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U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: **MAY 08 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,

Per Michael T. Kelly
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. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as an 11-employee developer and manufacturer of scuba diving and underwater communication equipment¹ established in 1950. In order to employ the beneficiary in what it designates as a part-time logistics analyst position at a salary of \$26.39 per hour² the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the evidence of record does not demonstrate that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (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.

On appeal counsel for the petitioner indicates that the "preponderance of the evidence" standard is relevant to this matter. With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part 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" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 339920, "Sporting and Athletic Goods Manufacturing." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "339920 Sporting and Athletic Goods Manufacturing," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited April 23, 2014).

² The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Logisticians" occupational classification, SOC (O*NET/OES) Code 13-1081, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

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.

Applying the preponderance of the evidence standard, the AAO finds that upon review of the entire record of proceeding, the evidence of record does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. SPECIALTY OCCUPATION

The AAO will now address the director's determination that the evidence of record has not established that the proffered position is a specialty occupation. 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. Accordingly, the appeal will be dismissed, and the petition will be denied.

As indicated above, the petitioner seeks to employ the beneficiary in a position that it describes as a "Logistics Analyst" on a part-time basis. The petitioner stated at page 5 of the Form I-129 that the beneficiary would work 25 hours per week, and the petitioner stated on both the Form I-129 and the LCA that it would pay him a salary of \$26.39 per hour.

In its March 26, 2013 letter, the petitioner described the proffered position as follows:

As a Logistics Analyst, Mr. [REDACTED] will be responsible for maintaining databases of logistics information and interpret data on logistics elements such as availability, maintainability, reliability, supply chain management, strategic sourcing or distribution, supplier management, or transportation. Additionally, Mr. [REDACTED] will work as a bridge between the U.S. and Italian Logistics Office using both Navision and QuickBooks. He will assist in managing a team of different professionals in Diving, Personal Protection, and Injection Molding fields in performing his duties.

Mr. [REDACTED] will be charged with preparing and updating monthly logistic schedules to assure delivery to production locations and coordinate product delivery schedules with customers. He will track product flows from origin to final delivery and works closely with providers to assure efficient and effective execution of defined processes and goods transportation. Mr. [REDACTED] will consult with assigned clients to understand their distribution networks and determine the logistics resources required to support equipment, safety, personnel and maintenance.

In an undated document attached to counsel's August 29, 2013 response to the director's RFE, the petitioner stated that the job description of the proffered position would include the following tasks:

- Manage the supply of logistics-related data to support customers in the day-to-day general areas of engineering, supply, configuration management and technical requirements;
- Consult with assigned clients to understand their distribution networks and determine the logistics resources required to support equipment, safety, personnel and maintenance;
- Negotiate with supply sources to meet the technical requirements of [REDACTED];
- Prepare and recommend operations and personnel budgets for approval;
- Monitor spending for adherence to budget, recommend variances as necessary;
- Coordinate movement of all purchased materials from suppliers to the plants and address any supply/supplier issues; and
- Responsible for all logistical operations and support across all distribution channels.

The petitioner further delineated the specific duties would include:

- Assembling organization and planning of injection molding 15%
- Review of the inventory and launching of the purchase/manufacturing orders plan 30%
- Quality control supervision 5%
- Inventory operations supervision and relevant professional improvements 25%

- Update of the quality control assurance company handbook (to keep all process/procedures available and updated 10%)
- Plan of molding and maintenance 15%

Before proceeding further, upon consideration of the totality of all of the petitioner's duty descriptions, position descriptions, explanations, and assertions, as well as the complete complement of documents submitted in support of the petitioner's specialty occupation claim, we find that the evidence in the record of proceeding does not establish relative complexity, specialization and/or uniqueness as distinguishing aspects of either the proposed duties or the position that they are said to comprise.

While the petitioner and counsel may claim that the nature of the proposed duties and the position that they are said to comprise elevate them above the range of usual Logistician positions and duties by virtue of their level of specialization, complexity, and/or uniqueness, the evidence of record does not support these claims. 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. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As evident in the list of duties quoted above, the record of proceeding presents the duties comprising the proffered position in terms of relatively abstract and generalized functions that lack sufficient detail and concrete explanation to establish the substantive nature of the work and associated applications of specialized knowledge that that their actual performance would involve. Take for example the following duty description:

Manage the supply of logistics-related data to support customers in the day-to-day general areas of engineering, supply, configuration management and technical requirements[.]

