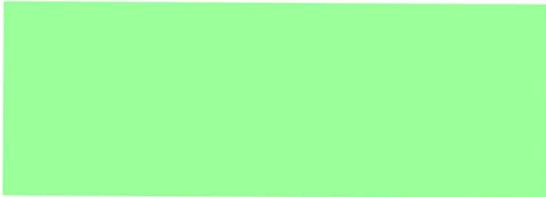


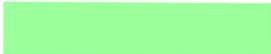


U.S. Citizenship  
and Immigration  
Services

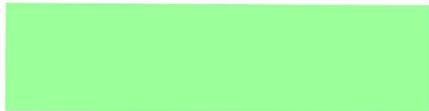
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DATE: **SEP 05 2014**

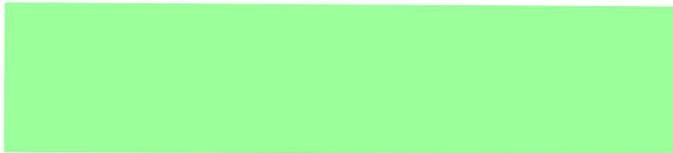
OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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

On the Form I-129 visa petition, the petitioner describes itself as a telecommunications services company established in 1999. In order to employ the beneficiary in what it designates as an accountant position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the 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. We reviewed the record in its entirety before issuing this decision.

For the reasons that will be discussed below, we agree 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. PROCEDURAL AND FACTUAL HISTORY

In the petition signed on November 26, 2013, the petitioner indicates that it is seeking the beneficiary's services as an accountant on a full-time basis. In addition, the petitioner states that the beneficiary will be responsible for the following duties and responsibilities:

Compile and analyze financial information to prepare entries to accounts. Analyze financial information detailing assets, liabilities, and capital, and prepare balance sheets, profit and loss statements, and other reports to summarize current and projected company financial position. Also, preparation of a forecast of company business activity and financial position in areas of income, expenses, and earnings, based on past, present, and expected operations. Implement accounting control procedures and prepare budgets.<sup>1</sup>

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<sup>1</sup> The petitioner has described many of the duties of the beneficiary's employment in the same general terms as those used from various sources on the Internet, including excerpts from the *Dictionary of Occupational Titles* (DOT). That is, the wording of the above duties as provided by the petitioner for the proffered position is recited almost verbatim from other sources. This type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but it fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, cannot be relied upon by a petitioner when discussing the duties attached to specific employment for

Further, the petitioner states, "For this professional-level, specialty-position, we require at least a Bachelor's degree in Accounting, or Finance, or foreign equivalent."

With the Form I-129 petition, the petitioner submitted a copy of the beneficiary's credentials from [REDACTED]<sup>2</sup> In addition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcript, as well as a credential evaluation from Washington Evaluation Service. The credential evaluation indicates that the beneficiary's foreign education is "equivalent to a Bachelor of Science in Business Administration with a major in Accounting as awarded by an accredited U.S. university." The petitioner also submitted three employment verification letters.<sup>3</sup>

In addition, the petitioner submitted, in part, the following documents:

- A Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner indicated that the occupational classification for the proffered position is "Accountants and Auditors" - SOC (ONET/OES Code) 13-2011, at a Level I (entry level) wage.
- A line-and-block organizational chart.<sup>4</sup> The chart indicates that three individuals report to the beneficiary, specifically, the accountant assistant position, collection position, and clerk position.
- Prior non-immigrant approval notices on behalf of the beneficiary.
- Copies of Form W-2, Wage and Tax Statements, from 2009 to 2012 issued to the beneficiary from [REDACTED]

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H-1B approval. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Moreover, the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

<sup>2</sup> It appears from public records that [REDACTED] is not an accredited institute of higher education.

<sup>3</sup> It must be noted for the record that in all three letters, the writers repeatedly refer to someone with a different first name than the beneficiary. The record provides no explanation. Thus, we must question the accuracy of the letters and whether they pertain to the beneficiary.

<sup>4</sup> The Form I-129 petition and the LCA indicate that the job title of the proffered position is "Accountant." However, the organizational chart indicates that the job title of the proffered position is "Accounting Manager." No explanation for the variance was provided by the petitioner.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought and issued an RFE on December 11, 2013. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the evidence to be submitted.

