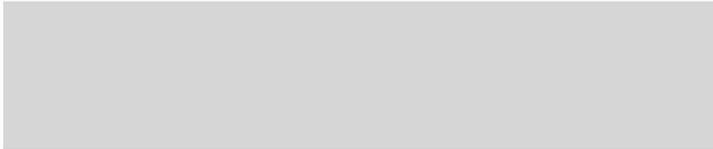




U.S. Citizenship  
and Immigration  
Services

(b)(6)



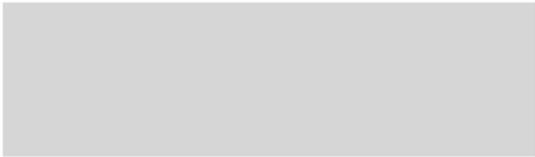
DATE: JUL 13 2015

PETITION RECEIPT #: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(15)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

## I. PROCEDURAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 0-employee "Condom manufacture, distribute, market, sell" business established in [REDACTED]. In order to employ the beneficiary in a position it designates as an "Accountant Executive," the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The Director denied the petition, determining that the evidence of record did not establish that the proffered position qualifies for classification as a specialty occupation. On appeal, the petitioner asserts that the Director's basis for denial of the petition was erroneous and contends that it has satisfied all evidentiary requirements.

The entire record of proceeding includes: (1) the petitioner's Form I-129 and supporting documentation; (2) the service center's RFE; (3) the petitioner's response to the RFE; (4) the Director's denial letter; and (5) the Notice of Appeal or Motion (Form I-290B), a brief, and additional documentation. We reviewed the record in its entirety before issuing our decision.<sup>1</sup>

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

## II. THE PROFFERED POSITION

The petitioner identified the proffered position as an "Accountant Executive" on the Form I-129, and attested on the required Labor Condition Application (LCA) that the occupational classification for the position is "Accountant and Auditors," SOC (ONET/OES) Code 13-2011, at a Level I (entry) wage.

In the petitioner's letter submitted in support of the petition, dated March 24, 2014, the petitioner's owner stated that he has "decided to employ [the beneficiary] as Accountant Executive through one

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

Also, in light of the petitioner's references to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

of [his] exclusively owned business entit[ies], [the petitioner]." The petitioner stated that the beneficiary will be the petitioner's full-time employee and that she "will have two layers of job duties as Accountant Executive." The petitioner explained that the "first layer of duties is primarily dedicated to accountant responsibilities to [the petitioner], and the second layer of duties, which will be contracted between [the petitioner's owner] and the [petitioner] is to provide accounting services to [the owner] as an individual." The petitioner also stated that "the attainment of a Bachelor's degree in Accounting is the minimum requirement for this position and would be required by [the petitioner] in analogous positions."

In a response to the RFE, the petitioner listed the job duties and percentages of time allocated to those duties as follows:

- Prepare, examine, or analyze accounting records, financial statements, or other financial reports to assess accuracy, completeness, and conformance to reporting and procedural standards; 15%
- Advise to the leader of the company of finances of the company; 5%
- Setting up and implementing recordkeeping and accounting systems; 10%
- Establishing and maintaining tables of accounts and assign entries to proper accounts; [no percentage allocated]
- Providing internal and external auditing services for the company; 10%
- Preparing and filing taxes with Federal, State and local government authority; 10%

Duties for the Individual Owner among other things:

- Prepare financial statements or other financial reports for financing or refinancing purposes; 15%
- Prepare and file taxes with Federal, State and local government authorities; 10%
- Provide internal and external auditing services; 10%
- Prepare monthly balance sheet reconciliations [.] 10%

The petitioner added, in response to the RFE, that the beneficiary would also spend 5 percent of her time "Working with [redacted] at the end of year regarding the overall accounting status of the company" on behalf of the petitioner.<sup>2</sup>

### III. SPECIALTY OCCUPATION

#### A. Legal Framework

To meet its burden of proof, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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<sup>2</sup> The petitioner's owner states that [redacted] an accounting firm, worked for him and his ex-wife, and that from 2008 to 2011, he paid an employee of [redacted] to also provide accounting services to the petitioner.

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 meet one of the following criteria:

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R.

