



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.

On the Form I-129 visa petition, the petitioner describes itself as a marble and granite custom manufacturing and sales company established in 1989. In order to employ the beneficiary in what it designates as a management production analyst position, 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, 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, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

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

I. Factual and Procedural Background

In this matter, the petitioner seeks the beneficiary's services to serve in a position it designates as a management production analyst on a full-time basis at the rate of \$54,000 per year. In its support letter dated March 25, 2013, the petitioner states that the beneficiary will be responsible for performing the following duties and responsibilities in the proffered position:

- Perform project analysis and coordination of major installation projects;
- Perform logistics for qualitative and quantitative analysis;
- Plan, schedule and perform cost control analysis for the execution of each project;
- Contract and financial analysis or [sic] each project's viability[;]
- Budgeting[;]
- Manpower allocation analysis; [and]
- Create automatic daily stats reports that will fix inaccuracies and provide management utilizing business management tools[.]

In addition, the petitioner states that the proffered position requires "a minimum of a Bachelor's degree or greater in Business economics or Economics or Accounting or in an equivalent related university study or field and at least 3 years of experience in the project management field."

With the Form I-129 petition, the petitioner submitted a copy of the beneficiary's transcript from the [REDACTED] which indicates that she was awarded a Bachelor of Arts degree in Business Economics on December 14, 2012. In addition, the petitioner submitted a copy of the beneficiary's foreign professional training certificate and transcript. Furthermore, the petitioner provided a printout from its website.

The petitioner also submitted an 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 "Management Analysts" - SOC (ONET/OES Code) 13-1111. The petitioner designated the proffered position as a Level I (entry level) position.

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 18, 2013. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted. The AAO notes that the director specifically requested the petitioner to provide a more detailed description of the work to be performed by the beneficiary for the entire period requested, including the specific job duties, the percentage of time to be spent on each duty, level of responsibility, etc.¹

On July 12, 2013, counsel for the petitioner responded by submitting a brief and additional evidence. Specifically, counsel submitted, in part: (1) an excerpt entitled "Management Analysts" from the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*); (2) the petitioner's income tax return for 2012; (3) the petitioner's employee wage summaries from October 1, 2012 to December 31, 2012, and January 1, 2013 to March 31, 2013; and (4) printouts from the petitioner's website.²

¹ In its March 25, 2013 letter of support, the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks 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.

Further, the initial job description fails to convey the substantive nature of the work that the beneficiary would actually perform. That is, the petitioner has not provided sufficient details regarding the nature and scope of the beneficiary's employment or substantive evidence regarding the actual work that the beneficiary would perform. Without a meaningful job description, the record lacks evidence establishing that position requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent). The tasks as described fail to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education.

² Although specifically requested in the RFE, the petitioner did not provide a more detailed description of the work to be performed by the beneficiary. Rather, counsel submitted a copy of the petitioner's letter of support dated March 25, 2013. No explanation was provided for failing to submit a more detailed description of the duties of the proffered position.

The director reviewed the information provided by counsel to determine whether the petitioner had established eligibility for the benefit sought. 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 at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on July 23, 2013.

On July 24, 2013, the petitioner and its counsel submitted additional documentation, including: (1) a letter from [REDACTED]

Thereafter, the petitioner submitted an appeal of the denial of the H-1B petition. On the Form I-290B, the petitioner checked box B under Part 2, indicating that the petitioner would send a brief and/or evidence within 30 days. However, the AAO did not receive a brief and/or additional evidence within the allotted timeframe (or thereafter). Accordingly, the record of proceeding is deemed complete as currently constituted.

II. Preponderance of the Evidence Standard

In the appeal brief, counsel references the "preponderance of the evidence" standard. The AAO notes that with respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

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.

USCIS examines 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. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. 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. As will be discussed, in the instant case, that burden has not been met.

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

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.

