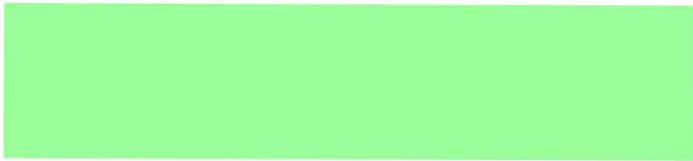




U.S. Citizenship  
and Immigration  
Services

(b)(6)



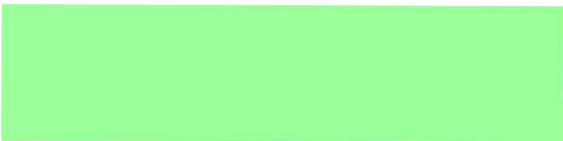
DATE: **APR 09 2014** OFFICE: CALIFORNIA SERVICE CENTER

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 11, 2013. In the Form I-129 visa petition, the petitioner describes itself as a hotel established in 2006. In order to employ the beneficiary in what it designates as a management analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on July 25, 2013, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

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

## **I. Factual and Procedural History**

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a management analyst on a full-time basis at the rate of pay of \$55,952 per year. In the letter of support dated March 18, 2013, the petitioner stated that "[u]nder the general guidance of the president and executive staff, and within [REDACTED] policies and procedures, the management analyst will analyze and suggest methods to improve our organization's overall structure and increase our profits." The petitioner provided the following breakdown of the duties for the proffered position:

<b>Duties</b>	<b>Estimated Percentage of time per week spent on each duty</b>
Gather pertinent information and data on existing procedures, processes, and operations. Review and analyze the information gathered and propose solutions or alternative methods to undertake.	60
Measure and evaluate workflow;	20

conduct cost and time studies; conduct quality control studies on operations, services, and procedures.	
Ensure that service quality standards of the entire hotel are met as it relates to compliance with corporate processes and procedures.	10
Prepare illustrative charts, tables, graphs, and diagrams to assist the analysis and improvement of the processes and procedures.	10

**TOTAL 100%**

In addition, the petitioner stated that "[the beneficiary] is qualified to hold the position of a Management Analyst in our hotel," and that "[h]e has extensive experience in this field and continues to have a strong desire to further his career path in the field of hospitality management."<sup>1</sup> The petitioner submitted a work experience evaluation report, along with supporting documents. Although the petitioner stated that the beneficiary is qualified to serve in the proffered position, the petitioner did not state that the position has any particular academic requirements. With the petition, the petitioner provided documents regarding its business operations, along with several job postings.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Management Analysts" – SOC (ONET/OES Code) 13-1111, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 22, 2013. The director outlined the specific evidence to be submitted. The AAO notes that the director specifically requested the petitioner submit probative evidence to establish that the proffered position is a specialty occupation.

On July 12, 2013, the petitioner and its counsel responded by submitting further information regarding the proffered position and additional evidence. In response to the director's RFE, the petitioner submitted a letter dated July 2, 2013, which included a revised description of the duties of the proffered position. Specifically, the petitioner provided the following information:

Job Description: The work to be performed by [the beneficiary] is:

<sup>1</sup> The test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation, as required by the Act. See section 214(i)(1) of the Act.



- a. Following data and informational gathering from management, staff, employees, and contracto[r]s, he will advise on operational review, maintenance, budget reviews and actual cost of operations of each hotel, processes, products, profitability, and the use of funds.
- b. Following the evaluation and measure of workflow, he will provide advice regarding high employee turnover at the various hotels and make recommendations on options to decrease turnover.
- c. Provide analysis on the cost estimation of services provided by the hotels such as food service, cable TV etc. for review by [REDACTED] management.
- d. Carry out research and data collection to understand the hotel operations including conducting analysis and interviewing client's employees, management team and other stakeholders;
- e. Overview of the company financials to determine most effective operational methods to improve economic outlook.
- f. Advise on staffing needs in accordance with company goals and objectives and works to enhance the capabilities of current staff through performance and salary appraisals, mentoring, and training.
- g. Provide advice on properly positioning, specifically franchising or going independent as it relates to each hotel.
- h. Provide advice regarding Marketing strategies to increase revenue.
- i. Provide advice regarding the formations of business plans to secure new financing options and new investors.
- j. Provide advice and consultations regarding acquisitions of new properties using non-traditional methods including All-Inclusive Trust Deed (AITD, seller carry-back financing, and lease with option to buy.
- k. Advise the owner of exit strategies
- l. Preparing business proposals/presentations and reports to the owner and management.<sup>2</sup>

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<sup>2</sup> The petitioner did not provide information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks of the proffered position. Thus, the petitioner failed to specify which tasks were major functions of the proffered position and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.



