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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 2 6 2013 OFFICE: VERMONT 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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

James Blanzinger, for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a five-employee freight forwarder established in 1999. In order to employ the beneficiary in what it designates as a business operations specialist position,[1] 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 based on his determination that the petitioner had failed to establish that the proffered position qualifies for classification as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

Upon a complete review of the record of proceeding, the AAO finds that the director's decision to deny the petition for its failure to establish the proffered position as a specialty occupation was correct. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

As a preliminary matter, and in light of counsel's argument that the director misapplied the applicable standard of proof, the AAO affirms that, in the exercise of its appellate review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

> Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.
>
> * * *
>
> The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.
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> * * *

[1] The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 13-1199, the associated Occupational Classification of "Business Operations Specialists, All Other," and a Level I (entry-level) prevailing wage rate.

> Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.
>
> Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe.* Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director's determination that the petitioner did not establish the proffered position as a specialty occupation was correct. Upon its review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, the AAO finds that the petitioner has not established that its claim of a specialty occupation position is "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claim is "more likely than not" or "probably" true.

The AAO will now address the director's finding that the proffered position does not qualify for classification 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 following statutory and regulatory requirements.

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd 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 upon a proffered position's title. The specific duties of the position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

As already noted, in the Form I-129 and its allied documents, the petitioner asserted that it wished to employ the beneficiary in a position to which it assigned the title "business operations coordinator" on a full-time basis with a salary of $44,400 per year. The following description of the proposed duties is quoted, verbatim, from the petitioner's November 8, 2011 letter of support:

- Keep track of monetary exchange rates between Chinese Yuan and US dollars;
- Coordinate daily business operations including freight shipping arrangements, forwarding, international logistics and supply chain management;
- Research and plan the most appropriate route for shipments, such as consolidation of air, seal and road services, taking into account of the particular nature of the goods, costs, transit time and security to guarantee the most cost-effective and secure solutions;
- Maintain most updated knowledge of relevant legislation, political situations and other factors that could affect the freight transportation;
- Obtain, check and prepare documentations to meet customs and insurance requirements, packing specifications, and compliance with oversea [sic] countries' regulation [sic] and fiscal regimes;

- Analyze accounting records to determine financial resources to implement various operations programs;
- Negotiate and administer contracts with clients in regards to transportation and handling costs;
- Communicated and negotiate with carriers to obtain relevant quotes in order to arrange load and unload for shipments;
- Contact suppliers and purchaser for problems related to imports, distribution and forwarding, and initiate payment process for invoices;
- Utilize E-commerce, Internet technology and satellite systems to enable real-time tracking of freights;
- Maintain and review order status and report to clients on daily basis;
- Work closely with customers, colleagues and third parties to ensure smooth operations, and measure the effectiveness of communications programs and strategies;
- Research the electrics accessories market statistics, track new and current appliances' designs and models in order to keep pace with the upgrading market and forecast future marketing trends;
- Create research database to keep current of new regulations that may affect accessories market, and act as consultant for clients in customs matters;
- Manage and handle frequent special requests from clients related to seasonal events such as holiday promotion.

The petitioner further explained that the incumbent must possess knowledge of business analysis, and asserted that it is the core of the petitioner's business. More specifically, the petitioner outlined the core knowledge competencies of business analysis:

- Knowledge of business and management principles involved in strategic planning, resource allocation, production methods and coordination of people and resources;
- Knowledge of international finance
- Knowledge of pricing structure
- Knowledge of product development, product sourcing in the United States and China

- Understanding of community relations, customer service, quality assurance as well as traditional promotional techniques such as advertising, public relations and sales promotion

- Bilingual in Chinese and English.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on March 21, 2012. Within the RFE, the director outlined the specialty occupation regulatory criteria and requested specific documentation to establish that the proffered position qualifies for classification as a specialty occupation. Counsel responded to the RFE on April 16, 2012, and submitted an RFE response letter with updated duties, and additional evidence.

The petitioner's breakdown of time spent on the duties appears follows:

- Keep track of monetary exchange rates between Chinese Yuan and US [dollars] in order to conduct research and construct framework for existing and potential business transactions, taking into consideration maximization of company profit and remaining competitive in the market. Analyze accounting records prepared by the bookkeeper to determine financial resources to implement various operations programs.