§ 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

#### B. Analysis

Preliminarily, the petitioner's allocation of 45 percent of the beneficiary's duties to performing tasks associated with its individual owner may not be considered as part of this petition. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm'r 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm'r 1980). Accordingly, if the

beneficiary will perform duties, part-time, for an individual or entities other than the petitioner, those individuals or entities must file the appropriate petition on her behalf.<sup>3</sup>

With respect to the proposed duties for the petitioner, the petitioner described the duties of the proffered position in terms of general and generic functions. The evidence of record does not describe any of the listed functions in sufficient detail to either establish the substantive nature and associated complexity or specialization of the petitioner's matters upon which the beneficiary would focus or the practical and theoretical level of accounting knowledge that the beneficiary would have to apply to those matters. For example, preparing, examining or analyzing accounting records to assess accuracy, completeness, and conformance to specific standards, setting up and implementing recordkeeping and accounting systems, and establishing and maintaining tables of accounts and assigning entries to proper accounts present such a broad view of the proposed duties, that it is not possible to differentiate these duties from routine bookkeeping functions.

The petitioner has not included sufficient detail regarding the beneficiary's actual day-to-day tasks associated with its general outline of duties to ascertain that its duties actually include tasks that entail accounting services at a level requiring the theoretical and practical application of at least a bachelor's degree level of knowledge in accounting. As the evidence of record lacks sufficient detail and evidence of the actual job duties the beneficiary will perform, the evidence of record fails to demonstrate that the proffered position more likely than not requires a bachelor's or higher degree in a specific specialty or its equivalent as a minimum for entry. See INA § 214(i)(1). As discussed in greater detail below, the evidence in this record of proceeding does not establish the educational attainment actually required to perform the proffered position; thus, the petitioner has not satisfied any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

That being said and with the understanding that we are incorporating these comments and findings as part of our analysis of each of the criterion at 8 C.F.R. § 214.2(h)(4)(iii), we shall now separately address each of those criteria.

*A baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position*

We will first address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). This criterion requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position. We recognize the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>4</sup>

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<sup>3</sup> The petitioner's owner noted that he will contract with the petitioner for the beneficiary's services; however, the record does not include evidence of this agreement.

<sup>4</sup> All of the references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational category are hereby incorporated into the record of proceeding.

The petitioner asserts that the duties it describes are those of an accountant and thus more complex than the duties of a bookkeeper, even though a bookkeeping occupation involves a wide range of tasks, including maintaining an entire organization's books.<sup>5</sup> In this matter, the petitioner has not identified anyone who would perform the routine bookkeeping functions of its business. In response to the Director's RFE, the petitioner stated that it employed independent contractors to perform "sales, marketing, logistics, website maintenance, etc." Moreover, the petitioner submitted its organizational chart identifying a project manager and in-house accountant reporting directly to the petitioner's chief executive officer/owner and individuals employed as independent contractors in manufacturing, logistics, sales, art, information technology, marketing, web and application development, and product development departments.<sup>6</sup> The record also included affidavits from five individuals attesting that they had worked for the petitioner as independent contractors in sales, in manufacturing, as a project manager, and as a consultant. Neither the organizational chart nor other evidence in the record demonstrates that the petitioner employs or contracts with anyone to perform the routine bookkeeping functions of its organization. This brings into question how much of the beneficiary's time can actually be devoted to accounting duties above those usually performed by a junior accountant or a bookkeeping, auditing, or accounting clerk. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Even though the record is materially deficient regarding the beneficiary's actual duties, we have reviewed the information in the *Handbook* regarding the occupational category "Accountants and Auditors," including the section entitled "How to Become an Accountant or Auditor," which describes the following preparation for the occupation, in pertinent part:

Most accountants and auditors need at least a bachelor's degree in accounting or a related field. Certification within a specific field of accounting improves job prospects. For example, many accountants become Certified Public Accountants (CPAs).

#### **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

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<sup>5</sup> The *Handbook* reports that most bookkeeping, accounting, and auditing clerks need a high school diploma. In other words, a bachelor's degree in a specific specialty is not required for bookkeeping, accounting and auditing clerk positions. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Bookkeeping, Accounting and Auditing Clerks," <http://www.bls.gov/ooh/office-and-administrative-support/bookkeeping-accounting-and-auditing-clerks.htm#tab-4> (June 17, 2015).

<sup>6</sup> The petitioner's organizational chart shows the individual in the position of "in-house" accountant as having the same last name as the beneficiary. It appears from the petitioner's references to the beneficiary throughout the record, that the in-house accountant depicted on the organizational chart is the proposed beneficiary.

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," <http://www.bls.gov/ooh/business-and-financial/accountants-and-auditors.htm#tab-4> (last visited July 8, 2015).