The evidence of record contains neither substantive explanation, work-product copies, or other documentation showing the range and volume of such "logistics-related data" that the beneficiary would have to manage. Likewise, the record does not illuminate what substantive work management in this area would involve. Likewise, we see that the petitioner does not provide substantive information with regard to the particular work, methodologies, and applications of knowledge that would be required for the percentage-assigned duties, such as "Inventory operations supervision and relevant professional improvements 25%."

As a final representative example of the generality of the petitioner's information about the proffered position and its duties, we note the statement that the beneficiary would "prepare and recommend operations and personnel budgets for approval." Here, as throughout the record's descriptions of the position's constituent duties, we find insufficient details for a factual foundation

that would substantively support a finding that the particular duty or aspect of the position is particularly complex, specialized, and/or unique. The record of proceeding simply lacks evidence of concrete aspects of the budgets that would engage the beneficiary, let alone any particular complexities that may reside in them.

The duties of the proffered position, and the position itself, are described in relatively generalized and abstract terms that do not relate substantial details about either the position or its constituent duties. Further, the AAO finds, that the petitioner has not supplemented the job and duty descriptions with documentary evidence establishing the substantive nature of the work that the beneficiary would perform, whatever practical and theoretical applications of highly specialized knowledge in a specific specialty would be required to perform such substantive work, and whatever correlation may exist between such work and associated performance-required knowledge and attainment of a particular level of education, or educational equivalency, in a specific specialty.

Thus, we conclude that, as generally described as all of the elements of the constituent duties are, they do not - even in the aggregate - establish the nature of the position or the nature of the position's duties as more complex, specialized, and/or unique than those of logistician positions that do not require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

To meet its burden of proof in establishing the proffered position as a 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 Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and

responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO 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.

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

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.³ As noted above, the LCA that the petitioner submitted in support of this petition was certified for a job offer falling within the "Logisticians" occupational category.

The *Handbook* states the following with regard to the duties of logisticians:

Logisticians analyze and coordinate an organization's supply chain—the system that moves a product from supplier to consumer. They manage the entire life cycle of a product, which includes how a product is acquired, distributed, allocated, and delivered. . . .

Logisticians typically do the following:

- Direct the allocation of materials, supplies, and finished products
- Develop business relationships with suppliers and customers

³ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.bls.gov/ooh>. The AAO's references to the *Handbook* are from the 2014-15 edition available online.

- Work to understand customers' needs and how to meet them
- Design strategies to minimize the cost or time required to move goods
- Review the success of logistical functions and identify areas for improvement
- Propose improvements to management and customers.

Logisticians oversee activities that include purchasing, transportation, inventory, and warehousing. They may direct the movement of a range of goods, people, or supplies, from common consumer goods to military supplies and personnel.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Logisticians," <http://www.bls.gov/ooh/business-and-financial/logisticians.htm> (last visited April 23, 2014).

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

Logisticians may qualify for positions with an associate's degree. However, as logistics become increasingly complex, more companies prefer to hire workers who have at least a bachelor's degree. Many logisticians have a bachelor's degree in business, industrial engineering, process engineering, or supply chain management.

Id. at <http://www.bls.gov/ooh/business-and-financial/logisticians.htm#tab-4> (last visited April 23, 2014).

The statements made by DOL in the *Handbook* regarding entrance into this occupational category do not support a finding that a bachelor's degree, or the equivalent, in a specific specialty is normally required. First, the *Handbook* specifically states that "[l]ogisticians may qualify for positions with an associate's degree." Furthermore, although a bachelor's degree may be preferred⁴ by "more" companies (though not even necessarily a majority), the *Handbook* makes clear that a bachelor's degree from the fields of business, industrial engineering, process engineering, or supply chain management would also suffice. The *Handbook's* recognition that a bachelor's or higher degree is "preferred" but not exclusively "required" by employers, strongly suggests that a bachelor's degree in a specific specialty, or the equivalent, is not a normal, minimum entry requirement for this occupation.