  -15% (6 hours/week)

- Research and plan the most appropriate route for shipments, such as consolidation of air, seal and road services, taking into account of the particular nature of the goods, costs, transit time and security to guarantee the most cost-effective and secure solutions.

  -15% (6 hours/week)

- Maintain most updated knowledge of relevant legislation, Sino-American political [situations] and other factors, such as global fuel prices, that could affect freight transportation. Create research database to keep current of new regulations that may affect accessories market.

  -10% (4 hours/week)

- Make [preparations] based on the above research and analysis to negotiate and administer contracts with clients in regards to transportation and handling costs, contact suppliers and purchaser for problems related to the entire freight forwarding process, and communicated with carriers to obtain most reasonable quotes in order to arrange shipping.

  -25% (10 hours/week)

- Obtain, check and prepare documentations to meet customs and insurance requirements, packing specifications, and compliance with foreign countries' regulations.

  -10% (4 hours/week)

- Coordinate daily business operations including imports and supply chain management, international logistics and freight shipping arrangements, distribution and forwarding. Work closely with colleagues to ensure smooth operations and measure the effectiveness of communication programs and strategies.

  -10% (4 hours/week)

- Maintain real-time tracking of freights, review order status and report to clients on daily basis. Act as consultant for clients in customs and regulation related matters.

  -10% (4 hours/week)

- Research the electrics accessories market statistics and keep current with the market forecast future marketing trends. Manage and handle frequent special requests from clients related to seasonal events such as holiday promotion.

  -5% (2 hours/week)

The AAO observes that these are essentially the initial duties described by the petitioner, but regrouped, and slightly reworded in some instances, but overall the same. In a letter submitted in response to the director's RFE, counsel asserted that the proffered position qualifies as a specialty occupation, and contended that it met each of the four criteria.

The director denied the petition on August 7, 2012.

On appeal, counsel for the petitioner contends that the director erroneously determined that the proffered position is not a specialty occupation, and submits that proffered position meets more than one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To supplement the appeal brief, counsel resubmitted many of the same supporting materials that accompanied the RFE response.

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

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

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide

variety of occupations it addresses.[2]

Counsel contends that the proffered position does not fit within any one occupational classification described in the *Handbook*. Because the proffered position does not fit squarely within one occupational classification, counsel argues that elements of the duties are comparable to those of numerous occupational classifications, and claims that most of these occupations require a four-year bachelor's degree. Specifically, counsel suggests that some of the duties are akin to the following Occupational Classifications: "Logisticians," SOC (O*NET/OES) Code 13-1081; "Cost Estimators," SOC (O*NET/OES) Code 13-1051; "Marketing Managers," SOC (O*NET/OES) Code 11-2021; and "Market Research Analysts and Marketing Specialists," SOC (O*NET/OES) Code 13-1161.

However, this argument does not establish the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) for two reasons. First, counsel neither develops his argument in meaningful detail nor supports it with any evidence. 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)). Second, the *Handbook* does not indicate that logisticians, cost estimators, marketing managers, or market research analysts normally require a bachelor's degree or the equivalent, *in a specific specialty,* for entry.

As counsel notes, the occupational category "Business Operations Specialists, All Other" is one for which the *Handbook* does not provide detailed data. The *Handbook* states the following with regard to these occupations:

> **Data for Occupations Not Covered in Detail**
>
> Employment for the hundreds of occupations covered in detail in the *Handbook* accounts for more than 121 million, or 85 percent of all, jobs in the economy. [The *Handbook*] presents summary data on 162 additional occupations for which employment projections are prepared but detailed occupational information is not developed. These occupations account for about 11 percent of all jobs. For each occupation, the Occupational Information Network (O*NET) code, the occupational definition, 2010 employment, the May 2010 median annual wage, the projected employment change and growth rate from 2010 to 2020, and education and training categories are presented. For guidelines on interpreting the descriptions of projected employment change, refer to the section titled "Occupational Information Included in the OOH."

[2] The *Handbook*, which is available in printed form, may also be accessed online at http://www.stats.bls.gov/oco/. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

> Approximately 5 percent of all employment is not covered either in the detailed occupational profiles or in the summary data given here. The 5 percent includes categories such as "all other managers," for which little meaningful information could be developed.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook,* 2012-13 ed., "Data for Occupations Not Covered in Detail," http://www.bls.gov/ooh/About/Data-for-Occupations-Not-Covered-in-Detail.htm (last visited Jun. 21, 2013).