The *Handbook* only states that "[m]ost accountant and auditor positions require at least a bachelor's degree in accounting or a related field." The *Handbook* does not state that such a degree is a normal minimum entry requirement for all accountant and auditor positions. In addition, as set out above, the *Handbook* indicates that some without a bachelor's degree or even a postsecondary degree may "advance to accountant positions by demonstrating their accounting skills on the job."

When reviewing the *Handbook*, it also must be noted that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. 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).

Thus, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels,

this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. As noted above, according to DOL guidance, a statement that the job offer is for a research fellow, worker in training or an internship is indicative that a Level I wage should be considered.

In certain instances, the *Handbook* is not determinative. When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position more likely than not satisfies this or one of the other three criteria, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other objective, authoritative sources) that supports a finding that the particular position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider and weigh all of the evidence presented to determine whether the particular position qualifies as a specialty occupation.

We have reviewed the Occupational Information Network (O\*NET) Summary Report for 13-2011.01 – Accountants, submitted by the petitioner, which indicates this occupation is within an occupational category wherein most but not all of these occupations require a four-year bachelor's degree. Of greater significance for this discussion, the O\*NET does not state that a bachelor's degree in any specific specialty is required, and does not, therefore, demonstrate that a position so designated is a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Further, the Help Center's discussion confirms that Job Zone 4, the occupational category for an Accountant, does not indicate any requirements for particular majors or academic concentrations. See O\*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 4. As such, even if the proffered position were determined to be primarily an accountant position, it cannot be concluded based on the *Handbook* or O\*NET that the position qualifies as a specialty occupation normally requiring at least a bachelor's degree in accounting, or its equivalent.

We have also reviewed the letter, dated July 17, 2014, prepared by [REDACTED] Ph.D., submitted in response to the RFE. Dr. [REDACTED] restates the list of duties provided by the petitioner. Dr. [REDACTED] however, does not differentiate between duties performed for the petitioner and duties performed for the individual owner. Additionally, Dr. [REDACTED] does not list the reference materials on which he relies as a basis for his conclusion. Rather, it appears that Dr. [REDACTED] did not base his opinion on objective evidence, but instead relies on the general duties the petitioner ascribed to the position and the petitioner's owner's assets of \$40 million from multiple business enterprises. Dr. [REDACTED] opines that the duties listed show that the position encompassing those duties is "considered a professional position and would normally be filled by a graduate with a minimum of a Bachelor's Degree in Accounting, Business Administration, or a related area, or the equivalent."

Upon review of Dr. [REDACTED] credentials we do not find that even when considered in the aggregate, that his credentials establish a sufficient basis to support his expertise with regard to the minimum education requirements for the performance of the particular position that is the subject of this petition. While Dr. [REDACTED] claims expertise on the basis of his position as a professor and his research, he does not persuasively articulate – and his curriculum vitae does not show – that he has expertise or has been recognized as an authority in the areas on which he presented his opinion, that is, in the area of the minimum educational requirements for the particular proffered position or in the area of a position's qualification for H-1B specialty occupation recognition in accordance with the governing statutes and USCIS regulations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Additionally, Dr. [REDACTED] does not specify or discuss any relevant research, studies, surveys, or other authoritative publications as part of his review and or as a foundation for his opinion. Further, Dr. [REDACTED] does not discuss the fact that the petitioner submitted an LCA certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.<sup>7</sup> The omission of such an important factor diminishes the evidentiary value of his opinion.

Finally, Dr. [REDACTED] opines that a bachelor's degree in business administration is adequate to perform the duties listed for the position. However, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). USCIS has consistently stated that, 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 139, 147 (1st Cir. 2007).

We may, in our discretion, use advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). Here, we find that Dr. [REDACTED] opinion does not merit recognition or weight as an expert opinion, and is not probative evidence towards satisfying this criteria (8 C.F.R. § 214.2(h)(4)(iii)(A)(I)) or any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). We incorporate our discussion of Dr. [REDACTED] opinion on the proffered position into each of the criterion discussed below.

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<sup>7</sup> The *Prevailing Wage Determination Policy Guidance* is available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

The *Handbook* does not support the claim that the occupational category of accountants is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent. Even if it did (which it does not), the record lacks sufficient evidence to support a finding that the particular position proffered here, an entry-level accountant position (as indicated on the LCA), would normally have such a minimum, specialty degree requirement or its equivalent. The duties and requirements of the position as described in the record of proceeding do not indicate that this particular position proffered by the petitioner 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).