The petitioner also stated that "the minimum educational level required for the **Management Analyst** is a Bachelor's degree or experience related."

In addition, the petitioner and counsel submitted additional documents, including: (1) copies of the petitioner's Income Tax Returns for 2011 and 2012; (2) copies of the petitioner and its hotels' Forms 941, Employer's Quarterly Federal Tax Return for 2013 (quarter 1); (3) employee contact lists for the petitioner and its hotels; (4) documentation regarding the petitioner's hotels, including printouts from the hotels' websites, hotel coupons, and advertisements for the hotels; and (5) job vacancy announcements.

The director reviewed the information provided by the petitioner and counsel. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation, as required by the Act. The director denied the petition on July 24, 2013. Counsel submitted an appeal of the denial of the H-1B petition. With the appeal, counsel submitted a brief, along with previously submitted documentation and new evidence.<sup>3</sup>

## II. Beyond the Director's Decision – Additional Grounds for Denial of the H-1B Petition

The AAO reviewed the record of proceeding in its entirety and, as will be discussed below, has identified several issues that preclude the approval of the H-1B petition that were not identified by

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<sup>3</sup> With regard to the new documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533. If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not consider the sufficiency of such evidence requested in the RFE but submitted for the first time on appeal. Nevertheless, the AAO reviewed the documentation but finds that it fails to establish eligibility that the proffered position qualifies as a specialty occupation under the applicable statutory and regulatory provisions.

the director.<sup>4</sup> Thus, even if the petitioner overcame the grounds for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought.

**A. The Petitioner Does Not Require a Bachelor's or Higher Degree in a Specific Specialty**

In the initial submission, the petitioner did not provide any requirements for the proffered position. Thereafter, in response to the RFE, the petitioner claims that the "minimum education level required for the Management Analyst is a Bachelor's Degree or experienced related." On appeal, counsel states that the position requires "a Bachelor's Degree or work experience equivalent to a bachelor's degree or higher." Thus, it appears that a general-purpose degree or a degree in any discipline is acceptable for the proffered position.

The assertion that a general-purpose degree or a degree in any discipline is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1<sup>st</sup> Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, 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) (stating that "[t]he mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility"). Thus, while a general-purpose degree or a degree in any discipline may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

Accordingly, without more, the petitioner has failed to establish eligibility for the benefit sought under the applicable statutory and regulatory provisions. The petitioner's statement that a degree is required, without further requiring that (1) the degree be in any specific specialty or (2) the degree be equivalent to a degree in a specific specialty when combined with additional education, training, and/or experience, is tantamount to an admission that the proffered position is not in fact a specialty occupation.

The AAO notes that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. *See Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000). The AAO does not find, however, that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner. Instead, USCIS must examine the actual employment requirements and, on the basis of that examination, determine whether the position qualifies as a

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<sup>4</sup> The AAO conducts its review of service center decisions on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).



specialty occupation. *See generally* *Defensor v. Meissner*, 201 F. 3d 384. Furthermore, the AAO does not find (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. at 560 ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Second, in promulgating the H-1B regulations, the former Immigration and Naturalization Service (INS) made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

Initially, the petitioner did not provide any requirements for the proffered position. Thereafter, in response to the RFE, the petitioner claims that the proffered position requires "a Bachelor's Degree or experienced related." Upon review, however, the petitioner has not asserted and the record of proceeding does not support the conclusion that the petitioner's claimed requirement is equivalent to a bachelor's or higher degree in a specific specialty.