Thereafter, the petitioner responded to the RFE. In a letter dated December 30, 2013, the petitioner provided a revised description of the duties of the proffered position, along with the approximate percentage of time that the beneficiary will spend performing each duty, as follows:

Oversee employer's financial operations and systems, including supervise 3 accounting clerks, to perform the following duties:

-Using general accepted accounting principles and financial standards, perform General Ledger, Journal entries and accounting transactions through Balance Sheet, Income Statement and Cash Flow. Review monthly, quarterly and year end closing and adjusting entries to ensure they are timely and accurate according to financial standards. Monitor accounting clerks' transactions for discrepancies and guide their resolution.

9%

-Organize and maintain employer's financial records and accounting procedures. Ensure accurate and appropriate recording and analysis of revenues and expenses. Review, analyze, and maintain accurate and complete financial information. Report all financial information to management and CEO on a weekly and monthly basis, including Profit and Loss and Balance Sheet and suggest ways to cut costs, increase revenues, and improve profits.

21%

-Perform critical product cost accounting by comparing the rates and terms that the various carriers charge per destination, and then prepare recommendations for which carriers to use for each destination, based on overall profitability.

14%

-Prepare weekly cash flow schedule to create budget for managing payments. Budgets are typically created by using prior month's [sic], quarters's [sic] and year's [sic] budgets and adjusting them according to future projections[.]

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<sup>5</sup> In the November 26, 2013 letter, counsel asserts that the Form W-2s were issued to the beneficiary by the petitioner; however, the petitioner's name is not on the documents and the Federal Employment Identification Number does not correspond to the petitioner.

8%

-Monitor and support employer's various tax reporting and other compliance with tax laws and regulations[.]

10%

-Maintain and oversee Accounts Payables, including inspections of invoices for accuracy, verifying purchasing department's authorization and management of payments. Compare carriers' (telecom vendors) CRD (Call Record Details) with their invoice (average 300 transactions and \$31,000 per invoice) to ensure our company's own billing is accurate and there is no revenue leakage. Comparing CRD requires checking the country rate (\$/minute) as pre our contract with the carrier, total minutes by country, preparing a billing dispute and analyzing its effect on our cash flow and financial forecasts.

14%

-Supervise, review and coordinate all Account Receivables billing and collection activities. Review and reconcile accounts receivable aging reports from the billing software (Oracle) with the accounting records (Quickbooks). Maintain accounts receivables and produce weekly and monthly reports, Manage Payments in both Systems (Oracle and Quickbooks) for accuracy.

16%

-Prepare and submit employees' hours for [REDACTED] file payroll reports, employee reporting, maintain and implement employee benefit package. Even though our company outsources some of its payroll functions to [REDACTED] it must still complete the following payroll processes in-house for [REDACTED] services:

-Review new hire documents (I-9, W-4, bank direct deposit form etc.), upload them to [REDACTED] TOTAL SOURCE highly secured website then e-mail then [sic] to [REDACTED] Manager also through secured e-mail.

-Retrieve biweekly employees hours from [REDACTED] hand punch machine through Software called EZ LABOR MANAGER, process the payroll through [REDACTED] TOTAL SOURCE secured Website, and then submit it.

-Review delivered payroll checks for accuracy, post the payroll into accounting software system then pass paychecks to each department manager.

-Reconcile quarterly payroll reports to general ledger and bank account. In order to maintain confidentiality of our employees' personal data (I-9, W-4 forms), we require our Accountant personally to perform these payroll duties.

8%

Total: 100%

In addition, the petitioner indicates that the position requires a bachelor's degree in accounting or finance or the foreign equivalent and at least two years of professional-level accounting experience.<sup>6</sup>

Further, the petitioner submitted, in part: (1) job vacancy announcements; (2) extracts from the petitioner's employee manual; (3) financial and tax documents (4) the petitioner's bills to customers; (5) invoices; (6) the petitioner's quarterly wage reports for 2011, 2012 and 2013; (7) a letter from (8) documentation described as the beneficiary's work product; and (9) the beneficiary's Income Tax Returns for 2010, 2011 and 2012.

