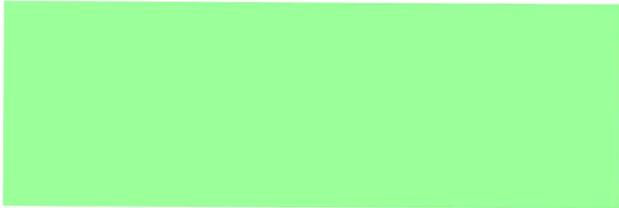


(b)(6)

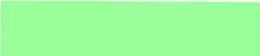
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

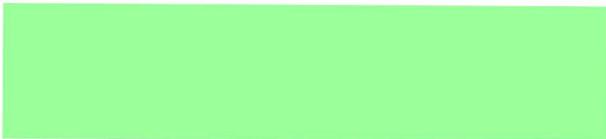


U.S. Citizenship
and Immigration
Services



DATE: **MAY 05 2014**

OFFICE: CALIFORNIA 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 before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

In the Form I-129 visa petition, the petitioner describes itself as a contract manufacturer providing product solutions for industrial companies, and the petitioner states that it was established in 1980.¹ In order to employ the beneficiary in a position to which it assigned "Supply Chain Cost Estimator" as the job title, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, 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 satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

I. EVIDENTIARY STANDARD APPLIED ON APPEAL

As a preliminary matter, and in light of counsel's references to the requirement that the AAO apply the "preponderance of the evidence" standard, the AAO affirms that, in the exercise of its appellate review in this matter, as in all matters that come within its 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, 375-376 (AAO 2010). 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.

¹ A review of online corporate records for the State of Michigan reveals that, subsequent to the filing of the instant petition, the petitioner filed a Certificate of Amendment to its Articles of Incorporation, amending its corporate name from [REDACTED] Inc. to [REDACTED] Inc.

* * *

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

* * *

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds 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*, the AAO finds that the director’s determinations in this matter were correct. Upon its 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, the AAO finds that the petitioner has not established that its claims are “more likely than not” or “probably” true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner’s claims are “more likely than not” or “probably” true.

II. SPECIALTY OCCUPATION: LEGAL FRAMEWORK

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

The primary issue for consideration is whether the petitioner's proffered position qualifies as a

specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

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

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

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

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

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

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To make this determination, the AAO turns to the record of proceeding. To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. 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."

III. CHRONOLOGICAL OVERVIEW

In the petition signed on March 7, 2013, the petitioner indicates that it is seeking the beneficiary's services as a "supply chain cost estimator" on a full-time basis at the rate of pay of \$38,000 per year.

In its March 1, 2013 letter of support the petitioner declared that "the duties of this position simply cannot be performed without the knowledge contained in a bachelor's or higher degree, or the equivalent, related to this field of work." The question before us is whether, in fact, the petitioner has presented sufficient relevant, probative, and credible evidence to lead the AAO to believe that the petitioner's claims are "more likely than not" or "probably" true.

That letter also asserted that the beneficiary "clearly has met that requirement," and submitted a copy of the beneficiary's Bachelor of Arts degree in Supply Chain Management and associated academic transcript from [REDACTED] in support of this contention.

The petitioner's March 1, 2013 letter of support enumerated 12 duties that the proffered position would require the beneficiary to perform.

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the job prospect corresponds to the occupational classification of "Cost Estimators" - SOC (ONET/OES Code) 13-1051, at a Level I (entry level) wage.

The petitioner also submitted (1) an organizational chart for its organization; (2) a copy of the employment agreement signed by both the beneficiary and the petitioner on March 7, 2013; (3) copies of the beneficiary's most recent earning statements; (4) copies of the beneficiary's Wage and Tax Statements (W-2 forms) for 2011 and 2012; and (5) a copy of the beneficiary's most recent federal tax return (Form 1040NR-EZ).

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 24, 2013. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted. The AAO notes that the director specifically requested the petitioner to provide evidence that would:

- explain the beneficiary's proposed duties and responsibilities;
- indicate the percentage of time devoted to each duty;
- state the minimum educational requirements for these duties; and
- explain how the beneficiary's education related to the position.

On July 9, 2013, former counsel for the petitioner responded to the RFE. Former counsel resubmitted a copy of the petitioner's March 1, 2013 letter of support and copies of the beneficiary's diploma and transcript, contending that such evidence "is sufficient and provides satisfactory support to find that [the petitioner] has met its burden in this case." Counsel also provided a document entitled "Academic Credential Evaluation, Position Evaluation & Expert Opinion" from [REDACTED] Ph.D., an Evaluator for [REDACTED] Inc.). Counsel for the petitioner also submitted a copy of the occupational summary for "Cost Estimators" found in the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)*.