#### **B. The Petitioner Did Not Comply with the Itinerary Requirement**

In the instant case, the record of proceeding contains discrepancies regarding the place of employment for the beneficiary. The petitioner indicated in Part 1 that its address is [REDACTED]. On the Form I-129, the petitioner provided the following information in Part 5 (page 4):

Address where the beneficiary(es) will work if different from address in Part 1.  
(Street number and name, city/town, state, zip code)

Same as part 1

On the page 4 of the Form I-129 petition, the petitioner indicated the following:

Will the beneficiary work off-site? ☐ No ☒ Yes



Further, on page 19 of the Form I-129, the petitioner provided the following information:

Part D. Off-Site Assignment of H-1B Beneficiaries

- ☐ No ☒ Yes a. The beneficiary of this petition will be assigned to work at an off-site location for all or part of the period for which H-1B classification is sought.
- ☐ No ☒ Yes b. Placement of the beneficiary off-site during the period of employment will comply with the statutory and regulatory requirements of the H-1B nonimmigrant classification.
- ☐ No ☒ Yes c. The beneficiary will be paid the higher of the prevailing wage or actual wage at any and all off-site locations.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

*Service or training in more than one location.* A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 shall be where the petitioner is located for purposes of this paragraph.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations. Here, the petitioner states that the beneficiary will work at its business location and an off-site location. Thus, the beneficiary would work at multiple locations at some point during the requested period of employment and as the petitioner failed to provide this required evidence when it filed the Form I-129 in this matter, the petition must also be denied on this additional basis.

**C. The LCA Filed in the Instant Matter Would Not Correspond to a Higher-Level and More Complex Position**

The petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational title of "Management Analysts" - SOC (ONET/OES) code 13-1111. The petitioner stated in the LCA that the wage level for the proffered position was a Level I (entry) position.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (O\*NET) occupational code classification. Then, a prevailing wage determination is made

by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.<sup>7</sup>

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.<sup>8</sup> The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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

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

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).

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<sup>7</sup> For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>8</sup> A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.



Throughout the record of proceeding, the petitioner and counsel claim that the proffered position involves complex, unique and/or specialized duties. Moreover, counsel claims that the petitioner will be relying on the beneficiary to provide experience and leadership to promote the needs of its customers while increasing the organization's profits. Furthermore, counsel states that the beneficiary will provide analysis for building the business. Counsel also describes the proffered position as complex and highly specialized. In addition, the petitioner states that it requires an individual with expertise for the proffered position, and that the beneficiary will analyze and suggest methods to improve the organization's overall structure and increase profits.

On appeal, counsel claims that the "responsibilities of a Management Analyst of a Corporation with multiple hotel properties of varying brand names are exacting and complex." Counsel further references the complexity and uniqueness of the duties of the position. In addition, counsel states that the "[b]eneficiary is expected to perform in the proposed position at the level of one with the knowledge, training, and ability to oversee multiple hotel properties and manage a multi-million dollar company." According to counsel, the proffered position is "more demanding than a typical management analyst," and "[w]hat makes this position specialized and complex is the fact that [the beneficiary] will be employed as Management Analyst for a group of hotels of varying sizes under Petitioner." Further, counsel notes the "sophistication and scope" with regard to the "specialized and complex duties" that the beneficiary will perform.

The AAO must question the level of complexity, independent judgment and understanding required for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described in the record of proceeding conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. 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; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. Furthermore, a Level I designation is appropriate for a position such as a research fellow, a worker in training, or an internship.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. As previously mentioned, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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

Certification by the Department of Labor [DOL] of a labor condition application in an occupational classification does not constitute a determination by that agency that



the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

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

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

As such, a review of the enclosed LCA indicates that the information provided therein does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements, which if accepted as accurate would result in the beneficiary being paid a salary below that required by law. As a result, even if it were determined that the proffered position were a higher-level and more complex position as described and claimed elsewhere in the petition in support of the petitioner's assertions that this position qualifies as a specialty occupation, the petition could still not be approved for this additional reason.<sup>9</sup>

### III. The Director's Basis for Denial of the H-1B Petition

<sup>9</sup> Fundamentally, it appears that (1) the petitioner previously claimed to DOL that the proffered position is a Level I, entry-level position to obtain a lower prevailing wage; and (2) the petitioner is now claiming to USCIS that the position is a higher-level and more complex position in order to support its claim that the position qualifies as a specialty occupation. The petitioner cannot have it both ways. Either the position is a more senior and complex position (based on a comparison of the petitioner's job requirements to the standard occupational requirements) and thereby necessitates a higher required wage, or it is an entry-level position for which the lower wage offered to the beneficiary in this petition is acceptable. To permit otherwise would be directly contrary to the U.S. worker protection provisions contained in section 212(n)(1)(A) of the Act and its implementing regulations.