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on January 9, 2014. Counsel submitted an appeal of the denial of the H-1B petition.

## II. BEYOND THE DIRECTOR'S DECISION

Upon review of the record, we have 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.<sup>7</sup>

### A. Late Extension Filing

In the instant case, the petitioner is ineligible to extend its employment of the beneficiary in H-1B classification. Specifically, the petition must be denied as it was filed after the expiration of the petition it sought to extend. *See* 8 C.F.R. § 214.2(h)(14).<sup>8</sup> In this matter, the petitioner indicated at Part 2.2. (page 2) that the basis of classification was "Continuation of previously approved

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<sup>6</sup> We note that the petitioner did not indicate in its initial submission that it requires two-years of experience for the proffered position. No explanation was provided.

<sup>7</sup> We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

<sup>8</sup> Title 8 C.F.R. § 214.2(h) states, in pertinent part, the following about petition extensions:

(14) Extension of visa petition validity. The petitioner shall file a request for a petition extension on Form I-129 to extend the validity of the original petition under section 101(a)(15)(H) of the Act. . . . *A request for a petition extension may be filed only if the validity of the original petition has not expired.*

(Emphasis added.) As noted above, a request for a *petition extension* may be filed only if the *validity of the original petition has not expired*. Thus, the regulations do not permit for the late filing of a *petition extension*.

employment without change with the same employer." The petitioner indicated that it sought to extend the petition with a receipt number of [REDACTED]. However, that petition was denied and, thus, it cannot be extended.

Further, we note that the petitioner's prior petition [REDACTED] on behalf of the beneficiary was valid until September 30, 2012. The instant petition was filed on November 27, 2013, which is 423 day after the prior petition's expiration. Consequently, the petition extension was filed after the validity of the original petition had expired. Accordingly, for this additional reason, the instant petition must be denied.

#### B. Labor Condition Application

Upon review, we note that the record of proceeding contains discrepancies between what the petitioner claims about the level of responsibility and requirements inherent in the proffered position set against the contrary 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 proffered position to the corresponding occupational category of "Accountants and Auditors" - SOC (ONET/OES) code 13-2011. 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).<sup>9</sup> The LCA was certified on November 25, 2013. 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.<sup>10</sup>

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<sup>9</sup> 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/>.

<sup>10</sup> For additional information regarding prevailing wage determinations, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) position after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.<sup>11</sup> The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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

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

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

In the initial submission, the petitioner stated that it requires a bachelor's degree in accounting or finance or the foreign equivalent. In response to the RFE, the petitioner claimed that it requires a bachelor's degree in accounting or finance or the foreign equivalent *and* at least two years of professional level accounting experience.

The petitioner submitted an organizational depicting the hierarchy of the petitioner's organization. The chart indicates that the proffered position reports to the CEO/president. Thus, when reviewing the placement of the proffered position, there is one position that is more senior than the proffered position. Moreover, three individuals report to the beneficiary, specifically, the accountant assistant

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<sup>11</sup> A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

position, collection position, and clerk position. In the December 30, 2013 letter, the petitioner states that the beneficiary will supervise three individuals and that he will "manage all our accounting activities" and "prepare complex reports for management's critical direction of our company." The petitioner states that the beneficiary is in charge of its overall accounting operations, as well as assigning and supervising others' work. Further, the job duties involve overseeing and supervising important functions, and that the beneficiary will prepare complex reports for the "critical direction" of the company.

On appeal, counsel states that the "job description clearly indicate[s] the beneficiary's significant participation in the employer's business decision-making." Counsel continues by stating that the beneficiary's functions are to increase revenues and cut costs and are significant in the petitioner's overall business decision-making process. According to counsel, the proffered position involves "very specialized and technical accounting skills way beyond those of a regular bookkeeper or accounting clerk." He further states that the tasks involve "highly skilled professional-level duties."