The director reviewed the information provided by the petitioner to determine whether the petitioner had established eligibility for the benefit sought. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on August 12, 2013. Newly-retained counsel submitted an appeal of the denial of the H-1B petition. On appeal, counsel submitted a brief and additional evidence, including a new letter for consideration as an expert opinion in support of the contention that the proffered position is a specialty occupation.

IV. PRELIMINARY OBSERVATIONS AND FINDINGS

Before applying the criteria at 8 C.F.R. § 214.2(h)(4) to the evidence, we shall enter some findings that have a material bearing on the application of several of those criteria to this particular record of proceeding.

A. Insufficient Evidence about the Proffered Position and Its Duties

The petitioner's March 1, 2013 letter of support enumerated 12 sets of duties that the proffered position would require the beneficiary to perform. The letter describes them as follows:

1. Manage/control daily processing of Requests for Estimate that may include complex mechanical drawings, collect data, prepare intricate spreadsheets and maintain continuity between suppliers, sales teams, and engineering personnel.
2. Maintain/manage proposal logs, which require frequent daily updating assembled from records and correspondence between multiple department heads.
3. Communicate precisely with Asian suppliers on all relative issues concerning production manufacturing and business related contractual obligations.

4. Compile and maintain records of suppliers/customers through the use of internal/external database sources.
5. Constantly communicate with other members of [the petitioner] to insure effective implementation of your responsibilities and be of assistance in the accomplishment of their growth and progress.
6. Assume accountability of all of your actions relative to your position within the company.
7. Develop a thorough understanding of the business in order to be a key participant in the growth of [the petitioner].
8. Create supplier matrix reports as directed.
9. Develop a proactive supplier contact process that maintains close contact with all of the current and potential suppliers.
10. Maintain up-to-date records of key measures of performance on supplier activities.
11. Keep aware of competitive activity, and provide regular input to management as to your observations.
12. Complete special projects as assigned.

We have fully considered that through the above list the petitioner has ascribed to the proffered position more than twelve distinctly separate functions that the beneficiary would have to perform. While the petitioner has thus identified separate functional elements of the proffered position, we also find that the petitioner describes each of those functional elements in generalized and relatively abstract terms. Take, for instance, the first duty description, which reads:

Manage/control daily processing of Requests for Estimate that may include complex mechanical drawings, collect data, prepare intricate spreadsheets and maintain continuity between suppliers, sales teams, and engineering personnel.

The evidence of record does not expand or supplement this description with additional information and/or documentation that communicates the substantive nature of the "manage/control" activities in which the beneficiary would engage with the Requests for Estimate.

Likewise, the record of proceeding does not establish either the substantive nature of the work required, or the educational or education-equivalent level of knowledge in any specific specialty that such work would require, to actually "Maintain/manage proposal logs"; "Communicate precisely with Asian suppliers" on the general issues noted in the list; "Compile and maintain the

records of supplier/customers"; "Create supplier matrix reports as directed"; and perform any of the other enumerated duties. In this regard, we also note that there is no well-known, generally shared knowledge upon which the AAO can take administrative notice of the nature and academic attainment in any specialty that the generally described functions of the proffered position would require.

Additionally, we find that, as evident in the list of duties itself and as reflected in our related comments and findings above, the evidence of record develops neither the proffered position nor its constituent duties in sufficient detail to distinguish either of them as more specialized, complex, and/or unique than others in the position's occupational group that are performed by persons without at least a bachelor's degree in a specific specialty, or the equivalent.

B. Documents Submitted for Consideration as Expert Opinions

The petitioner submitted two letters for consideration as expert opinions. The first letter, prepared for the petitioner by a Professor [REDACTED] Ph.D., was submitted as part of the petitioner's response to the RFE. The author of the second letter, which is submitted on appeal, identifies himself as [REDACTED] DBA, CPIM, PMP, Professor of Operations and Supply Chain Management at the [REDACTED]

1. Regarding Dr. [REDACTED] Opinion

The first letter, from [REDACTED] Ph.D., of [REDACTED] Inc., was submitted in response to the RFE. In this letter, dated July 9, 2013, Dr. [REDACTED] states that he is a tenured Professor of Computer Science at [REDACTED] in Somerville, New Jersey, and has been teaching Computer Information Systems (CIS) and Computer Science (CS) courses at the college for 31 years. He further states that he has done over 14,000 academic/work experience credential evaluations in addition to many expert opinion letters for immigration purposes. At the outset, we must note that this professor's references to his experience in rendering opinions and evaluations are carry little weight as they do not establish either the quality or accuracy of those opinions and evaluations or the weight that they may have been accorded. In any event, in deciding the weight of any opinion submitted as expert, we look primarily to the extent and quality of the factual and analytical foundations that the opining person's submission presents for his or her findings and conclusions.