A. The 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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens

who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

B. The Proffered Position

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To make this determination, the AAO turns to the record of proceeding. To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Upon review, the AAO notes that the record of proceeding contains inconsistent information regarding the minimum requirements for the proffered position. In response to the director's RFE, counsel stated that the position requires "someone who has at least a bachelor's degree in Economics or related field." Furthermore, the petitioner provided letters from [REDACTED] who stated that the position requires "a Bachelors [sic] degree in Business and Economics or in a related university field of study." However, in the same letter, they later stated that "a person who possesses at least a Bacheors [sic] degree in Business Economics or in a related area possesses the minimum requirement to perform the position of Management Analyst." In addition, the petitioner provided a letter from [REDACTED] who stated that the position requires "the minimum of a Bachelor's Degree in Project Management, Business, or a related area, or the equivalent." On appeal, the petitioner also states that the proffered position requires "at least a bachelor's degree in Economics or related field." No explanation for the variances was provided.

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 *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³ As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Management Analysts."

The AAO reiterates that the job duties of the proffered position, as provided by the petitioner, do not convey the substantive nature of the actual work that the beneficiary would perform within the petitioner's business operations. Rather, the job description conveys, at best, only generalized functions at a generic level for the occupational category. Upon review of the record of proceeding, the petitioner has not established that the actual day-to-day duties of the proffered position fall under the occupational category "Management Analysts." Nevertheless, the AAO reviewed the chapter of the *Handbook* (2014-2015 edition) entitled "Management Analysts" including the sections regarding the typical duties and requirements for this occupational category.⁴ However, even assuming *arguendo* that the proffered position falls under the occupational category "Management Analysts," the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

The subchapter of the *Handbook* entitled "How to Become a Management Analyst" states in pertinent part the following about this occupational category:

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.

³ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2014 – 2015 edition available online. The AAO hereby incorporates into the record of proceeding the excerpt of the *Handbook* regarding the duties and requirements of the occupational category "Management Analysts."

⁴ For additional information regarding the occupational category "Management Analysts," see 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-1> (last visited April 7, 2014).

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.

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 7, 2014).

When reviewing the *Handbook*, the AAO must note that the petitioner designated the wage level of the proffered position as a Level I position on the LCA. 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 she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results.¹⁴

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.

¹⁴ 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.

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.⁵ 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* states that a degree in business is acceptable. 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 147.⁵ Therefore, the *Handbook's* recognition that a

⁵ 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*

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.

The AAO observes that in response to the RFE dated July 9, 2013, counsel states that the Dictionary of Occupational Titles (hereinafter the DOT) "assigns a professional level to this position of Management Analyst, i.e. a professional position requiring a minimum of a Bachelor's Degree as the minimum requirement to perform this position." It is important to note, however, that DOT was last updated in 1991 (approximately 20 years prior to the submission of the H-1B petition) and has been superseded by O*NET.⁶ Although counsel references DOT, he fails to submit evidence to substantiate his claim and to establish its relevancy to establish the current educational requirements for entry into the occupation.⁷ Therefore, the DOT is not probative evidence to establish that the proffered position is a specialty occupation.

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.

Id.

⁶ See, for instance, this note at the opening page of the U.S. Department of Labor Internet site at <http://www.oalj.dol.gov/libdot.htm> (last visited April 7, 2014):

The Dictionary of Occupational Titles (DOT) was created by the Employment and Training Administration, and was last updated in 1991. It is included on the Office of Administrative Law Judges (OALJ) web site because it was a standard reference in several types of cases adjudicated by the OALJ, especially in older labor-related immigration cases. **The DOT, however, has been replaced by the O*NET.**

(Emphasis in the original).

⁷ More specifically, the occupational title of "Management Analyst" has a Specialized Vocational Preparation of 7 to less than ("<") 8. Section II of the DOT's Appendix C, Components of the Definition Trailer, which addresses the SVP rating system. The section reads:

II. SPECIFIC VOCATIONAL PREPARATION (SVP)

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

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

The AAO will now discuss the letter from [REDACTED]. The letter is dated July 23, 2013. In the letter, [REDACTED] claims that the proffered position qualifies as a specialty occupation and requires "a Bachelor's Degree in Project Management, Business, or a related area, or the equivalent."