It appears that the petitioner and counsel claim that the petitioner will be relying heavily on the beneficiary's expertise to make critical decisions regarding the company's business activities. Such reliance on the beneficiary's work appears to surpass the expectations of a Level I accountant position, as described above, where (relative to others within the occupation) the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and limited exercise of judgment. In the instant case, rather than the beneficiary's work being "monitored and reviewed for accuracy," it appears that the petitioner will depend upon the beneficiary's work with regard to the growth of its operations, as well as important business decisions for the company.

Upon review of the assertions regarding the proffered position, we must question the stated requirements for the proffered position, as well as the level of complexity, independent judgment and understanding that are needed for the proffered position as the LCA is certified for a Level I entry-level position.<sup>12</sup> This 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, a Level I designation is appropriate for a position such as a research fellow, a worker in training, or an internship.

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<sup>12</sup> The regulations at 20 C.F.R. § 655.731(a)(2)(ii)(A)(3) state that when an employer obtains a prevailing wage determination from the National Prevailing Wage Center, DOL will accept that wage as correct and will not question its validity, i.e. the employer is granted "safe harbor" in connection with the request. However, obviously, this "safe harbor" cannot be accorded to employers who fail to fully and/or accurately describe the position, including such aspects as the tasks, work activities, knowledge, skills, and specific vocational preparation (education, training, and experience) that are considered by DOL for its determining of the nature of the job and wage level. In the instant case, the petitioner has not established that the job description submitted for the prevailing wage determination corresponds to the description it provided to USCIS.

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 \$46,696 per year on the LCA corresponds to a Level I for the occupational category of "Accountants and Auditors" for Los Angeles County (Long Beach, California).<sup>13</sup> Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$61,110 per hour for a Level II position, \$75,525 per year for a Level III position, and \$89,939 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.<sup>14</sup> To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. It is questionable whether the petitioner will pay an adequate salary for the beneficiary's work, as required under the Act.

Further, this aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. It is incumbent upon the petitioner to resolve any

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<sup>13</sup> For additional information regarding the prevailing wage for accountants and auditors in Los Angeles County, see the All Industries Database for 7/2013 - 6/2014 for this occupation at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?area=31084&code=13-2011&year=14&source=1> (last visited September 2, 2014).

<sup>14</sup> To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between DOL and the U.S. Department of Homeland Security (DHS), a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2). Upon receiving DOL's certification, the prospective employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). DOL reviews LCAs "for completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition. 20 C.F.R. § 655.705(b); see generally 8 C.F.R. § 214.2(h)(4)(i)(B).

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 elsewhere in the petition, the petitioner would have failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position. That is, the LCA submitted in support of the petition would then fail to correspond to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance section 212(n)(1)(A) of the Act and the pertinent LCA regulations. As a result, even if it were determined that the proffered position were a higher-level and more complex position as described and claimed elsewhere 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.

### III. REVIEW OF THE DIRECTOR'S DECISION

#### 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), 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.

Upon review of the job duties of the proffered position, we note that the petitioner describes the proposed duties in terms of generic functions that do not convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will "[p]repare and submit employees' hours for [REDACTED]". However, this statement does not provide insight into the beneficiary's actual duties, nor does it include any information regarding the specific tasks that the beneficiary will perform. Additionally, the petitioner claims that the beneficiary will be responsible for "organiz[ing] and maintain[ing] employer's financial records and accounting procedures" and

"[e]nsur[ing] accurate and appropriate recording and analysis of revenues and expenses." Notably, the petitioner does not demonstrate how the performance of these duties, as described in the record, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

The petitioner further claims that the beneficiary will be responsible for "[m]onitor[ing] and support[ing] employer's various tax reporting and other compliance with tax laws and regulations" and "review[ing] monthly, quarterly and year end closing and adjusting entries." The petitioner's statements fail to convey any pertinent details as to the actual work involved in this task. The petitioner does not explain the beneficiary's specific role and how his work will be conducted and/or applied within the scope of the petitioner's business operations. Furthermore, the petitioner fails to convey how a baccalaureate level of education (or higher) in a specific specialty, or its equivalent, would be required to perform this task. Thus, the overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations.

Such generalized information does not in itself establish a necessary correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. It is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position.

