



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: **AUG 25 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:

[Redacted]

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, and the matter is now before the Administrative Appeals Office (AAO) on appeal.<sup>1</sup> The appeal will be dismissed. The petition will be denied.

## I. INTRODUCTION

On the Form I-129 visa petition, the petitioner describes itself as a single-employee non-profit religious organization<sup>2</sup> established in 1975. In order to employ the beneficiary in what it designates as a part-time music director position at a salary of \$17.79 per hour,<sup>3</sup> the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and she issued a request for additional evidence (RFE) on June 20, 2013. Within the RFE, the director requested specific documentation to establish that the proffered position is a specialty occupation. The director denied the petition, concluding that the evidence of record 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 has satisfied all evidentiary requirements.

The record of proceeding before us contains the following: (1) the Form I-129 and supporting documentation; (2) the director's RFE; (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

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<sup>1</sup> The petitioner filed two Forms I-290B: [REDACTED] This decision applies to both filings.

<sup>2</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 813110, "Religious Organizations." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "813110 Religious Organizations," <http://www.naics.com/naics-code-description/?code=813110> (last visited July 28, 2014).

<sup>3</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Music Directors and Composers" occupational category, SOC (O\*NET/OES) Code 27-2041, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

## II. STANDARD OF REVIEW

In the exercise of our administrative review in this matter, as in all matters that come within our purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

\* \* \*

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

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Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

*Id.* at 375-76.

Again, we conduct our review of service center decisions on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determination that the evidence of record does not establish that the proffered position is a specialty occupation was correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find

that the evidence of record does not establish that the petitioner's claim of the proffered position as a specialty occupation is "more likely than not" or "probably" true. In other words, as the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claim that the proffered position is a specialty occupation is "more likely than not" or "probably" true.

### III. FACTUAL AND PROCEDURAL BACKGROUND

The petitioner indicates that it is seeking the beneficiary's services as a music director on a part-time basis (15 hours per week) at a wage of \$17.79 per hour. In its March 22, 2013 letter of support, the petitioner states that the beneficiary will be responsible for the following duties:

The Music Director will: confer with the Pastor to choose the appropriate music and style to be used in worship services under the different seasons for the church year; plan, lead, direct, and coordinate the music for worship services; confer with the pastor and clerk of session and help them in selecting hymns by applying knowledge of church music history; coordinate the music for special services throughout the year, including Thanksgiving, Advent, Lent, Holy Week and Christmas; rearrange classical church music pieces (composed by master such as Handel, Bach, Beethoven, Mozart, etc.) to make them accessible to ordinary audience; evaluate and assess individual members' skills and train and develop their musical knowledge and skills in vocal techniques, instrument, appreciation of harmonies, etc.; train and direct various choirs and music teams as a group; direct the music group at rehearsals and performances to achieve desired effects; using music theories and composition techniques, transcribe musical compositions and melodic lines to adapt them to, or create a particular style suitable for particular services and events; lead, guide, and train choirs, contemporary worship leaders, and instrument musicians; etc.

In addition, the Music Director will organize and supervise the choir anthem library; select and purchase music, complying with requirements for copyrights; and examine and report needs for repair of instruments to the Worship and Music Committee to the church council may be informed and act on these problems.

The petitioner also stated that the proffered position requires "a Bachelor's degree or higher in the field of Music, Music Education, or a closely-related field."

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 20, 2013. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director did not find the petitioner's response sufficient, and she denied the petition on September 18, 2013.

### IV. THE LCA SUBMITTED IN SUPPORT OF THE PETITION

We have reviewed the record of proceeding in its entirety and, as will be discussed later in this decision, we agree with the director that the proffered position is not a specialty occupation.

However, before addressing that issue we will first address an issue we have identified on appeal which also precludes approval of the petition. Specifically, we find that the petitioner's claims with regard to the level of responsibility and requirements inherent in the proffered position are inconsistent with the wage-level designated by the petitioner in the LCA.

As discussed, the petitioner submitted an LCA certified for use with a job prospect within the "Music Directors and Composers" occupational category, SOC (O\*NET/OES) Code 27-2041, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. We note that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant O\*NET occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.<sup>4</sup>

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) position after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.<sup>5</sup> The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform

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<sup>4</sup> For additional information regarding prevailing wage determinations, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

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

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

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

The petitioner has classified the proffered position at a Level I wage, which is only appropriate for a position requiring only "a basic understanding of the occupation" expected of a "worker in training" or an individual performing an "internship." This designation indicates further that the beneficiary will only be expected to "perform routine tasks that require limited, if any, exercise of judgment." However, we find that many of the duties described by counsel and the petitioner exceed this threshold.