Regarding the proffered position, Dr. [REDACTED] states: "Because of the complex nature of the job responsibilities this job indeed is of a specialty occupation and it requires a minimum of a Bachelor's degree with a major in Supply Chain Management." Dr. [REDACTED]'s letter does not demonstrate that his opinion is based upon sufficient information about the particular "supply chain cost estimator" position proposed here. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

Specifically, the content of Dr. [REDACTED]'s letter does not demonstrate that his opinion is based upon sufficient information about the particular position at issue. First, the letter reveals that his knowledge of the position is limited to the duties submitted by the petitioner to USCIS – which, as we have stated, are relatively abstract. Second, Dr. [REDACTED] does not relate any personal observations of those operations or of the work that the beneficiary would perform, nor does he state that he has reviewed any projects or work products related to the proffered position. Third, Dr. [REDACTED]'s opinion does not relate his conclusions to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for his conclusions about the educational requirements for the particular position here at issue. In this regard, we find that the professor's letter is perfunctory and conclusory, particularly in that it concludes – without substantive discussion and analysis – that "the complex nature of the job responsibilities" constitutes a position requiring at least a bachelor's degree in Supply Chain Management.

Therefore, the AAO accords no probative weight to this document towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

2. Regarding Dr. [REDACTED]'s Opinion

On appeal, counsel for the petitioner submits a second letter for consideration as an expert opinion. This one is from [REDACTED], DBA, CPIM, PMP, Professor of Operations and Supply Chain Management at the [REDACTED]

Dr. [REDACTED] contends that he has extensive experience, both professionally and academically, in the area of cost estimating in supply chain management based on his work as a Professor of Operations and Supply Chain Management at the [REDACTED] School of Business Administration for over 30 years, as well as his certification in Production and Inventory Management (CPIM) and his certification as a Project Management Professional (PMP). Dr. [REDACTED] contends that he has developed an awareness of the educational needs of various positions in these fields through these experiences.

Regarding the proffered position, Dr. [REDACTED] states:

It is my expert opinion based on a review of the job description, the nature of the company's business, etc. as well as my familiarity with the requirements in this field, that the position of Supply Chain Cost Estimator is a qualified "specialty occupation" and that [the beneficiary] has completed the necessary courses to provide him with the specialized knowledge needed to succeed in this position.

We find that Dr. [REDACTED]'s opinion letter fails to convey whatever substantive analysis he made of the proffered position. In fact, the content of Dr. [REDACTED]'s letter also fails to demonstrate that he based his opinion upon sufficient information about the particular position at issue. The letter provides no information regarding the nature of the information upon which his opinion is based, merely claiming that it is based on "the petitioner's description of the position offered to [the

beneficiary]." Dr. [REDACTED] does not summarize this description or identify any specific duties that influenced his opinion in this matter. Moreover, Dr. [REDACTED] does not relate any personal observations of the petitioner's operations or of the work that the beneficiary would perform, nor does he state that he has reviewed any projects or work products related to this particular proffered position. Dr. [REDACTED]'s opinion, like the opinion of Dr. [REDACTED], does not relate his conclusions to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for his conclusions about the educational requirements for the particular position here at issue. Rather, Dr. [REDACTED] references his academic and professional experience in the field as a basis for determining that this position of supply chain cost estimator requires a course of study that focuses on cost estimating and supply chain management. However, Dr. [REDACTED] fails to anchor his conclusion in discussions and explanations about particular characteristics of the actual duties as they would actually be performed that support his conclusion.