Although the beneficiary has served in the proffered position for over 12 years, the petitioner did not substantiate the claim that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. More specifically, the petitioner submitted financial documentation regarding the company's business operations, including its tax returns, quarterly wage reports, general ledger, bills to customers, and invoices. Notably, the tax returns and quarterly wage reports were not prepared by the beneficiary. Specifically, the tax returns submitted by the petitioner indicate that they were prepared by [REDACTED] a Certified Public Accountant at [REDACTED] rather than by the beneficiary. Further, the quarterly wage reports indicate that they were prepared by [REDACTED]. In the December 30, 2013 letter, submitted in response to the RFE, the petitioner states that "our company outsources some of its payroll functions to [REDACTED]." The petitioner provided a few reports (A/P aging summary report, profit and loss report, statement of cash flows, and vendor balance detail report), with the beneficiary's name and/or initials handwritten on the documents. However, the record of proceeding lacks documentation establishing the beneficiary's role in the preparation of the reports. 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. It is incumbent upon the petitioner to

demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent.

In the instant case, the petitioner claims that the beneficiary has served in the proffered position since 2001, however, the petitioner did not provide sufficient details regarding the nature and scope of the beneficiary's employment or substantive evidence regarding the actual work that the beneficiary performs. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described fail to communicate (1) the work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education in a specific specialty (or its equivalent). The petitioner's assertion with regard to the requirements of the position is conclusory and unpersuasive, as it is not supported by the job description or substantive evidence.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation we will now discuss in detail the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 our determination whether the proffered position qualifies as a specialty occupation, we first turn 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 when determining these criteria include: whether DOL's *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which USCIS 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)).

We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>15</sup> As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Accountants and Auditors."

We reviewed the chapter of the *Handbook* entitled "Accountants and Auditors," including the sections regarding the typical duties and requirements for this occupational category.<sup>16</sup> However, the *Handbook* does not indicate that "Accountants and Auditors" comprise an occupational group that requires at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation.

The subchapter of the *Handbook* entitled "How to Become an Accountant or Auditor" states, in part, the following about this occupation:

**Education**

Most accountant and auditor positions require at least a bachelor's degree in accounting or a related field. Some employers prefer to hire applicants who have a master's degree, either in accounting or in business administration with a concentration in accounting.

A few universities and colleges offer specialized programs, such as a bachelor's degree in internal auditing. In some cases, those with associate's degrees, as well as bookkeepers and accounting clerks who meet the education and experience requirements set by their employers, get junior accounting positions and advance to accountant positions by showing their accounting skills on the job.

Many colleges help students gain practical experience through summer or part-time internships with public accounting or business firms.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Accountants and Auditors, on the Internet at <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-4> (last visited September 2, 2014).

When reviewing the *Handbook*, we 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

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<sup>15</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The references to the *Handbook* are to the 2014 – 2015 edition available online. We hereby incorporate into the record of proceeding the chapter of the *Handbook* regarding "Accountants and Auditors."

<sup>16</sup> For additional information regarding the occupational category "Accountants and Auditors," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Accountants and Auditors, on the Internet at <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-1> (last visited September 2, 2014).

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 his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. DOL guidance indicates that a job offer for a research fellow, a worker in training, or an internship is an indicator that a Level I wage should be considered.

The *Handbook* reports that certification may be advantageous or even required for some accountant positions. However, we note that there is no indication that the petitioner requires the beneficiary to have obtained the designation Certified Public Accountant (CPA), Certified Management Accountant (CMA) or any other professional designation to serve in the proffered position. Further, the *Handbook* indicates that with regard to certification, some states allow experience to substitute for a college degree.

The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation.<sup>17</sup> Rather, the occupation accommodates other paths for entry, including less than a bachelor's degree in a specific specialty. The *Handbook* reports that most accountants and auditors need at least a bachelor's degree in accounting or a related field. However, this statement does not support the view that any accountant job, within the wide spectrum of accountant positions, qualifies as a specialty occupation as "most" is not indicative that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.<sup>18</sup> More specifically, "most" is not indicative that a position normally requires at least a bachelor's degree in a specific specialty, or its equivalent (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)), or that a position is so specialized and complex as to require knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)).