Thus, the narrative of the *Handbook* indicates that there are over 160 occupations for which only brief summaries are presented. That is, detailed occupational profiles for these 160+ occupations are not developed.[3] The *Handbook* continues by stating that approximately five percent of all employment is not covered either in the detailed occupational profiles or in the summary data. The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed.

Accordingly, 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 *Handbo*ok's support on the issue. In such a case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other objection, 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.

DOL's Occupational Information Network (O*NET OnLine) does not establish that the proffered position qualifies as a specialty occupation under the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. O*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as O*NET OnLine's Job Zone designations make no mention of the specific field of study from which a degree must come. As was noted previously, the AAO interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. The Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. For all of these reasons, the information from O*NET OnLine is of little evidentiary value to the issue presented on appeal.

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[3] The AAO notes that occupational categories for which the *Handbook* only includes summary data includes a range of occupations, including for example, postmasters and mail superintendents; agents and business managers of artists, performers, and athletes; farm labor contractors; audio-visual and multimedia collections specialists; clergy; merchandise displayers and window trimmers; radio operators; first-line supervisors of police and detectives; crossing guards; travel guides; agricultural inspectors, as well as others.

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

Finally, it is noted that the petitioner submitted an LCA certified for a 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.[4]

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common 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.

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[4] The *Prevailing Wage Determination Policy Guidance* (available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf (last accessed Jun. 21, 2013)) issued by DOL states the following with regard to Level I wage rates:

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

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level indicates that the proffered position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to possess a basic understanding of the occupation; that she will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms 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.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner argues that USCIS approved H-1B petitions filed by counsel on behalf of similarly-situated companies sharing the same job title as the proffered position. In support of this argument, counsel submitted H-1B approval notices and documentation pertaining to the beneficiaries of two such cases: (1) S-E-; and (2) M-F-.[5]

Although copies of some of the documents contained in these previously approved petitions were submitted by the petitioner, a full copy of each petition was not. If a petitioner wishes to have unpublished service center or AAO decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. § 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i).[6]

That being said, the AAO will nonetheless address the documents that *were* submitted from these records of proceeding. With regard to the petition filed on behalf of S-E-, the instant record of proceeding contains that record's H-1B approval notice; educational documentation indicating that S-E- earned a bachelor's degree in business administration, with a concentration in marketing; and the Form I-129 and associated LCA, which indicate that the position proffered in that petition was characterized as one within the "Business Operations Specialists, All Other" occupational classification. However, in reviewing these materials, it is noted that the petitioner in S-E-'s case provided a North American Industry Classification System (NAICS) Code of 315239, "Women's

[5] Name withheld to protect individuals' identities.

[6] However, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, neither the director nor the AAO was required to request and/or obtain copies of these petitions.

and Girls' Cut and Sew Other Outerwear Manufacturing."[7] However, the petitioner in this case provided a NAICS Code of 488510, "Freight Transportation Arrangement."[8] The petitioner has not explained how a company describing itself as one conducting business in the field of "Women's and Girls' Cut and Sew Other Outerwear Manufacturing" is "similar" to the petitioner, as is required in order to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Furthermore, and as noted above, the petitioner in this matter 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. It is not clear whether such was true of the position filled by S-E-. The record, therefore, does not contain enough information to establish that the position filled by S-E- is in fact "parallel" to the one proffered here, as is also required in order to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is the information submitted from the record of proceeding pertaining to the petition filed on behalf of M-F- sufficient to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The instant record of proceeding contains that record's approval notice and information regarding M-F-'s educational credentials. However, this information is not sufficient to support counsel's assertion that that both business entities shared the same industry, that they are similar organizations, or that they petitioned for parallel positions.

Moreover, even if the AAO were to find that these two H-1B petitions did involve parallel positions in similar organizations, the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) would still not be satisfied. According to the Bureau of Labor Statistics there were approximately 931,010 persons employed within the "Business Operations Specialists, All Other" occupational classification as of May, 2012.[9] Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the materials it submits regarding the two positions for which these H-1B petitions were filed with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that these two petitions were not 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

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[7] U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2007 NAICS Definition, "315239 Women's and Girls' Cut and Sew Other Outerwear Manufacturing," http://www.census.gov/cgi-bin/sssd/naics/naicsrch (accessed Jun. 21, 2013).

