have chosen the relevant occupational code for the highest paying occupation. The prevailing wage for "First-Line Supervisors of Non-Retail Sales Workers" is significantly lower than the prevailing wage for "Sales Managers."

As stated on the LCA, the Online Wage Library lists the prevailing wage for "First-Line Supervisors of Non-Retail Sales Workers" as \$52,894 per year at the time the petition was filed in this matter, for a Level I position in Miami, Florida. The prevailing wage for a Level I "Sales Manager" SOC (ONET/OES Code) 15-1132 position is listed as 65,666 per year.<sup>11</sup> Thus, according

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<sup>11</sup> For additional information regarding the prevailing wage for this occupation in [REDACTED] FL), see the All Industries Database for 7/2012 - 6/2013 at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at

to DOL guidance, if the petitioner believed its position was a combination of the occupations, it should have chosen the relevant occupational code for the highest paying occupation. Notably, the petitioner indicated on the Form I-129 that it would pay the beneficiary a full-time annual salary of \$53,000. This is an insufficient salary for a position with duties pertaining to an occupational category with a prevailing wage of \$65,666.

In addition to the issue of the occupational category, we observe that the wage level at which the petitioner certified the proffered position on the LCA does not correspond to representations regarding the proffered position made by the petitioner and counsel. The petitioner certified the proffered position at a Level I (entry level) wage. As previously noted, the "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

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

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

Again, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation. That is, 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 and carries expectations that the beneficiary will perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. DOL guidance indicates that a Level I designation is appropriate for a position (within the occupational category) as a research fellow, a worker in training, or an internship.

In a letter dated April 3, 2013, the petitioner stated that it "has made a business decision to rely on the professional services of [the beneficiary] to assist the firm in remaining competitive amidst current economic challenges and changes." The petitioner referred to the "specialized knowledge"

and "complexity of duties" of the proffered position. In response to the RFE, counsel emphasized that "[t]he services of [the beneficiary] are **absolutely essential** to the firm due to the fact that he will be **solely responsible** for sales and client development." Counsel further stated that the beneficiary "will guide the law firm through the process of analyzing growth and expansion." In addition, counsel claimed that the beneficiary will expand the petitioner's client base "using his business savvy and knowledge of business administration." In summary, counsel stated: "[The beneficiary's] specialized knowledge in developing sales strategies, negotiating joint ventures and coordinating the financial aspects of businesses are all vital to the growth and expansion of the firm as well as his fluency in the Portuguese and English language."

On appeal, counsel makes the following claims regarding the proffered position:

[T]he director of Sales and Client Development will mostly be autonomous at [the petitioner] and will therefore require the education to act in an independent manner. Unlike other subordinate positions at [the petitioner], the Director of Sales and Client Development will possess a wealth of knowledge unavailable to the partners of the law firm. Therefore, the law partners will not be able to instruct [the beneficiary] on how to perform the duties associated with [the proffered] position. The petitioner is purposefully hiring [the beneficiary] to supply new, separate knowledge for the benefit of the firm. In fact, [the beneficiary] will be the one advising the petitioner on how to run its business.

Thus, upon review of the assertions made by the petitioner and counsel, it appears that the level of complexity, independent judgment and understanding actually required for the proffered position exceeds the expectations of a Level I (entry level) position. The designation of the position at a Level I wage level indicates that the beneficiary will "perform routine tasks that require limited, if any, exercise of independent judgment." Employees in Level I positions "work under close supervision and receive specific instructions on required tasks and results expected." Further, their work is "closely monitored and reviewed for accuracy." Here, it appears that the petitioner is relying on the beneficiary's expertise and independent judgment in order for the petitioner to remain competitive. Further, counsel claims that there is no one at the firm with the expertise required to instruct the beneficiary or review his work for accuracy. Thus, we must conclude that the petitioner's designation of the proffered position at a Level I entry level wage is not consistent with the expectations for the proffered position.

In addition, counsel claims that knowledge of the Portuguese language is required for the position. We note that a language requirement other than English in a petitioner's job offer is generally considered a special skill for all occupations, with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers. In the instant case, the petitioner has not established that the foreign language requirement has been reflected in the wage-level for the proffered position.

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 petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational category and 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. The petitioner in this matter has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted.

The 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 an LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the occupational category that the petitioner ascribed to the proffered position and to the wage corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

Therefore, for these reasons, even if it were determined that the petitioner overcame the director's basis for denial of the petition (which it has not), the petition could not be approved.

#### B. Beneficiary's Qualifications

In addition to the above described deficiencies of the instant petition, we note a further issue that precludes approval of requested benefit. Although we do not need to examine the issue of the beneficiary's qualifications where the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation, we observe that the petitioner has not demonstrated that the beneficiary is qualified to perform services in a specialty occupation position.

Specifically, the claimed equivalency to a United States baccalaureate or higher degree in the specialty occupation was based on the beneficiary's work experience. However, there is no evidence that the evaluator had the authority to grant college-level credit for work experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience and that the beneficiary also has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. *See* 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and (D)(1).

In the instant case, we observe that the petitioner provided an evaluation of the beneficiary's credentials performed by a commercial evaluation service. USCIS does not accept evaluations of work experience from commercial evaluation services. Further, even if the evaluation had not been performed by a commercial service, there is no independent evidence in the record from appropriate officials, such as deans or provosts, to establish that Christos Koulamas is, in the language of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), "an official [with] authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience."

Furthermore, upon review of the beneficiary's employment letter, we finds that the letter provides insufficient information regarding the beneficiary's work history and duties (e.g., complexity of the job duties; the level of judgment; the amount and level of supervision; the level of understanding required to perform the job duties). The letters describe the beneficiary's involvement in various projects; however, the letter does not provided specifics regarding the substantive nature of the work that the beneficiary performed. The letters do not present an adequate factual foundation for the evaluator to determine that the beneficiary has the education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and that he has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. See 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). Thus, we find that the evaluation fails to establish that the beneficiary's education, training and/or work experience are the equivalent of a bachelor's degree in a specific specialty based upon the information provided. In light of the lack of a sufficient factual foundation discussed above, the evaluation is insufficient even if it had been rendered by an official qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

Moreover, when USCIS determines a beneficiary's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), it must be demonstrated that the beneficiary's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the beneficiary has documented recognition of expertise in the specialty. In the instant case, the documentation from the beneficiary's prior employers does not establish that his work experience included the theoretical and practical application of specialized knowledge and that his experience was gained while working with peers, supervisors, or subordinates who have a degree in the specialty occupation, or its equivalent. Additionally, the petitioner did not submit probative documentation establishing that the beneficiary has recognition of expertise in the specialty. As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in any specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

#### IV. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by us 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 we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

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.