The *Handbook's* narrative states that some graduates from junior colleges or business or correspondence schools obtain junior accounting positions and advance to accountant positions by

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<sup>17</sup> We hereby withdraw the director's statement in the decision regarding the academic credentials required for bona fide accountant positions.

<sup>18</sup> For instance, the first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of the positions need at least a bachelor's degree in accounting, it could be said that "most" of the positions need such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. (The proffered position has been designated by the petitioner in the LCA as a low, entry-level position relative to others within the occupation.) Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

showing their accounting skills on the job. Accordingly, individuals who have less than a bachelor's degree in a specific specialty, or its equivalent, can obtain junior accounting positions and advance to accountant positions. Furthermore, the *Handbook* reports that bookkeepers and accounting clerks meeting education and experience requirements set by employer can also advance to accountant positions by demonstrating their accounting skills. The *Handbook* does not indicate that this education and experience must be the equivalent to at least a bachelor's degree in a specific specialty. Therefore, even if the proffered position were determined to be an accountant position, the *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

The director reviewed the job description provided by the petitioner and found that the proffered position falls under the occupational classification of "Bookkeeping, Accounting, and Auditing Clerks." We reviewed the sections of the *Handbook* relating to "Bookkeeping, Accounting, and Auditing Clerks," and find that the *Handbook* does not indicate that bookkeeping, accounting, and auditing clerks comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree, in a specific specialty, or the equivalent. The *Handbook* provides the following information in the subsection entitled "How to Become a Bookkeeping, Accounting or Auditing Clerk" for this occupational category:

**Education**

Most bookkeeping, accounting, and auditing clerks need a high school diploma. However, some employers prefer candidates who have some postsecondary education, particularly coursework in accounting.

**Training**

Bookkeeping, accounting, and auditing clerks usually get on-the-job training. Under the guidance of a supervisor or another experienced employee, new clerks learn how to do their tasks, including double-entry bookkeeping. (Double-entry bookkeeping means that each transaction is entered twice, once as a debit (cost) and once as a credit (income) to ensure that all accounts are balanced.)

Some formal classroom training also may be necessary, such as training in specialized computer software. This on-the-job training typically takes around 6 months.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Bookkeeping, Accounting, and Auditing Clerks, on the Internet at <http://www.bls.gov/ooh/Office-and-Administrative-Support/Bookkeeping-accounting-and-auditing-clerks.htm#tab-4> (last visited September 2, 2014).

The *Handbook* does not report that, as an occupational group, "Bookkeeping, Accounting, and Auditing Clerks" normally require at least a bachelor's degree in a specific specialty (or its equivalent) for entry. It explains that most bookkeeping, accounting, and auditing clerks need a high school diploma. The *Handbook* continues by stating that some employers prefer candidates who have some postsecondary education, particularly coursework in accounting. It further states

that workers usually receive on-the-job training. The *Handbook* does not indicate that at least a baccalaureate degree in a specific specialty (or its equivalent), is normally the minimum requirement for entry into the occupation.

We will now discuss the letter from [REDACTED] which was submitted in response to the director's RFE. The letter is dated July 17, 2009 (approximately four years prior to the submission of the H-1B petition). In the letter, Mr. [REDACTED] claims that the proffered position is "a professional position and would normally be filled by a graduate with a minimum of a Bachelor's Degree in Accounting or a related area, or the equivalent."

Mr. [REDACTED] provided a summary of his education and experience and attached his curriculum vitae. He described his qualifications, including his educational credentials and professional experience, as well as provided a list of the publications he has written. However, based upon a complete review of Mr. [REDACTED] letter and curriculum vitae, he has not provided sufficient information regarding the basis of his claimed expertise on this particular issue. Mr. [REDACTED] claims that he is qualified to comment on the position of accountant because of the position he holds at the [REDACTED] as well as his professional experience and academic training. Without further clarification, it is unclear how his education, training, skills or experience would translate to expertise or specialized knowledge regarding the current recruiting and hiring practices of telecommunications services companies similar to the petitioner for accountant positions (or parallel positions).