Finally, the AAO notes that Dr. [REDACTED] claims that "[the beneficiary's] prior work experience provides him with the practical skills which when combined with his formal theoretical training will ensure his success in the proffered position." The record contains no evidence of the beneficiary's prior work experience, other than earnings statements and W-2 forms indicating that he was previously employed by the petitioner. There is no claim in the record that he was previously employed in the position of supply chain cost estimator, nor does the petitioner submit a resume or other synopsis of the beneficiary's prior work experience. The AAO further notes that the beneficiary's undergraduate degree in Supply Chain Management was completed in August 2012, less than 8 months prior to the filing of the instant petition. The AAO, therefore, questions the nature and duration of the beneficiary's prior work experience upon which Dr. Teplitz relies, since there is no explanation with regard to the beneficiary's prior work history nor does Dr. [REDACTED] identify the work history upon which his conclusion is based.²

Again, the AAO may, in its discretion, use as an advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791.

The AAO reviewed the record of proceeding in its entirety and, as will be discussed later in the decision, agrees with the director that the petitioner has not established eligibility for the benefit sought. Moreover, the AAO has identified several, additional issues that preclude the approval of the H-1B petition that were not identified by the director. Consequently, even if the petitioner overcame the grounds for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought.³

² It appears that during the course of his past employment with the petitioner, the beneficiary was still a student pursuing his undergraduate degree.

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

C. Implications of the Submission of the LCA Certified for Level I Wage-Rate

More specifically, the record of proceeding contains discrepancies between (1) what the petitioner claims about the level of responsibility and requirements inherent in the proffered position and (2) the lower level of responsibility and requirements conveyed by the wage level indicated in the LCA submitted in support of petition.

As previously discussed, the petitioner submitted an LCA in support of the petition that designated the job prospect in this matter to the corresponding occupational category of "Cost Estimators" - SOC (ONET/OES) code 13-1051. The wage level for the proffered position in the LCA corresponds to a Level I (entry) position. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.⁴ The LCA was certified on March 8, 2013. The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) 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.⁵

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

⁴ The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Office of Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

⁵ 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.

duties.⁶ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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

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

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.

The petitioner and its counsel claim that the proffered position involves complex, unique and/or specialized duties. In the March 1, 2013 letter of support, the petitioner states that the beneficiary "will be providing highly specialized and complex duties" at the petitioner's headquarters and that the beneficiary will "develop a thorough understanding of the business in order to be a key participant in [the petitioner's] growth." Moreover, the petitioner claimed that in the course of performing his duties, the beneficiary would prepare intricate spreadsheets and complex mechanical drawings. On appeal, counsel further states that the job duties provided in the support letter demonstrated the complex nature of the position.

Furthermore, within the record, the petitioner claims that the beneficiary's academic background, qualify him for the proffered position, noting specifically that his bachelor's degree in supply chain management sufficiently qualifies him to perform the duties of the proffered position. Although a potential employee's credentials to perform a particular job are relevant only when the job is found

⁶ 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.

to be a specialty occupation, the AAO observes that the petitioner emphasized the beneficiary's academic credentials as relevant in performing the duties of the proffered position.

Upon review of the assertions regarding the proffered position, the AAO must question the stated requirements for the proffered position, as well as the level of complexity, independent judgment and understanding that are actually needed for the proffered position, as the LCA is certified for a Level I entry-level position. The petitioner's characterization of the position and the claimed duties, responsibilities and requirements as described in the record of proceeding conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. Furthermore, as indicated by the DOL guidance, a Level I designation is appropriate for a position such as a research fellow, a worker in training, or an internship.

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 (7th 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]").

The prevailing wage of \$37,066 per year on the LCA corresponds to a Level I wage (at the time of certification) for the occupational category of "Cost Estimators" for Oakland County (Warren-Troy-Farmington Hills, Michigan).⁷ Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$49,130 per year for a Level II position, \$61,214 per year for a Level III position, and \$73,278 per year for a Level IV position.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition.⁸ To permit otherwise

⁷ For additional information regarding the prevailing wage for cost estimators in Cook County, see the All Industries Database for 7/2012 - 6/2013 for this occupation at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?code=13-1051&area=16974&year=13&source=1> (last visited February 19, 2014).

⁸ 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

would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary.

The above-discussed aspects of the LCA submitted in support of the petition undermine 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).

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

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

While DOL is the agency that certifies LCA applications before they are submitted to 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):

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

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. 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

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).

elsewhere in the petition, the petitioner would have failed to submit an 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 and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. The AAO finds 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 enclosed LCA 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 a level of work and requirements, which if accepted as accurate would result in the beneficiary being offered a salary below that required by law. As a result, even if it were determined that the proffered position were a higher-level and more complex position as claimed in the petition in support of the petitioner's assertions that this position qualifies as a specialty occupation, the petition could still not be approved for these additional reasons.⁹

V. ANALYSIS OF THE SPECIALTY OCCUPATION ISSUE

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. For efficiency's sake, the AAO hereby incorporates this decision's earlier discussions and findings into its application, below, of the regulatory criteria to the evidence in this record of proceeding.