Additionally, although the *Handbook* indicates that a bachelor's or higher degree is preferred by more companies, it also indicates that baccalaureate degrees in various fields are acceptable for entry into the occupation. The *Handbook's* recognition that a bachelor's degree in "business" would provide sufficient preparation for a career as a logistician is further evidence that a bachelor's degree

⁴ It should be noted that preferences are not synonymous with requirements.

in a specific specialty, or the equivalent, is not required for this position. Although a general-purpose bachelor's degree, such as a degree in business administration without further specification, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. The fields referenced do not constitute a specific specialty; such a wide range of acceptable majors or academic concentrations is not indicative of a position requiring the theoretical and practical application of a distinct body of highly specialized knowledge in a specific specialty, as required by section 214(i)(1) of the Act and its implementing regulation at 8 C.F.R. § 214.2(h). A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business, without further specification, does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

Accordingly, as the *Handbook* indicates that entry into the Logisticians occupational group does not normally require at least a bachelor's degree or the equivalent in a specific specialty or its equivalent, it does not support the proffered position as satisfying this first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). That is, in light of the *Handbook's* information on the range of acceptable educational credentials for entry into the Logisticians occupational group, a position's inclusion within this group is not in itself sufficient to establish that position as one for which a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry.

Additionally, the materials from DOL's Occupational Information Network (O*NET OnLine) do not establish that the proffered position satisfies the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. O*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a 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, the AAO 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. The Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does 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. For all of these reasons, the O*NET OnLine excerpt submitted and referenced by counsel on appeal is of little evidentiary value to the issue presented on appeal.

Nor is the AAO persuaded by counsel's citation to the DOL's *Dictionary of Occupational Titles* (the *DOT*), and his argument regarding the value of an SVP rating of 7 to 8. The *DOT* does not support the assignments of SVP ratings of 7 to 8 as indicative that a particular position requires at least a bachelor's degree, or the equivalent, in a specific specialty. This is obvious upon reading Section II of the *DOT's* Appendix C, Components of the Definition Trailer, which addresses the

Specialized Vocational Preparation (SVP) rating system,⁵ and which states, in pertinent part, the following:

II. SPECIFIC VOCATIONAL PREPARATION (SVP)

Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience⁵ in other jobs.

Specific vocational training includes training given in any of the following circumstances:

- a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);
- b. Apprenticeship training (for apprenticeable jobs only);
- c. In-plant training (organized classroom study provided by an employer);
- d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);
- e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

⁵ U.S. Dep't of Labor, Office of Administrative Law Judges, OALJ Law Library, *Dictionary of Occupational Titles*, <http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTAPPC.HTM> (accessed April 23, 2014).

As noted at section A.1.1 in DOL's Employment and Training Administration's Clearance Package Supporting Statement to the Office of Management and Budget, which is accessible on the Internet at http://www.onetcenter.org/dl_files/omb2011/Supporting_StatementA.pdf, "The O*NET data supersede the U.S. Department of Labor's (DOL's) *Dictionary of Occupational Titles (DOT)*," and the *DOT* "is no longer updated or maintained by DOL." It should also be noted that the *DOT* was last updated more than 20 years ago, in 1991. See <http://www.oalj.dol.gov/libdot.htm>, the homepage of DOL's Office of Administrative Law Judges (OALJ), online edition of the *DOT's* Fourth Edition, Revised in 1991.

Level Time

- 1 Short demonstration only
- 2 Anything beyond short demonstration up to and including 1 month
- 3 Over 1 month up to and including 3 months
- 4 Over 3 months up to and including 6 months
- 5 Over 6 months up to and including 1 year
- 6 Over 1 year up to and including 2 years
- 7 Over 2 years up to and including 4 years
- 8 Over 4 years up to and including 10 years
- 9 Over 10 years

Note: **The levels of this scale are mutually exclusive and do not overlap.**

Thus, an SVP rating of 7 to 8 does not indicate that at least a four-year bachelor's degree is required to perform the duties of the proffered position or, more importantly, that such a degree must be in a specific specialty closely related to the requirements of that occupation. Therefore, the information from the DOT is not probative of the proffered position being a specialty occupation.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion within the Logisticians occupational group is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

Finally, it is noted 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.⁶

⁶ The *Prevailing Wage Determination Policy Guidance* (available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last visited April 23, 2014)) issued by DOL states the following with regard to Level I wage rates:

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].