With regard to the opinion letter itself, Mr. [REDACTED] does not reference or discuss any studies, surveys, industry publications, authoritative publications, or other sources of empirical information which he may have consulted in the course of whatever evaluative process he may have followed. Mr. [REDACTED] provides a brief, general description of the petitioner's business activities; however, the information he provides regarding the number of employees and gross annual income does not correspond to the information provided by the petitioner in the Form I-129. No explanation for the discrepancy was provided. Further, he does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. For instance, there is no evidence that he has any in-depth knowledge of the petitioner's business operations gained through such means as visiting the petitioner's premises, observing the petitioner's employees, interviewing them about the nature of their work, or documenting the knowledge that they apply on the job.

Mr. [REDACTED] does not discuss the duties of the proffered position in any substantive detail. To the contrary, he simply listed the tasks in bullet-point fashion with little discussion. As a result, it is not evident that he analyzed the duties prior to formulating his letter. Furthermore, it must be noted that the job duties submitted by Mr. [REDACTED] differs from the job description provided by the petitioner to USCIS. For example, Mr. [REDACTED] job description states that the beneficiary will be responsible for "[m]onitoring carrier billing, obtaining confirmation from the purchasing department to ensure accurate billing, and scheduling carrier payments." No explanation was provided as to the reason the job duties submitted by Mr. [REDACTED] do not correspond to the job description provided by the petitioner to USCIS.

Importantly, there is no indication that the petitioner advised Mr. [REDACTED] that it characterized the proffered position as a low, entry-level position (as indicated by the wage-level on the LCA). As previously discussed, the wage-rate indicates that the beneficiary 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. It appears that Mr. [REDACTED] would have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that Mr. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine similar positions based upon job duties and responsibilities.

Mr. [REDACTED] does not provide a substantive, analytical basis for his opinion and ultimate conclusion. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. Moreover, he did not support his conclusions by providing copies or citations of any research material used. He has not provided sufficient facts that would support the assertion that the proffered position requires at least a bachelor's degree in a specific specialty (or its equivalent).

In summary, and for each and all of the reasons discussed above, we conclude that the advisory opinion rendered by Mr. [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by Mr. [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. There is an inadequate factual foundation established to support the opinion and we find that the opinion is not in accord with other information in the record.

We may, in our discretion, use as advisory opinions or 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. 1988). As a reasonable exercise of its discretion, and for the reasons discussed above, the advisory opinion letter is not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, we hereby incorporate the above discussion and analysis regarding Mr. [REDACTED] opinion letter into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fact that a person may be employed in a position designated by a petitioner as that of an accountant and may apply some accounting principles in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. This, the petitioner has failed to do.

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, we 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, we incorporate by reference the previous discussion on the matter. The petitioner did not submit any documentation from the industry's professional association stating that it has made a degree a minimum entry requirement.

The record of proceeding contains an opinion letter from Mr. [REDACTED]. However, as previously discussed in detail, the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of advertisements in response to the RFE. Upon review of the documentation, the petitioner fails to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common 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. Thus, the petitioner's reliance on the job announcements is misplaced.

More specifically, the petitioner did not provide any independent evidence of how representative the job advertisements are of the advertising employers' recruiting history for the type of jobs advertised. As the advertisements are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Furthermore, in the Form I-129, the petitioner stated that it is a telecommunications services company established in 1999. The petitioner also stated that it has 10 employees and a gross annual income of approximately \$4.2 million, and that its net annual income is \$327. The petitioner

designated its business operations under the North American Industry Classification System (NAICS) code 517110.<sup>19</sup> This NAICS code is designated for "Wired Telecommunications Carriers." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 517110 – Wired Telecommunications Carriers, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsreh> (last visited September 2, 2014).

For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that the organizations are similar and in the same industry without providing a legitimate basis for such an assertion.

The job postings do not establish eligibility under this criterion of the regulations. For instance, the petitioner submitted a job posting placed by a staffing firm (Accountemps) for which little or no information regarding the employer is provided. In addition, the petitioner provided job postings for [REDACTED] ("an S&P 500 and a Forbes Global 2000 company" and [REDACTED] (a company that has "offices throughout the United States and in nine other countries in Latin America, Asia and Africa"). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. Consequently, the record is devoid of sufficient information regarding these advertising employers to conduct a legitimate comparison of the organizations to

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<sup>19</sup> According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited September 2, 2014).

the petitioner. The petitioner did not supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations. Again, the petitioner must demonstrate the degree requirement is *common to the industry* in parallel position *among similar organizations*.