For example, in its March 22, 2013 letter the petitioner characterized the proffered position as "crucial," claimed that the beneficiary would deal with "complicated combinations of musical instruments," and stated that she would "have complete autonomy and discretion." The petitioner concluded its letter by stating that the position "involves complex duties and responsibilities."

In her August 15, 2013 letter, counsel also claimed that the beneficiary would deal with complicated combinations of musical instruments and that that the position would involve complex duties and responsibilities. On appeal, she argues that the duties of the position are "complex and unique."

These statements indicate that the beneficiary will be required to exercise extensive independent judgment in the proffered position, which conflicts with the Level I wage-rate designation.

We therefore question the level of complexity, independent judgment and understanding actually required for the proffered position, as the LCA was certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described by the petitioner 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, the selected wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. This characterization of the proffered position and the claimed duties and responsibilities as described by the petitioner 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.

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); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7<sup>th</sup> Cir. 2010). The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]").

It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ her at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. Again, the petitioner has offered the beneficiary a wage of \$17.79 per hour, which satisfied the Level I (entry level) prevailing wage for a music director in the California Metropolitan Division at the time the LCA was certified.<sup>6</sup> However, in order to offer employment to the beneficiary at a Level II (qualified) wage-level, which would involve only "moderately complex tasks that require limited judgment," the petitioner would have been required to raise her salary to at least \$23.85 per hour. The Level III (experienced) prevailing wage was \$29.92 per hour, and the Level IV (fully competent) prevailing wage was \$35.98 per hour.<sup>7</sup>

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition.<sup>8</sup> To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower

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<sup>6</sup> U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Music Directors and Composers," <http://www.flcdatacenter.com/OesQuickResults.aspx?area=36084&code=27-2041&year=13&source=1> (last visited July 28, 2014).

<sup>7</sup> *Id.*

<sup>8</sup> To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between DOL and the U.S. Department of Homeland Security (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 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). DOL reviews LCAs "for completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, 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).

prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted for a higher-level and more complex position as claimed elsewhere in the petition.

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. As previously mentioned, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

DOL has stated clearly that its LCA certification process is cursory, that it does not involve substantive review, and that it makes the petitioner responsible for the accuracy of the information entered in the LCA. With regard to LCA certification, the regulation at 20 C.F.R. § 655.715 states the following:

*Certification* means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Likewise, the regulation at 20 C.F.R. § 655.735(b) states, in pertinent part, that "[i]t is the employer's responsibility to ensure that ETA [(the DOL's Employment and Training Administration)] receives a complete and accurate LCA."

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.<sup>9</sup>

While DOL is the agency that certifies LCA applications before they are submitted to U.S. Citizenship and Immigration Services (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):

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<sup>9</sup> See also 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) ("An approved labor condition application is not a factor in determining whether a position is a specialty occupation").

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 an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, provided the proffered position was in fact found to be a higher-level and more complex position as asserted by the petitioner and counsel elsewhere in the petition, the petitioner would have failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position. That is, the LCA submitted in support of the petition would then fail to correspond 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 section 212(n)(1)(A) of the Act and the pertinent LCA regulations.

The statements regarding the requirements and claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position, and this conflict undermines the overall credibility of this petition. We find that, fully considered in the context of the entire record of proceeding, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

As such, a review of the LCA submitted by the petitioner indicates that the information provided therein does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such higher level work and responsibilities, which if accepted as accurate would result in the beneficiary being offered a salary below that required by law. Thus, even if it were determined that the petitioner had overcome the director's ground for denying this petition (which it has not), the petition could still not be approved.<sup>10</sup>

## V. SPECIALTY OCCUPATION

We will now address the director's basis for denial of the petition: whether the proffered position is a specialty occupation position. Based upon a complete review of the record of proceeding, we agree with the director and find that the evidence fails to establish that the position as described

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<sup>10</sup> Fundamentally, it appears (1) that the petitioner claimed to DOL that the proffered position is a Level I, entry-level position to obtain a lower prevailing wage; and (2) that 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 is a specialty occupation. The petitioner cannot have it both ways. Either the position is a more senior and complex position (based on a comparison of the petitioner's job requirements to the standard 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.

constitutes a specialty occupation.

To meet the petitioner's burden of proof with regard to the proffered position's classification as an H-1B specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

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

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

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

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

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

We will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

We will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied by establishing that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of the instant petition.