[REDACTED] provided a summary of his education and experience and attached a copy of his curriculum vitae. [REDACTED] claims that he is qualified to comment on the position of

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

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

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

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

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

An SVP rating of "7 to < 8" is less than 8 and, thus, does not include "[o]ver 4 years up to and including 10 years." This does not indicate that at least a four-year bachelor's degree is required for an occupational category that has been assigned such a rating or, more importantly, that such a degree must be in a specific specialty directly related to the occupation. Rather, the SVP rating simply indicates that the occupation requires over 2 years up to and including 4 years of training of the wide variety of forms of preparation described above, including experiential training. Accordingly, DOT does not indicate that at least a bachelor's degree in a specific specialty (or its equivalent) is normally the minimum requirement for entry into these positions.

management analyst because of the position he holds at the [REDACTED], as well as his 19 years of industry experience in business and technology sectors, and academic training. However, based upon a complete review of [REDACTED] letter and curriculum vitae, the AAO notes that he has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. Without further clarification, it is unclear how his education, training, skills or experience would translate to expertise or specialized knowledge regarding the current recruiting and hiring practices of marble and granite custom manufacturing and sales companies similar to the petitioner for management production analyst positions (or parallel positions).

[REDACTED] opinion letter and curriculum vitae do not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for management production analysts (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. The opinion letter contains no evidence that it was based on scholarly research conducted by [REDACTED] in the specific area upon which he is opining. In reaching this determination [REDACTED] provides no documentary support for his ultimate conclusion regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies). [REDACTED] asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement.

Upon review of the opinion letter, there is no indication that [REDACTED] possesses any knowledge of the petitioner's proffered position beyond the job description. He does not discuss the duties of the proffered position in any substantive detail. To the contrary, he simply listed a few tasks in bullet-point fashion with no further discussion. As a result, it is not evident that he analyzed the duties prior to formulating his letter. The fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. While [REDACTED] provides a brief description of the petitioner, he does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. For instance, there is no evidence that Mr. [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. Mr. [REDACTED] provides general conclusory statements regarding the project management analyst position, but he does not provide a substantive, analytical basis for his opinion and ultimate conclusions.

Also, it must be noted that there is no indication that the petitioner and counsel advised Mr. [REDACTED] that the petitioner characterized the proffered position as a low, entry-level position (as indicated by the wage-level on the LCA) relative to others within the occupational category. As previously discussed, the wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that 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. It appears that [REDACTED] would have found this information relevant for his 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 similar positions based upon job duties and responsibilities.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the advisory opinion rendered by [REDACTED] is not probative evidence to establish the proffered position 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 he 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.

The AAO may, in its discretion, use as advisory opinions or statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion, and for the reasons discussed above, the AAO finds 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 [REDACTED] opinion letter into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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)(I).

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.

As stated earlier, in determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 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* (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 AAO acknowledges that the record of proceeding contains an opinion letter from Mr. [REDACTED]. However, as previously discussed in detail, the AAO finds that the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

In the Form I-129 petition, the petitioner stated that it is a marble and granite custom manufacturing and sales company established in 1989, with 26 employees. The petitioner claims that it has a gross annual income of \$4.0 million and a net annual income of \$350,000. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 423320.⁸ This NAICS code is designated for "Brick, Stone, and Related Construction Material Merchant Wholesalers." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments primarily engaged in the merchant wholesale distribution of stone, cement, lime, construction sand, and gravel; brick; asphalt and concrete mixtures; and/or concrete, stone, and structural clay products.

U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 423320 – Brick, Stone, and Related Construction Material Merchant Wholesalers, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited April 7, 2014).

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the 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 an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

In support of the assertion that the proffered position is a specialty occupation under this criterion of the regulations, the petitioner and counsel submitted letters from [REDACTED] and [REDACTED]. The AAO reviewed the letters in their entirety. However, contrary to

⁸ 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 7, 2014).

the purpose for which the letters were submitted, they are not persuasive in establishing the proffered position as a specialty occupation position under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO reviewed the letters and observes that although the writers claim that the companies are similar in size and scope to the petitioner, the documents lack sufficient information regarding the organizations to conduct a meaningfully substantive comparison of the business operations to the petitioner. The petitioner did not provide any supplemental information to establish that the organizations are similar to the petitioner.