*The requirement of a baccalaureate or higher degree in a specific specialty,  
or its equivalent, is common to the industry in parallel  
positions among similar organizations*

Next, we will review the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other reliable and authoritative source, indicates that there is a standard, minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

The petitioner submitted several advertisements from employers in the medical device industry to demonstrate that a degree in a specialty is common to that industry. As a preliminary matter, we note that the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices. Moreover, the petitioner does not submit probative evidence that it is in the medical device industry. For the petitioner to establish that the advertising organization is similar to

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

The petitioner stated on the Form I-129 that it manufactures, distributes, markets, and sells condoms. It designated its business operations under the North American Industry Classification System (NAICS) code 424990. According to the U.S. Census Bureau, 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 July 8, 2015). The NAICS code specified by the petitioner is designated for "Other Miscellaneous Nondurable Goods Merchant Wholesalers," and is defined by the U.S. Department of Commerce, Census Bureau as an industry comprised of "establishments primarily engaged in the merchant wholesale distribution of nondurable goods (except printing and writing paper; stationery and office supplies; industrial and personal service paper; drugs and druggists' sundries; apparel, piece goods, and notions; grocery and related products; farm product raw materials; chemical and allied products; petroleum and petroleum products; beer, wine, and distilled alcoholic beverages; farm supplies; books, periodicals and newspapers; flower, nursery stock and florists' supplies; tobacco and tobacco products; and paint, varnishes, wallpaper, and supplies).<sup>8</sup>

U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 424990 – Other Miscellaneous nondurable Goods merchant Wholesalers, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited July 8, 2015).

Accordingly, the businesses in the medical device industry do not appear to be similar to the petitioner, as these companies are not in the same industry the petitioner attested to and identified on the Form I-129. Additionally, the petitioner has not submitted probative evidence that these advertisers employ a similar number of people or contractors, or generate similar revenue. Further, a majority of the advertisements appear to be for more senior positions than the proffered position as they require between one and five years of experience in addition to the bachelor's degree. In this matter, the petitioner has characterized the proffered position as a Level I (entry) position on the LCA. DOL guidance states that Level I positions are appropriate for a worker-in-training or an

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<sup>8</sup> Here we note that the 2012 NAICS code 326299, an industry comprised of establishments primarily engaged in manufacturing rubber products, including condom manufacturing, may have been a more appropriate industry designation. In any event, the petitioner has not identified itself or explained further why it should be considered a business within the medical device industry.

individual performing an internship.<sup>9</sup> Thus, the proffered position is not parallel to positions requiring experience as such a position would be designated at a higher wage level on the LCA. Further, several of the advertisements, either do not specifically require a bachelor's degree or they note that a degree in a specific discipline is preferred, not required. Preference is not synonymous with a requirement that the degree is in a specific specialty. Furthermore, upon review of the variety of duties required by each of the advertisements it is not possible to conclude that the advertised positions are parallel to the proffered position.

The job advertisements submitted do not establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions in the petitioner's industry. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner does not demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.<sup>10</sup>

As set out above, we do not find, based upon a complete review of the record of proceeding, that the petitioner has established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is (1) common to the petitioner's industry (2) in parallel positions (3) among organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

*The particular position is so complex or unique that it can be performed only by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent*

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.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted its corporate documents, its 2012 federal tax return, its balance

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<sup>9</sup> For additional information regarding 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).

<sup>10</sup> 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").

sheets, profit and loss details and expenses from 2008 to 2010, testimonials from the petitioner's owner's business associates, website articles, product brochures and brief synopses of its company's products. However, upon review of the record of proceeding, the evidence of record does not credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. We reiterate that the petitioner provided a broad overview of the duties of the proffered position.

The evidence does not demonstrate how the duties that collectively constitute the proffered position require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While a few related courses may be beneficial, or even required, in performing certain duties of the proffered position, the petitioner has not demonstrated 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.

We again have reviewed Dr. [REDACTED] opinion and although Dr. [REDACTED] opines that different courses required for a degree in accounting or business administration prepare an individual to perform the general duties the petitioner listed, he does not provide any meaningful analysis on how an accounting or business administration baccalaureate degree, are directly related to the duties and responsibilities of the proffered position. That is, other than his conclusory statements, he does not discuss specific bachelor's level coursework and provide an analysis of how and why such coursework is directly related to particular duties and why such coursework is required to perform those duties. The extent of meaningful analysis involved in the formulation of the position-evaluation opinion, therefore, is questionable. Dr. [REDACTED] does not sufficiently explain the empirical basis for his conclusory opinion.