We recognize DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>11</sup> As noted above, the LCA that the petitioner submitted in support of this petition was certified for a job offer falling within the "Music Directors and Composers" occupational category.

The *Handbook* states the following with regard to the duties of positions falling within the "Music Directors and Composers" occupational category:

Music directors (also called conductors) lead orchestras and other musical groups during performances and recording sessions. Composers write and arrange original music in a variety of musical styles.

### **Duties**

Music directors typically do the following:

- Select musical arrangements and compositions to be performed for live audiences or recordings
- Prepare for performances by reviewing and interpreting musical scores
- Direct rehearsals to prepare for performances and recordings
- Choose guest performers and soloists
- Audition new performers or assist section leaders with auditions
- Practice conducting to improve technique
- Meet with potential donors and attend fundraisers

Music directors lead orchestras and other musical groups. They ensure that the musicians play with one coherent sound, balancing the melody, timing, rhythm, and volume. They also give feedback to musicians and section leaders so that they can achieve the sound and style they want for the piece.

Music directors may work with a variety of orchestras and musical groups, including church choirs, youth orchestras, and high school or college bands, choirs, or orchestras. Some work with orchestras that accompany dance and opera companies.

Composers typically do the following:

- Write original music that orchestras, bands, and other musical groups perform
- Arrange existing music into new compositions
- Write lyrics for music or work with a lyricist
- Meet with companies, orchestras, or other musical groups that are interested in commissioning a piece of music

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<sup>11</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. Our references to the *Handbook* are from the 2014-15 edition available online.

- Study and listen to music of various styles for inspiration
- Work with musicians to record their music

Composers write music for a variety of musical groups and users. Some work in a particular style of music, such as classical or jazz. They also may write for musicals, operas, or other types of theatrical productions.

Some composers write scores for movies or television; others write jingles for commercials. Many songwriters focus on composing music for audiences of popular music.

Some composers use instruments to help them as they write music. Others use software that allows them to hear a piece without musicians.

For more information about careers in music, see the profile on musicians and singers. Some music directors and composers give private music lessons to children and adults. Others work as music teachers in elementary, middle, or high schools. For more information, see the profiles on kindergarten and elementary school teachers, middle school teachers, and high school teachers.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Music Directors and Composers," <http://www.bls.gov/ooh/entertainment-and-sports/music-directors-and-composers.htm#tab-2> (last visited July 28, 2014).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

Educational and training requirements for music directors and composers vary. A conductor for a symphony orchestra typically needs a master's degree, but a choir director may need a bachelor's degree. There are no formal educational requirements for those interested in writing popular music. Music directors and composers typically begin their musical training at a young age by learning to play an instrument or singing.

### **Education**

A degree in music theory, music composition, or conducting is generally preferred for those who want to work as a conductor or classical composer. To enter these programs, applicants are typically required to submit recordings, audition in person, or both.

These programs teach students about music history and styles, as well as composing and conducting techniques. Information on degree programs is available from the

A bachelor's degree is typically required for those who want to work as a choir director.

There are no specific educational requirements for those interested in writing popular music. These composers usually find employment by submitting recordings of their compositions to bands, singers, and music and movie studios. Composers may promote themselves through personal websites or through online video or audio of their musical work.

### **Important Qualities**

***Discipline.*** Talent is not enough for most music directors and composers to find employment in this field. They must constantly practice and seek to improve their technique and style.

***Interpersonal skills.*** Music directors and composers need to work with agents, musicians, and recording studios. Being friendly, respectful, open to criticism as well as praise, and enjoying being with others can help music directors and composers work well with a variety of people.

***Leadership.*** Music directors and composers must guide musicians and singers by preparing musical arrangements and helping them achieve the best possible sound.

***Musical talent.*** To become a music director or composer, one must have musical talent.

***Perseverance.*** Attending auditions and submitting compositions can be frustrating because it may take many different auditions and submissions to find a job. Music directors and composers need determination and perseverance to continue attending auditions and submitting work after receiving many rejections.

***Promotional skills.*** Music directors and composers need to promote their performances through local communities, word of mouth, and social media platforms. Good self-promotional skills are helpful in building a fan base and getting more work opportunities.

### **Training**

Music directors and composers who are interested in classical music may seek additional training through music camps and fellowships. These programs provide participants with classes, lessons, and performance opportunities.

### **Work Experience in a Related Occupation**

Often music directors and composers work as musicians or singers in a group, choir, or orchestra before they take on a leadership role. They use this time to master their instrument and gain an understanding of how the group functions.