The primary issue for consideration is whether the petitioner's proffered position qualifies as a

⁹ Fundamentally, it appears that (1) the petitioner previously claimed to DOL that the proffered position is a Level I, entry-level position to obtain a lower prevailing wage; and (2) the petitioner is now claiming to USCIS that the position is a higher-level and more complex position in order to support its claim that the position qualifies as a specialty occupation. The petitioner cannot have it both ways. Either the position is 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.

specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

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

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

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

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

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

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among

similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when applying these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹⁰ As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Cost Estimators."

The AAO reviewed the chapter of the *Handbook* entitled "Cost Estimators," including the sections regarding the typical duties and requirements for this occupational category.¹¹ However, the *Handbook* does not indicate that "Cost Estimators" comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. It follows that a particular position's inclusion within this occupational group is not in itself sufficient to establish the position as one for which, in the language of the first criterion, "[a] baccalaureate or higher degree is normally the minimum requirement for entry."

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

Education

Increasingly, employers prefer candidates who have a bachelor's degree. A strong background in mathematics is essential.

Construction cost estimators generally need a bachelor's degree in an industry-related field, such as construction management, building science, or engineering. Those interested in estimating manufacturing costs typically need a bachelor's degree in engineering, physical sciences, mathematics, or statistics. Some employers

¹⁰ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2014 – 2015 edition available online. The AAO hereby incorporates into the record of proceeding the chapter of the *Handbook* regarding "Cost Estimators."

¹¹ For additional information regarding the occupational category "Cost Estimators," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Cost Estimators, on the Internet at <http://www.bls.gov/ooh/business-and-financial/cost-estimators.htm#tab-1> (last visited April 1, 2014).

accept candidates with backgrounds in business-related disciplines, such as accounting, finance, and business.

* * *

Work Experience in a Related Occupation

Increasingly, employers prefer that cost estimators—particularly those without a bachelor's degree—have previous work experience in the construction industry. For example, experienced electricians and plumbers can become construction cost estimators if they have the necessary construction knowledge and math skills.

Candidates interested in becoming cost estimators also can gain experience through internships and cooperative education programs.

Licenses, Certifications, and Registrations

Voluntary certification can show competence and experience in the field. In some instances, employers may require professional certification before hiring. The American Society of Professional Estimators, the Association for the Advancement of Cost Estimating International (also known as AACE International), and the International Cost Estimating and Analysis Association each offer a variety of certifications.

To become certified, estimators generally must have at least 2 years of estimating experience and must pass a written exam.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Cost Estimators, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/cost-estimators.htm#tab-4> (last visited April 1, 2014).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the wage level of the proffered position as a Level I position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that her 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 as a research fellow, a worker in training, or an internship.

The *Handbook* does not support the assertion that a baccalaureate or higher degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry into the occupation. The *Handbook* indicates that employers increasingly prefer candidates who have a bachelor's degree. Obviously, however, a *preference* is not a minimum degree *requirement*.

Further, the *Handbook* also points out that there are a variety of acceptable fields of study and backgrounds for this occupation, including construction management, building science, engineering, physical sciences, mathematics, statistics, and business-related disciplines (including accounting, finance, and business). The *Handbook* further states that employers prefer that cost estimators, particularly those without a bachelor's degree, have previous work experience, which can be gained in the industry, as well as through internships and cooperative education programs. The *Handbook*, however, does not describe the extent of the preferred work experience in either quantitative or qualitative terms.

The *Handbook* indicates that some employers may require professional certification before hiring an employee. Although the petitioner does not report that certification is required for the proffered position, the AAO observes that the narrative of the *Handbook* states that estimators generally must have at least two years of estimating experience and must pass a written exam for certification. The *Handbook* does not indicate that certification requires at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO reiterates that the *Handbook* does not indicate that at least a bachelor's degree is normally the minimum requirement for entry into the occupation. Rather, the *Handbook* indicates that some employers prefer candidates with a degree.

However, assuming *arguendo* that the *Handbook* were read as stating a degree requirement (which it does not), we note that there would still be insufficient grounds to read the *Handbook* as supporting the proposition that the entrance into the Cost Estimators occupational group normally requires at least a bachelor's degree in a specific specialty or in one of a closely connected group of specialties.

In this regard, the AAO notes that, in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's of higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added)."

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and

responsibilities of the particular position.