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below for dismissing the appeal.

**A. Statutory and Regulatory Provisions for a Specialty Occupation Position**

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;



- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

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

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



attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

### **B. The Proffered Position Does Not Quality as a Specialty Occupation**

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which 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.

The AAO recognizes the DOL's *Occupational Outlook Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>10</sup> As previously discussed, the petitioner asserts that the proffered position falls under the occupational category "Management Analysts."

#### **Education**

A bachelor's degree is the typical entry-level requirement for management analysts. However, some employers prefer to hire candidates who have a master's degree in business administration (MBA).

Few colleges and universities offer formal programs in management consulting. However, many fields of study provide a suitable education because of the range of areas that management analysts address. Common fields of study include business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English.

Analysts also routinely attend conferences to stay up to date on current developments in their field.

#### **Licenses, Certifications, and Registrations**

The Institute of Management Consultants USA (IMC USA) offers the Certified Management Consultant (CMC) designation to those who meet minimum levels of education and experience, submit client reviews, and pass an interview and exam covering the IMC USA's Code of Ethics. Management consultants with a CMC designation must be recertified every 3 years. Management analysts are not required to get certification, but it may give jobseekers a competitive advantage.

#### **Work Experience in a Related Occupation**

Many analysts enter the occupation with several years of work experience. Organizations that specialize in certain fields typically try to hire candidates who have experience in those areas. Typical work backgrounds include management, human resources, and information technology.

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<sup>10</sup> All of the AAO's references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The AAO hereby incorporates into the record of proceeding the chapter of the *Handbook* regarding "Management Analysts."

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Management Analysts, on the Internet at <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-4> (last visited April 8, 2014).

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

The *Handbook* reports that management analysts are not required to get certification, but it may give jobseekers a competitive advantage. According to the *Handbook*, the Institute of Management Consultants USA (IMC USA) offers the Certified Management Consultant (CMC) designation to those who meet minimum levels of education and experience, submit client reviews, and pass an interview and exam covering the IMC USA's Code of Ethics. The AAO notes that there is no indication that the petitioner requires the beneficiary to have obtained the CMC designation or any other professional designation to serve in the proffered position.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Rather, the *Handbook* states that many fields of study provide a suitable education for management analysts. The *Handbook's* narrative indicates that common fields of study include business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English. According to the *Handbook*, a range of programs can help people prepare for jobs in this occupation. The *Handbook* states that many analysts enter the occupation with several years of work experience, and that typical work backgrounds include management, human resources, and information technology. The *Handbook* does not conclude that normally the minimum requirement for entry into these positions is at least a bachelor's degree in a *specific specialty*, or its equivalent.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields (such as business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English) would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of



highly specialized knowledge is essentially an amalgamation of these different specialties.<sup>5</sup> Section 214(i)(1)(B) of the Act (emphasis added).

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

Here, the *Handbook* indicates a baccalaureate degrees in various fields are acceptable for entry into the occupation. In addition to recognizing degrees in disparate fields (i.e., business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English), the *Handbook* indicates that a common field of study for this occupation is business and that some employers prefer to hire candidates who have an advanced degree in business administration. Obviously, a *preference* for a candidate with a master's degree in business administration is not an indication of a *requirement* for the occupation. Furthermore, although a general-purpose bachelor's degree, such as a degree in business, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.<sup>5</sup> Therefore, the *Handbook's* recognition that a general, non-specialty degree in business is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not normally the minimum requirement for entry into this occupation.

On appeal, counsel submitted an advisory opinion letter from [REDACTED] president of [REDACTED] a company which provides "foreign credential evaluation and translation services." The letter is dated September 16, 2013. In the letter, [REDACTED] states her opinion on the educational requirements for the proffered position, specifically, claiming that the proffered position requires at least a bachelor's degree in business administration or a related area, or the equivalent.