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted

As the evidence in the record of proceeding does not establish that at least a baccalaureate 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 described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds 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 at 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent.

On appeal, counsel submitted an October 31, 2013 letter from [REDACTED] writing as the Vice President of [REDACTED]. In his letter, Mr. [REDACTED] stated that his company and the petitioner "are similar companies" in that both "make equipment or specialty apparel for scuba diving, both "exclusively work in providing quality products for scuba divers," and both "are small companies." According to the letter, Mr. [REDACTED]'s "responsibilities at [REDACTED] include hiring technical personnel." Mr. [REDACTED] states that he wrote the letter "as assistance to provide detail of our company's requirements for someone that would be serving in the position of Logistics Analyst." Notably, the author limits his comments to [REDACTED]'s practices.

After discussing [REDACTED]'s general recruiting process, the letter states:

When looking to fill a demanding position such as Logistic Analyst, someone with, a minimum of a Bachelor degree in a specialty field of Economics (or directly related),

an LCA certified for a Level I, entry-level position. The LCA's wage-level is appropriate for a proffered position that is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, by submitting an LCA with a Level I wage rate, the petitioner effectively attests that the beneficiary is only required to possess a basic understanding of the occupation; that she will be expected to perform routine tasks requiring 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.

with work experience in logistics or management is a must and would be part of the requirements for entry into the position. Ideally, an applicant with a Masters in Economics, with experience in logistics or management would be the best fit. In addition to these requirements [REDACTED] would also look for individuals with international experience since our designs are used worldwide. Because [REDACTED] operates internationally this type of experience is critical for liaising between different national operation centers. Other skills we would prefer include knowledge of Navision and QuickBooks. The individual factory needs between the various departments requires an applicant to be highly adaptive to a particular need.

The record contains no evidence that [REDACTED] has previously employed individuals in positions similar to the one proffered here, or that, if so, those individuals held a bachelor's degree in a specific specialty, or the equivalent. An equally fundamental and compelling reason for not according any significant weight to Mr. [REDACTED]'s letter is the fact that there is no documentary evidence in the record of proceeding that establishes that the practices that Mr. [REDACTED] attributes to [REDACTED] are representative of recruiting and hiring practices common to the industry with regard to positions parallel to the one proffered here that are found among organizations similar to this petitioner. Accordingly, we conclude that Mr. [REDACTED]'s letter does not merit any probative weight towards satisfying the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor do the two job vacancy announcements submitted by counsel satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

First, the AAO discounts these advertisements because counsel has failed to establish that they relate to the petitioner's industry, as would be required if those submissions were to be within this prong's zone of consideration. Again, the language of this prong limits the range of relevant evidence to the petition-pertinent industry's practices (stating "[t]he degree requirement" as one that would be "common to the industry" as well as "in parallel positions among similar organizations.") Second, the petitioner has not established that these two positions are "parallel" to the proffered position. Viasat requires 3+ years of international logistics experience and 3+ years working with third-party logistic providers. Baxter is seeking a Senior Logistics Analyst. However, as noted above, the petitioner's submission of an LCA certified for a Level I wage rate suggests that the petitioner regards the proffered position as a comparatively low, entry-level position relative to others within its occupation and one in which the beneficiary would only be expected to possess a basic understanding of the occupation. It is therefore difficult to envision how these attributes assigned to the proffered position by the petitioner by virtue of its wage-level designation on the LCA would be parallel to the positions described in these job vacancy announcements. Nor has the petitioner established that the positions advertised in these job-vacancy announcements require a bachelor's degree in a specific specialty, or the equivalent.⁷ Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in

⁷ Viasat requires a bachelor's degree but it does not require that it be in a specific specialty. Baxter states that a Bachelor of Science in Logistics, Supply Chain, Operations, Transportation or International Trade Compliance is preferred.