Other than stating that the proffered position is complex and unique and offering a comparison of the proffered position's duties to the duties listed in the *Handbook* for an accountant, the petitioner does not discuss what particular aspects of its company products or its business elevate the proffered position to one that is complex and unique.<sup>11</sup> The record here does not include evidence of the specific financial requirements associated specifically with the petitioner's manufacturing, marketing, and sale of condoms, including whether its business operations has unique financial requirements that would add complexity to the beneficiary's duties. Neither does the petitioner claim that it is currently required to deal with specific complex agreements and functions that might

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<sup>11</sup> We note here that the *Handbook* offers generalized descriptions of occupations and sets out a range of duties that may be performed within an occupation. Repeating or paraphrasing the duties in the *Handbook* cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. Otherwise, the record lacks the substantive information allowing for an accurate analysis of the actual position.

complicate its financial situation. We here reiterate that the actual responsibilities of the proffered position must be considered and those responsibilities must be related to the nature of the petitioner's ongoing business.

Further, as was also noted above, the LCA submitted in support of the visa petition is approved for a wage Level I employee, an indication that the proffered position is an entry-level position for an employee who has only a basic understanding of the occupation.<sup>12</sup> This does not support the proposition that the proffered position is so complex or unique relative to other positions in the same occupation that it can only be performed by a person with a specific bachelor's degree.<sup>13</sup>

Upon review of the totality of the record, 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. As the evidence of record does not so demonstrate 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 employer normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the position*

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 reviews the petitioner's past recruiting and hiring practices, information regarding employees who previously held the position, as well as any other documentation submitted by a petitioner in support of this criterion of the regulations.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. Again, USCIS must examine the actual employment requirements, and, on

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<sup>12</sup> See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>13</sup> The issue here is that the petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

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. According to the Court in *Defensor*, "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388. 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 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.*

Upon review, the record is insufficient to establish that the petitioner in this matter employed an individual in a similar position. That is, the petitioner has intermittently employed accounting firms and an individual to perform accounting functions. However, the record does not support a claim that the work performed is similar to the proffered position. We reiterate that the petitioner provided a broad overview of the proffered position. Additionally, the petitioner's owner's description of the duties performed by [REDACTED] and [REDACTED] do not describe the duties performed individually or by a firm, except in the most general way. It is not possible to ascertain from the record that the beneficiary will perform the same or similar duties as the individuals previously used by the petitioner who performed a variety of bookkeeping and accounting functions. Accordingly, the record does not include sufficient probative evidence establishing that it previously employed an accountant who will perform the duties of the current proffered position.

Upon review of the record, the petitioner has not submitted probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position.<sup>14</sup> Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

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

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<sup>14</sup> Again, the critical element is not the title of the position, or even the fact that an employer has routinely insisted on certain educational standards. As noted above, the petitioner must still establish that the 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.

*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 in a specific specialty, or its equivalent*

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than a junior accounting position, a position that is not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. We have reviewed the petitioner's 2012 IRS Form 1120S and the documents submitted to demonstrate the nature and scope of the petitioner's business. However, the record does not include probative evidence establishing that the petitioner's business and its financial transactions and functions require the performance of specialized and complex duties. Again, the petitioner's description of the beneficiary's proposed duties is broad and does not convey an understanding of what the beneficiary is expected to do for the petitioner on a daily basis. We again reviewed Dr. [REDACTED] opinion and note that it does not appear that Dr. [REDACTED] visited the petitioner business or otherwise understood, evaluated, and assessed the nature and scope of the petitioner's specific business in depth when preparing his opinion statement.<sup>15</sup>

We again note that the petitioner has designated the proffered position as a Level I position on the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation.<sup>16</sup> Such a classification is inconsistent with the petitioner's claim that the duties are specialized and complex. The record does not include sufficient consistent and probative evidence to establish that the position proffered here encompasses the performance of specialized and complex duties the nature of which requires knowledge usually associated with at least a bachelor's degree in a specific specialty. For the reasons discussed above, the evidence of record does not satisfy the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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<sup>15</sup> Dr. [REDACTED] identified the petitioner as a business involved in medical device industry however, as discussed above, the record does not support this claim. Moreover, Dr. [REDACTED] apparently believed that the beneficiary would be performing services only for the petitioner, as he did not address the petitioner's statements that a significant portion of the work to be performed would be performed on behalf of the petitioner's owner, individually. Accordingly, the probative value of Dr. [REDACTED] opinion is diminished for this additional reason.

<sup>16</sup> See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

The evidence of record does not satisfy 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 for classification as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

#### IV. CONCLUSION

As set forth above, we find that the evidence of record does not sufficiently establish that the proffered position qualifies for classification as a specialty occupation. Accordingly, the appeal will be dismissed and the petition denied.

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.