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<sup>5</sup> Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

The AAO reviewed the opinion letter in its entirety. However, as discussed below, the letter from [REDACTED] is not persuasive in establishing the proffered position as qualifying as a specialty occupation.

With the letter, [REDACTED] provided a printout regarding [REDACTED] and its employees. In the letter, [REDACTED] describes her qualifications, including her educational credentials and professional experience. Based upon a complete review of [REDACTED] letter and her company's printout, the AAO notes that [REDACTED] has failed to provide sufficient information regarding the basis of her expertise on this particular issue. While the documentation contains information about [REDACTED] credentials and [REDACTED] has not established her expertise pertinent to the hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. Without further clarification, it is unclear how her education, training, skills or experience would translate to any particular knowledge of the current recruiting and hiring practices of "hotels and motels" (as designated by the petitioner in the Form I-129 and with the North American Industry Classification System code) or similar organizations for management analyst positions (or parallel positions).<sup>14</sup>

[REDACTED] reports that she reviewed a description of the job duties of the proffered position, along with an explanation of the nature of the employer's business. Upon review of the opinion letter, there is no indication that [REDACTED] possesses any knowledge of the petitioner's proffered position beyond this information. She does not discuss the duties of the proffered position in any substantive detail. To the contrary, she simply lists the tasks in bullet-point fashion, and claims that the appropriate knowledge required for these job duties would be acquired in university level courses. She then lists approximately 70 courses, many of which appear to overlap. Upon review, it is not evident that she analyzed the duties prior to formulating her letter. [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. For instance, there is no evidence that [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job.

[REDACTED] asserts a general industry educational standard for management analyst positions without referencing any supporting authority or any empirical basis for the pronouncement. Likewise, she does not provide a substantive, analytical basis for her opinion and ultimate conclusion. Her opinion does not relate her conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. Accordingly, the very fact that she attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of her opinion.

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<sup>14</sup> According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited April 8, 2014).



[REDACTED] opinion letter does not cite specific instances in which her past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that she has published any work or conducted any research or studies pertinent to the educational requirements for such positions (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that she is an authority on those specific requirements.

Furthermore, there is no indication that the petitioner and counsel advised [REDACTED] that the petitioner characterized the proffered position as a low, entry-level management analyst position, for a beginning employee who has only a basic understanding of the occupation (as indicated by the wage-level on the LCA) relative to other positions within the occupational category. The wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. It appears that [REDACTED] would have found this information relevant for her opinion letter. Moreover, without this information, the petitioner has not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the opinion letter rendered by [REDACTED] is not probative evidence to establish the proffered position qualifies as a specialty occupation. The conclusions reached by [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which she reached such conclusions. There is an inadequate factual foundation established to support the opinion and the AAO finds that the opinion is not in accord with other information in the record. As such, neither [REDACTED] findings nor her ultimate conclusions are worthy of any deference, and her opinion letter is not probative evidence towards satisfying any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the opinion letter into each of the bases in this decision for dismissing the appeal.

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the

minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

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. at 1102).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source), reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. The record of proceeding does not contain any evidence from an industry professional association to indicate that a degree is a minimum entry requirement.

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

In support of the petitioner's assertion that the proffered position is a specialty occupation position, the record of proceeding contains several job announcements. However, upon review of the evidence, the AAO finds that the petitioner's reliance on the job announcements is misplaced.

As previously mentioned, the petitioner stated that it is a hotel with 55 employees. The petitioner also reported its gross annual income as approximately \$3.87 million and its net annual income as approximately \$33,900. As noted above, the petitioner designated its business operations under the NAICS code 721110, which describes "Hotels and Motels." See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited April 8, 2014).

For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the



particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner and counsel to claim that the organizations are similar and in the same industry without providing a legitimate basis for such an assertion.

Upon review of the documentation, the petitioner fails to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

For instance, the advertisements include the following positions:

- [REDACTED] a leading global provider of medical devices.
- [REDACTED] a proven provider of efficient business, records management, technology and facilities management solutions designed to help government and commercial clients.
- [REDACTED] – which does not contain information regarding its industry, but the posting indicates that the position will be supporting the Federal Aviation Administration.
- [REDACTED] – which does not contain any information regarding the company's industry and business operations.
- [REDACTED] – which appears to be an entity with several casinos/hotels/resorts.
- [REDACTED] – large boutique hotel group with over fifty properties.
- [REDACTED] which does not contain any information about its industry.
- [REDACTED] – which is described as the largest developer of solar power.