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)).⁸

Therefore, 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 requirement for at least a bachelor's degree in a specific specialty as common to the petitioner's industry in positions that are both (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

Next, the AAO finds 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."

We here refer the petitioner back to our earlier comments and findings with regard to the record's general and relatively abstract descriptions of the proffered position and the duties comprising it, which we here incorporate into the present analysis.

In this particular case, the evidence of record does not credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent. The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform the duties of that position. Rather, the AAO finds, 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 "Logisticians" 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.

The statements of counsel and the petitioner with regard to the claimed complex and unique nature of the proffered position are acknowledged. However, those assertions are further undermined by the fact 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. The AAO incorporates here by reference and reiterates its earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate

⁸ USCIS "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." *Matter of Chawathe*, 25 I&N Dec. at 376. As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the level of 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 positions located within the "Logistician" occupational category are performed by persons without at least a bachelor's degree in a specific specialty, or the equivalent, is not credible that 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* be so complex or unique that it could only be performed by a person with at least a bachelor's degree in a specific specialty or the equivalent.

As the evidence of record therefore fails to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) either.

The AAO turns 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.

The AAO's 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.⁹

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

⁹ 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.

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").

The director's August 6, 2013 RFE specifically requested the petitioner to document its past recruiting and hiring history with regard to the proffered position. The third section of the RFE includes the following specific requests for such documentation:

- Position Announcement: To support the petitioner's contention that the position is a "specialty occupation," provide copies of the petitioner's present and past job vacancy announcements. The petitioner may also provide classified advertisements soliciting for the current position, showing that the petitioner requires its applicants to have a minimum of a baccalaureate or higher degree or its equivalent for the position.
- Past Employment Practices: Provide evidence to establish that the petitioner has a past practice of hiring persons with a baccalaureate degree, or higher[,] in a specific specialty, to perform the duties of the proffered position. Indicate the number of persons employed in similar positions. Further, submit documentation to establish how many of those persons have a baccalaureate degree or higher and the particular field of study in which the degree was attained. Documentation should include copies of transcripts and pay records or Quarterly Wage Reports for the employees claimed to hold a baccalaureate degree in the specific field of study.

Although the director provided the petitioner with the opportunity to establish a history of recruiting and hiring only individuals for this position with a bachelor's degree in a specific specialty, or the equivalent, the petitioner submitted no such evidence. While a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, it is not possible that an employer that has never recruited and hired for the position would be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the position. Even if the record contained such evidence, the AAO would still find that the petitioner failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) because the record does not, as indicated above, establish that its degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position, a determination which is strengthened by the petitioner's submission as the supporting LCA one that was certified for the lowest wage-level, which is appropriate for a comparatively low, entry-level position relative to others within its occupation.

As the record of proceeding does not demonstrate that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the AAO finds 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, the AAO reiterates its earlier discussion regarding the *Handbook's* entries for positions falling within the "Logisticians" 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, such as supervisory responsibilities, that would elevate the duties proposed for the beneficiary above those discussed in the *Handbook*. As reflected in this decision's earlier discussion of the duty descriptions in the petitioner's letter of support, the proposed duties as described in the record of proceeding contain no indication of specialization and complexity such that the knowledge they would require is usually associated with any particular level of education. As generically and generally as they were described, the duties of the proposed position (such as, assembling organization and planning of injection molding and plan of molding and inventory operations supervision) are not presented with sufficient detail and explanation to establish the substantive nature of the duties as they would be performed in the specific context of the petitioner's particular business operations. Also as a result of the generalized and relatively abstract level at which the duties are described, the record of proceeding does establish their nature as so specialized and complex as to require knowledge usually associated with at least a bachelor's degree in a specific specialty, or the equivalent.

Additionally, the AAO finds 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 the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

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 (last visited April 23, 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 higher-than-here-assigned, 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, the AAO notes 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.

Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. 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).

II. CONCLUSION AND ORDER

The AAO agrees with the director's findings that 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.

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. The appeal will be dismissed and the petition denied for this reason.

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