*Id.* at <http://www.bls.gov/ooh/entertainment-and-sports/music-directors-and-composers.htm#tab-4> (last visited July 28, 2014).

Although the *Handbook* indicates that a bachelor's degree is typically required for those wishing to work as a choir director, it does not state that it is a mandatory requirement and, more importantly, it does not state that the degree must be in a specific specialty. Accordingly, the *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty is normally the minimum requirement for entry into this occupational category.

We will turn next to DOL's Occupational Information Network (O\*NET OnLine), an alternative authoritative source cited by counsel. We find that O\*NET OnLine does not establish that the proffered position qualifies as a specialty occupation under the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. In general, O\*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a standard entry requirement for a given position, as O\*NET OnLine's Job Zone designations make no mention of the specific field of study from which a degree must come. As was noted previously, we interpret 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 proposed position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Furthermore, the Specialized Vocational Preparation (SVP) ratings, which are cited within O\*Net OnLine's Job Zone designations, are meant to indicate only the total number of years of vocational preparation required for a particular position. The SVP ratings do not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require.

Where, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies this criterion by a preponderance of the evidence standard, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. 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." Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. In this case, the *Handbook* does not support the proposition that the proffered position satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), and the record of proceeding does not contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category would be sufficient in and of itself to establish that a bachelor's or higher degree in a specific specialty or its equivalent "is normally the minimum requirement for entry into [this] particular position."

Finally, we note again that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within

its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation. In conclusion, as the evidence in the record of proceeding does not establish that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we find that the petitioner has not satisfied 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)).

Here and as already discussed, the evidence of record does not establish that the petitioner's proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Nor do the letters from Sr. Pastor [REDACTED]

satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). While both individuals assert that their music directors hold a bachelor's degree in music, the record contains no evidence supporting their claims. Furthermore, these letters provide very little insight into either organization and lack details such as the size of their congregations, the size of their workforces, the missions of their organizations, the types and frequencies of activities conducted, or other information that would otherwise demonstrate that they are in fact similar to the petitioner. Nor does either individual specify the number of music directors his respective organization has recruited and employed, and neither provides the names of any music directors they employ or have employed in the past, copies of their degrees, or payroll documentation. 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)). Finally, while the assertions of Pastors Kim and Lee with regard to an industry-wide recruiting and hiring standard are acknowledged, the record contains no evidence to support their assertions. See *id.*

We also find that the petitioner's reliance upon the job vacancy advertisements is misplaced. In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of four advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions. The advertisements provided, however, establish at best that although a bachelor's degree may be generally required, a bachelor's degree in a *specific specialty* or its equivalent is not.

However, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent was required, they would still fail to establish that the submitted advertisements are from similar organizations in the same industry. The postings lack sufficient information regarding the actual employers to conduct a legitimate comparison of the organizations to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations. Without such evidence, job advertisements submitted by a petitioner are 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 to claim that the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici* at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

Furthermore, 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. Moreover, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices. Also, given that two of the advertising organizations state the size of their congregations as 750 and 1,000, it appears as though they are significantly larger than the petitioner.<sup>12</sup> Finally, we note that two the announcements require work experience in addition to the degree requirement. The proffered position, however, is a Level I, entry-level position.

Moreover, even if the job announcements did support a finding that music director positions require a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings which 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, or the equivalent, for entry into the occupation in the United States.<sup>13</sup>

For all of these reasons, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a

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<sup>12</sup> The petitioner stated that it has approximately 100 members in its congregation.

<sup>13</sup> Also, although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from less than a dozen job postings with regard to the common educational requirements for entry into parallel positions in similar religious 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").

requirement for at least a bachelor's degree in a specific specialty or its equivalent that is common (1) to the petitioner's industry and (2) for positions in that industry that are both (a) parallel to the proffered position and (b) located in organizations that are similar to the petitioner.

Next, we find that the evidence of record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

In the instant case, the evidence of record does not credibly demonstrate relative complexity or uniqueness as aspects of the proffered position. Specifically, it is unclear how the music director position, as described, necessitates the theoretical and practical application of a body of highly specialized knowledge such that a person who has attained a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. Rather, we find that, as reflected in this decision's earlier quotation of duty descriptions from the record of proceeding, the evidence of record does not distinguish the proffered position from other positions falling within the "Music Directors and Composers" occupational category, which, the *Handbook* indicates, do not necessarily require a person with at least a bachelor's degree in a specific specialty or its equivalent to enter those positions.