Without further information, the advertisements appear to be for organizations that are not similar to the petitioner, and the petitioner has not provided probative evidence to suggest otherwise. In the instant case, the petitioner failed to supplement the record of proceeding to establish that the employers are similar to it. That is, the petitioner has not provided information regarding which aspects or traits (if any) it shares with the advertising organizations. Further, some of the advertisements do not appear to be for parallel positions based upon the job duties and requirements.

Moreover, contrary to the purpose for which the advertisements were submitted, many of the jobs do not require a bachelor's (or higher) degree *in a specific specialty*, or its equivalent.<sup>15</sup> The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a specific specialty that is directly related to the position.

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<sup>15</sup> For example, the job postings for the positions with [REDACTED] & [REDACTED] indicate that a bachelor's degree is required, without further specification. Thus, the postings do not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is required.

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

The job advertisements 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 fails to 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>16</sup>

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

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

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<sup>16</sup> According to the *Handbook's* detailed statistics on management analysts, there were approximately 718,700 persons employed in these positions in 2012. *Handbook*, 2014-15 ed., available at <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-1> (last visited April 8, 2014). 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 postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

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



In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted information regarding the proffered position and documents regarding its business operations, including corporate documents, hotel coupons, printouts from its websites, advertisements for the hotels, tax returns and financial documents, and contact lists. While the business documents provide some insights into the petitioner's business activities, the evidence does not establish that the proffered 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.

Further, the petitioner itself does not require at least a baccalaureate or higher degree in a specific specialty, or its equivalent, but rather requires only a bachelor's degree or equivalent experience. Moreover, although [REDACTED] provided a list of courses that she claimed are relevant for performing the duties of the proffered position, it must be noted that 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 it claims are so complex or unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. That is, the petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or its equivalent.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry level) wage, which is the lowest of four assignable wage levels. As previously mentioned, the wage-level of the proffered position indicates that (relative to other positions falling under this occupational category) the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

The petitioner claims that the beneficiary's work experience in the field of hospitality management will assist him in carrying out the duties of the proffered position. However, as previously mentioned, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The petitioner does not explain or clarify which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the AAO finds that the petitioner has failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

To satisfy 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. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

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

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

The AAO notes that the petitioner stated in the Form I-129 petition that it was established in 2006 (approximately 7 years prior to the submission of the H-1B petition). The petitioner stated that it has not employed a management analyst in the past. Upon review of the record of proceeding, the



petitioner has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent. In fact, based on the petitioner's statements with regard to its own claimed educational requirement for the position, a general bachelor's degree or a degree in any discipline (or the equivalent) is sufficient to perform the duties of the position.

The petitioner has not provided probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty in a specific specialty or its equivalent.

The AAO reviewed the record of proceeding and acknowledges that the petitioner submitted job descriptions and documentation regarding its business operations, including the documentation previously outlined. While the evidence provides some insights into the petitioner's business activities, the documents do not establish that the nature of the specific duties of the proffered position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

In the appeal, counsel claims that the proffered position is "more demanding than a typical management analyst." Counsel asserts "[w]hat makes this position specialized and complex is the fact that [the beneficiary] will be employed as a Management Analyst for a group of hotels of varying sizes under Petitioner [the petitioner's] portfolio of hotel properties." On appeal, counsel further claims that "[a]s Management Analyst of [the petitioner's business], [the] [b]eneficiary is given decision-making authority and exercise of independent judgment." Counsel asserts that the "[p]etitioner will rely on [the] [b]eneficiary's years of experience in the hotel industry to effectively carry out [the] [p]etitioner's corporate goals and objectives." However, the AAO notes again that the petitioner designated the proffered position in the LCA as a low, entry-level position relative to others within the occupation. The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the nature of the specific duties of the position is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that

the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

#### **IV. Beneficiary's Qualification**

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence 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.

#### **V. Conclusion and Order**

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

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

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

**ORDER:** The appeal is dismissed.