Moreover, some of the advertisements do not appear to be for parallel positions. More specifically, the petitioner provided a posting for a senior accountant position with Accountemps, which requires a degree in accounting and "3 to 7 years [of] experience in Accounting." Additionally, the petitioner submitted a job posting for a senior staff accountant position with [REDACTED] which requires candidates to possess a degree in accounting and/or finance and "[a] minimum of 4 years [of] accounting experience." In addition, the petitioner submitted a posting for an accounting manager position with [REDACTED] which requires candidates to possess a degree and "8+ years [of] strong business/accounting experience, preferably in technology industry." As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) position. The advertised positions appear to be for more senior positions than the proffered position.

More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position. For instance, some of the advertising employers provided brief and/or vague job descriptions for the advertised positions. Thus, these advertisements do not contain sufficient information regarding the day-to-day duties, complexity of the job duties, supervisory duties (if any), independent judgment required, the amount of supervision received, or other relevant factors within the context of the advertising employers' business operations to make a legitimate comparison of the advertised positions to the proffered position.

Additionally, contrary to the purpose for which the advertisements were submitted, some of the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, the petitioner submitted an advertisement (specifically, the posting for [REDACTED] indicating that a bachelor's degree in business administration is acceptable. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.<sup>20</sup> Furthermore, the advertisement for [REDACTED]

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<sup>20</sup> Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

states that a "bachelor's degree in Accounting or Finance is preferred" for the position. Obviously, a *preference* for a degree in accounting or finance is not an indication of a *requirement* of a degree in one of these disciplines. Thus, the qualifications listed in the posting do not support a finding that the advertised position requires a *baccalaureate* (or higher degree) in a *specific specialty*, or its equivalent.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. The evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.<sup>21</sup>

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).

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

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elsewise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

*Id.*

<sup>21</sup> Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error.")

As such, even if the job announcements supported the finding that the position of accountant for companies that are similar to the petitioner requires a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

In the instant case, the record of proceeding contains information regarding the proffered position and the petitioner's business operations. However, upon review of the record of proceeding, the petitioner did not sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. We hereby incorporate into this analysis this decision's earlier comments and findings regarding the generalized level of the information and evidence provided with regard to the proposed duties and the position that they are said to comprise. As reflected in those earlier comments and findings, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent.

That is, the petitioner did not demonstrate how the duties of the position as described require a bachelor's or higher degree in a specific specialty, or its equivalent. For instance, while related courses may be beneficial, or in some cases even essential, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Accountants and Auditors" 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 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."<sup>22</sup>

Therefore, the evidence of record does not establish that this position is significantly different from other 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 the United States. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

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<sup>22</sup> 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

Consequently, as the petitioner has not demonstrated how the proffered position is so complex or unique relative to other positions that do not require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

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. 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-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 its equivalent.

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

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

beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner stated in the Form I-129 petition that it has 10 employees and was established in 1999 (approximately 14 years prior to the filing of the H-1B petition). In response to the director's RFE, the petitioner stated that the beneficiary has served in the position since 2001 and that it has not needed to "recruit for his position, and therefore do not have any vacancy announcements for his position." The petitioner did not provide probative evidence to satisfy 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.

Upon review of the record of the proceeding, the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

As reflected in this decision's earlier comments and findings with regard to the generalized level at which the proposed duties are described, the petitioner has not presented the proposed duties with sufficient specificity and substantive content to even establish relative specialization and complexity as distinguishing characteristics of those duties, let alone that they are at a level that would require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent. We incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category of "Accountants and Auditors." 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.<sup>23</sup> 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."

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<sup>23</sup> If the proffered position were designated as a higher level position, the prevailing wage for the occupational category in Long Beach, California at that time would have been \$61,110 per year for a Level II position, \$75,525 per year for a Level III position, and \$89,939 per year for a Level IV position.

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. We therefore, conclude that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

#### IV. CONCLUSION AND ORDER

An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.