We incorporate here by reference and reiterate our earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the analysis of the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate selected by the petitioner, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that he will receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy.

Accordingly, given the *Handbook's* indication that typical positions located within the "Musical Directors and Composers" occupational category do not require at least a bachelor's degree in a specific specialty, or the equivalent, for entry, it is unclear how a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* contain such a requirement.

Finally, we observe that the petitioner has indicated that the beneficiary's academic preparation makes her qualified for the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. In the instant case, the petitioner does not establish which of the proposed duties, if any, would render the proffered position so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Again, the petitioner did not 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.

For all of these reasons, it cannot be concluded that the evidence of record satisfies the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty or its equivalent for the position.

Our review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. Additionally, 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 the performance requirements of the proffered position.<sup>14</sup>

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

In response to the director's RFE, the petitioner submitted information pertaining to the credentials of two individuals it claims to have previously employed as music directors. However, the record of proceeding does not establish that the petitioner ever employed either individual; the petitioner's statement claiming it paid the salaries of both individuals is not sufficient. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici* at 165 (*citing Matter of Treasure Craft of California*, 14 I&N Dec. at 190).<sup>15</sup> Nor does the petitioner explain by what objective means it has determined

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<sup>14</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within the same occupation.

<sup>15</sup> Even if the petitioner had submitted credible payroll documentation, it would still not be considered. The director requested this evidence in her June 20, 2013 RFE, and the petitioner elected not to provide it. New documentation submitted on appeal that was encompassed by the director's RFE is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether

the foreign education of [REDACTED] equivalent to a U.S. bachelor's degree in a specific specialty.

We therefore find that the record of proceeding does not establish the prior history of recruiting and hiring required to satisfy this particular criterion. Accordingly, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, we find that the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specific specialty or its equivalent.

In reviewing the record of proceeding under this criterion, we reiterate our earlier discussion regarding the *Handbook's* entries for positions falling within the "Music Directors and Composers" occupational category. Again, the *Handbook* does not indicate that a bachelor's degree in a specific specialty, or the equivalent, is a standard, minimum requirement to perform the duties of such positions (to the contrary, it indicates precisely the opposite), and the record indicates no factors that would elevate the duties proposed for the beneficiary above those discussed in the *Handbook*. With regard to the specific duties of the position proffered here, we find that the record of proceeding lacks sufficient, credible evidence establishing that they are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's degree in a specific specialty, or the equivalent.

Moreover, we incorporate our earlier discussion regarding the wage-level designation on the LCA, which is appropriate for duties whose nature is less complex and specialized than required to satisfy this criterion. We find that both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, by the submission of an LCA certified for a wage-level I, the petitioner effectively attests that the proposed duties are of relatively low complexity as compared to others within the same occupational category. This fact is materially inconsistent with the level of complexity required by this criterion.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

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

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted for the first time on appeal.

**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 [emphasis in original].

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) (last visited July 28, 2014).

The pertinent guidance from DOL, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level 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.

*Id.*

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this Level II wage-rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of the petitioner's Level I wage-rate designation.

Further, we note the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

**Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may

have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

*Id.*

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

**Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

*Id.*

As already noted, by virtue of this submission, the petitioner effectively attested to DOL that the proffered position is a low-level, entry position relative to others within the same occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Although counsel cites two unpublished AAO decisions in her appellate brief, she does not provide copies of those decisions.

When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [ . . . ] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, we will not request and/or obtain copies of the unpublished decisions cited by counsel.

If a petitioner wishes to have unpublished decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself through its own legal research and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i). In the instant case, the petitioner failed to submit a copy of the unpublished decisions. As the record of proceeding does not contain any evidence of the unpublished decisions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding.

Nevertheless, even if this evidence had been submitted and even if it had been determined that the facts in those cases were analogous to those in this proceeding, those decisions are not binding on USCIS. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

As the evidence of record does not satisfy at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

We do not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. Therefore, we need not and will not address the beneficiary's qualifications further.

## VI. CONCLUSION AND ORDER

The petition will be denied and the appeal dismissed for the above stated reasons with each considered as an independent and alternative basis for the decision. As the grounds discussed above are dispositive of the petitioner's eligibility for the benefit sought in this matter, we will not address and will instead reserve our determination on the additional issues and deficiencies that we observe in the record of proceeding with regard to the approval of the H-1B petition.

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 143, 145 (3d Cir. 2004) (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 our 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. The petition is denied.