[8] U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "488510 Freight Transportation Arrangement," http://www.census.gov/cgi-bin/sssd/naics/naicsrch (accessed Jun. 21, 2013).

[9] U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, Occupational Employment and Wages, May 2012, "13-1199 Business Operations Specialists, All Other," http://www.bls.gov/oes/current/oes131199.htm (accessed Jun. 21, 2013).

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").

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

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

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The AAO finds that the record of proceeding does not establish relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform that position.

The petitioner contends that the position is complex and unique due to the research component of her position, particularly because her daily research and analysis involves written materials in Chinese. As an exhibit, the petitioner submitted some examples of the materials the beneficiary uses to conduct her daily duties. The AAO notes that these materials are not written in the English language, and not translated in full. There is a translation on the title of the documents, but without fully translated materials, the AAO cannot make any findings regarding this exhibit. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3).

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor's degree, or the equivalent, in a specific specialty.

Additionally, the AAO incorporates here by reference and reiterates its earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and

monitored; that she will receive specific instructions on required tasks and expected results; and that her work will be reviewed for accuracy.

Consequently, as it did not show that the particular position for which it filed this petition is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

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

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

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. The record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.[10] In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* § 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 at 387. In this pursuit, the critical element is not the title

[10] Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within its occupation.

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 a 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 proposed 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.

As proof that the proffered position satisfies this criterion, the record contains evidence that the petitioner employed S-E-[11] in 2010 and 2011. According to counsel, this individual possessed a bachelor's degree in accounting. However, this evidence does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

First, the AAO does not consider a single previous hire sufficient evidence of a past history of employing only persons with at least a bachelor's degree, or the equivalent, in a specific specialty to establish eligibility under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*). Nor does the record contain evidence that S-E- possessed the degree claimed by counsel. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

As the petitioner has failed to demonstrate a history of recruiting and hiring only individuals with a bachelor's degree, or the equivalent, in a specific specialty for the proffered position, it has failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty.

Both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level I is indicative of duties of relatively low complexity.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

> **Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees

[11] Name withheld to protect individual's identity.

> may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

> **Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

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

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

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

> **Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.
>
> Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

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

> **Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct

> work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II). The AAO also finds that, separate and apart from the petitioner's submission of an LCA with a wage-level I designation, the petitioner has also failed to provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved 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.

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

Finally, the AAO is not persuaded by the caselaw counsel cites on appeal. *Matter of Perez,* 12 I&N Dec. 701 (D.D. 1968) and *Matter of Sun*, 12 I&N Dec. 535 (BIA 1966) are not relevant here, as they pertained to immigrant visa petitions and whether the beneficiaries were members of the professions as defined in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and as interpreted at those times. The issue before the AAO, however, is whether the petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation and not whether it is a profession. *Matter of Perez* and *Matter of Sun* are, therefore, irrelevant here.[12]

Counsel also cites the following cases: (1) *Button Depot, Inc. v. U.S. Dept. of Homeland Sec.*, 386 F. Supp. 2d 1140 (C.D. Cal. 2005); (2) *Fred 26 Importers v. DHS*, 445 F. Supp. 2d 1174 (C.D. Cal. 2006); and (3) *Unico American Corp. v. Watson* ___ F. Supp. ___, CV No. 896958 (C.D. Cal. March 19, 1991). However, it is noted that in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising even within the same district. *See Matter of*

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[12] The AAO notes that the current, primary, and fundamental difference between qualifying as a profession and qualifying as a specialty occupation is that specialty occupations require the U.S. bachelor's or higher degree, or its equivalent, to be in a specific specialty. A position that qualifies as a profession as that term is defined in section 101(a)(32) of the Act does not necessarily qualify as a specialty occupation unless it satisfies section 214(i)(1) of the Act.

K-S-, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district court judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719.[13]

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

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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

[13] Furthermore, with regard to *Unico American Corp. v. Watson,* the AAO notes that this was an unpublished decision and, given that published decisions of the district courts are not binding on the AAO outside of that particular proceeding, an unpublished decision of a district court has even less persuasive value. In any event, the AAO is not running counter to the proposition for which counsel cites this decision, for the AAO bases its decision upon the totality of the evidence in the record of proceeding bearing upon the specialty-occupation issue, and without sole or excessive reliance upon the relevant information contained in the *Handbook*.