Here, the *Handbook* indicates that "construction cost estimators generally need a bachelor's degree in an industry-related field, such as construction management, building science, or engineering" and manufacturing cost estimators "typically need a bachelor's degree in engineering, physical sciences, mathematics, or statistics." The *Handbook* further indicates, "Some employers accept candidates with backgrounds in business-related disciplines, such as accounting, finance, and business." Thus, a wide-range of disparate fields and backgrounds are considered relevant for entry into the occupation. The record lacks evidence establishes how each of these is directly related to the duties and responsibilities of the position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act.

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position satisfies this criterion, notwithstanding the absence of the *Handbook's* support on the issue. As previously mentioned, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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

Next, the AAO will review the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source), reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. The petitioner also did not submit any documentation from the industry's professional association stating that it has made a degree a minimum entry requirement. The petitioner also failed to submit evidence from firms or individuals in the industry in support of this criterion of the regulations.

Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent.

As earlier noted, we here incorporate into this analysis our earlier comments and findings with regard to the relatively abstract descriptions of the proffered position and its constituent duties as an insufficient basis for establishing the substantive nature of the proffered position. Also, the evidence of record does not provide any substantial information with regard to the substantive nature of any matters that would actually engage the beneficiary. Also, there is virtually no concrete information regarding the petitioner's business operations, its products, or its manner of doing business. Thus, the petitioner did not establish how the beneficiary's day-to-day responsibilities relate to the petitioner's business operations and likewise failed to establish how the proffered position is so complex or unique that it can only be performed only by an individual with a baccalaureate (or higher degree) in a specific specialty, or its equivalent.

The petitioner has not provided sufficient credible evidence to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. That is, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position (through the job duties, the petitioner's business operations or by any other means) that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent.

Additionally, there are the aforementioned implications of the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Cost Estimators" at a Level I (entry level) wage, which is the lowest of four assignable wage levels. The wage level of the proffered position indicates that (relative to other positions falling under this occupational category) the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely

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

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique in comparison to others within the occupation, 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."¹²

Therefore, the evidence of record does not establish that this position is significantly different from other supply chain cost estimator positions such that it refutes the *Handbook's* information to the effect that a bachelor's degree in a specific specialty, or its equivalent, is not required for entry into the occupation. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than cost estimator positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The petitioner claims that the beneficiary's academic background will assist him in carrying out the duties of the proffered position. However, as previously mentioned, 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 (or its equivalent). The petitioner does not sufficiently explain or clarify 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.

Thus, upon review of the record of proceeding, the AAO finds that the petitioner has failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-

¹² For additional information on wage levels, 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.

caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or the equivalent.

While a petitioner may believe that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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

In any event, the petitioner has not addressed this criterion with probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the evidence of record 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.

We note that the petitioner and its counsel assert 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. However, as evident in our earlier quotation of the duty descriptions themselves, and as reflected in our earlier comments and findings with regard to the relatively abstract level of the duty descriptions - which we here incorporate - we find that relative specialization and complexity have not been developed as an aspect of the proffered duties, let alone as an aspect distinguishing their nature as more specialized and complex than the nature of the duties of other cost estimator positions not requiring knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty.

Additionally, as evidence countervailing the petitioner's claims under this criterion, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as an entry-level position relative to others within the occupational category of "Cost Estimators."

Again, the petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties compared to others within the occupation as such a position would likely be classified at a higher-level, such as a Level III (experienced) or IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

For the reasons discussed above, the AAO, concludes that the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Finally, the AAO notes that counsel cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for the proposition that "[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge."

The AAO agrees with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." 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 (or its equivalent)" requirement of

section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added). For the aforementioned reasons, however, the petitioner has failed to meet its burden and establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties.

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.¹³ The AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Additionally, counsel further refers to unpublished decisions in which the AAO determined that the positions proffered in those matters qualified as specialty occupations. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. Further, 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.

USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence. The evidence submitted, however, fails to establish that the petitioner's proffered position qualifies for the requested classification under the applicable statutory and regulatory provisions. It is not the volume of documentation that establishes eligibility for the benefit sought, but rather the relevance, probative value, and credibility of the documentation – both individually and within the context of the totality of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

¹³ It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. The AAO further notes that the service center director's decision was not appealed to the AAO. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, the AAO may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by the AAO in its *de novo* review of the matter.

As the petitioner has not satisfied 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.

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

VI. CONCLUSION

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

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

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

ORDER: The appeal is dismissed.