Notably, the letters are almost identical to each other. More specifically, the wording of the letters matches virtually verbatim, including grammatical and punctuation errors, as well as the same font type and size, margins, date, etc. When affidavits are worded the same (and include identical errors), it indicates that the words are not necessarily those of the affiant and may cast some doubt on the affidavits' validity. Moreover, neither letter contains any contact information for the writers or companies.

Furthermore, while the writers claim that "the requirement of a bachelor's degree in Business and Economics or in a related university field of study is the normal business requirement for a person entering the field of Management Analyst," their claims are not substantiated by evidence. They state that they have several years of experience "in the field and with having employed and hired a number of highly qualified professionals to work in various capacities of the construction industry." The writers do not indicate that they have ever employed management analysts or similar positions. They do not provide any specific information regarding the job titles, job duties and day-to-day responsibilities for these positions. There is also no information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, there is insufficient information regarding the duties and responsibilities of these positions to determine whether they are the same or parallel to the proffered position. Moreover, the AAO observes that the writers did not provide any documentary evidence to corroborate that they currently or in the past employed individuals in parallel positions to the proffered position, nor did they provide any documentation to substantiate their claimed academic requirements.

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.

To begin with, the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a

day-to-day basis such that complexity or uniqueness can even be determined. In the instant case, the record of proceeding contains a description of the proffered position and documentation regarding the petitioner's business operations, including printouts of the petitioner's website; the petitioner's income tax return for 2012; and the petitioner's employee wage summaries from October 1, 2012 to December 31, 2012, and January 1, 2013 to March 31, 2013. The petitioner, however, did not demonstrate how the duties of the position as described require 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) to perform them. For instance, while related courses may be beneficial, or in some cases even essential, in performing certain duties of the position, the petitioner did not demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Management Analysts" at a Level I (entry level) wage, which is the lowest of four assignable wage levels. The wage level of the proffered position indicates that (relative to other positions falling under this occupational category) the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require 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.

Without further evidence, it is not credible that the petitioner's proffered position is complex or unique in comparison to others within the occupation, as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."⁹

Therefore, the evidence of record does not establish that this position is significantly different from other management analyst positions such that it refutes the *Handbook's* information to the effect that degrees not in a specific specialty are acceptable for management analyst positions. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than management analyst positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

In response to the RFE and in the appeal brief, counsel states that "the [b]eneficiary has earned a four year university engineering degree in Economics from a prestigious U.S. university and has significant progressive directly related industry experience."¹⁰ However, as previously mentioned,

⁹ 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.

¹⁰ The record indicates that the beneficiary received a bachelor of arts in business economics from the [REDACTED]. There is no evidence that the beneficiary receive an engineering degree.

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 obtained by at least baccalaureate-level knowledge in a specialized area (or its equivalent). The petitioner does not sufficiently 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. To this end, the AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. 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.

While a petitioner may 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 therefore show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize

a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner stated in the Form I-129 petition that it has 26 employees and was established in 1989 (approximately 24 years prior to the filing of the H-1B petition). However, upon review of the record, the petitioner did not provide documentary evidence regarding its current or past employees who have served in the proffered position.

Upon review of the record, the petitioner has not provided probative evidence to establish that it normally requires a baccalaureate (or higher) 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, or its equivalent.

The petitioner and its counsel assert that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

In the instant case, the petitioner and its counsel submitted a description of the proffered position and documentation regarding the petitioner's business operations, including the documentation previously outlined. The AAO notes that relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. Further, the petitioner has not submitted probative evidence that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties satisfies this criterion of the regulations.

Further, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as an entry-level position relative to others within the occupational category of "Management Analysts." The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels).

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

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

IV. Conclusion and Order

An application or petition that fails to comply with the technical requirements of the law may be denied by 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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when 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.