



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JUN 03 2014** OFFICE: VERMONT SERVICE CENTER FILE [REDACTED]

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

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 Vermont Service Center on April 1, 2013. In the Form I-129 visa petition and supporting documents, the petitioner describes itself as a newspaper publisher that was established in 2005. In order to employ the beneficiary in what it designates as a sales manager 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 22, 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, the AAO agrees with the director's decision that the record of proceeding does not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Accordingly, the director's decision will not be disturbed.

I. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner states in the Form I-129 that it seeks the beneficiary's services as a full-time sales manager at a rate of pay of \$66,000 per year. In a letter dated April 1, 2013, the petitioner states the following regarding the proffered position:

In this specific case, Petitioner requires a Sales Manager who directs, coordinates and organizes the sales of all Petitioner's offices across the United States and abroad. This new position will allow Petitioner to gather information to make crucial corporate decisions, including the availability of sources to conduct Marketing/advertising campaigns, open new offices, etc. His function is central to the operation of the company considering that the main goal is to position the company across the globe. As explain[ed] above, his main duties, include overseeing the local and overseas sales, monitor Venezuelan migration within the United State[s] and abroad to consider opening new offices, he will direct, coordinate and create policies to sales teams, he will prepare budgets and reports to project sales/profitability.

The petitioner did not state at the time of the petition was filed that the proffered position has any particular academic requirements (or any other requirements). The petitioner does not claim that the proffered position 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, or its equivalent, as a minimum for entry into the occupation, as required by the Act. See section 214(i)(1) of the Act.

Rather, the petitioner states that "[the beneficiary]'s educational credentials reflect that [he] is qualified for the proffered position and have sufficiently satisfied our management staff." In support of this statement, the petitioner provided a copy of the work experience evaluation report from [REDACTED] which states that the beneficiary's work experience is equivalent to the U.S. degree of Bachelor of Business Administration with a concentration in Management awarded by a regionally accredited university in the United States.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner indicates on the LCA that the proffered position corresponds to the occupational category "Sales Managers" – SOC (ONET/OES Code) 11-2022, at a Level I (entry level) wage.²

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 16, 2013. The director outlined the evidence to be submitted.

Counsel responded to the RFE by submitting additional evidence in support of the H-1B petition. In a letter dated May 13, 2013, counsel provided a revised description of the proffered position along with the percentage of time to be spent on each duty, and stated that the proffered position requires at least a bachelor's degree and experience in the field."³ Counsel claimed that the "position offered qualifies as a specialty occupation and that the position requires at least a bachelor's degree."⁴

² The petitioner indicates on the LCA that the prevailing wage for the occupational category "Sales Managers"-SOC (ONET/OES Code)11-2022 at a Level I in Dade County is \$65,059 per year. However, according to the Foreign Labor Certification Data Center Online Wage Library, the prevailing wage is \$65,666 per year. See <http://www.flcdatcenter.com/OesQuickResults.aspx?code=11-2022&area=33124&year=13&source=1> (last visited June 2, 2014). No explanation for the variance was provided by the petitioner.

³ It is noted that counsel's description of the proffered position is not probative evidence as the information was provided by counsel, not the petitioner. Counsel's brief was not endorsed by the petitioner, and the record of proceeding does not indicate the source of the duties (and allocation of time), as well as the requirements that counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

⁴ It must be noted that counsel does not assert that the proffered position requires a baccalaureate or higher degree in a specific specialty, or its equivalent.

The director reviewed the record of proceeding, and determined that the petitioner did not establish eligibility for the benefit sought. The director denied the petition on July 22, 2013. Thereafter, counsel submitted an appeal of the denial of the H-1B petition.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, and for the specific reasons described below, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

II. SPECIALTY OCCUPATION

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 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.

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)(I), 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 *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁶ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Sales Managers."

The AAO reviewed the chapter of the *Handbook* entitled "Sales Managers," including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that "Sales Managers" comprise an occupational group for which 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 Sales Manager" states the following about this occupational category:

Most sales managers have a bachelor's degree and work experience as a sales representative.

Education

Most sales managers have a bachelor's degree: some have a master's degree. Educational requirements are less strict for job candidates who have significant experience as a sales representative. Courses in business law, management, economics, accounting, finance, mathematics, marketing, and statistics are advantageous.

Work Experience

Work experience is typically required for someone to become a sales manager. The preferred duration varies, but employers usually seek candidates who have at least 1 to 5 years of experience.

Sales managers typically enter the occupation from other sales and related occupations, such as sales representatives or purchasing agents. In small organizations, the number of sales manager positions is often limited, so advancement for sales workers usually comes slowly. In large organizations, promotion may occur more quickly.

⁶ 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 "Sales Managers."

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Sales Managers, on the Internet at <http://www.bls.gov/ooh/management/sales-managers.htm#tab-4> (last visited June 2, 2014).

When reviewing the *Handbook*, the AAO must note that the petitioner designated the proffered position under this occupational category at a Level I on the LCA.⁷ 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 will perform routine tasks that require limited, if any, exercise of judgment. In accordance with the relevant U.S. Department of Labor (DOL) explanatory information on wage levels, the beneficiary will be closely supervised and his work closely monitored and reviewed for accuracy. Furthermore, he will receive specific instructions on required tasks and expected results. DOL guidance indicates that a Level I designation is appropriate for a research fellow, a worker in training, or an internship. This designation suggests that the beneficiary will not serve in a high-level or leadership position relative to others within the occupational category.

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 occupational category. Rather, the *Handbook* states that while most sales managers have a bachelor's degree (no specific specialty is stated) and some have a master's degree, the educational requirements are less strict for job candidates who have significant experience as a sales representative.⁸ Notably, the *Handbook*

⁷ 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.

⁸ The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of sales managers have a degree (no specific specialty), it could be said that "most" sales managers have such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement (of at least a bachelor's degree in a specific specialty, or its equivalent) for that occupation, much less for the particular position proffered by the petitioner. As previously noted, the petitioner designated the proffered position in the LCA as a low-level,

does not state that such experience must be equivalent to a bachelor's degree in a specific specialty. The *Handbook* also reports that work experience is typically required for someone to become a sales manager. Furthermore, the *Handbook* indicates that the preferred duration of work experience varies, but employers usually seek candidates who have at least one to five years of experience.

The *Handbook* does not indicate that employers normally require a degree in a *specific specialty* (or its equivalent) for entry into the occupation. The *Handbook* reports that courses in business law, management, economics, accounting, finance, mathematics, marketing, and statistics are advantageous for sales manager positions. A statement that various courses are *advantageous* is obviously not an indication that such courses are *required*.

Moreover, 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 statement that it is advantageous to take courses in disparate fields, such as business law, management, economics, accounting, finance, mathematics, marketing, and statistics, would not meet the statutory requirement that the degree be "in *the* specific specialty."⁹ Section 214(i)(1)(B) (emphasis added). The text suggests that a baccalaureate degree or higher may be a preference among employers of sales managers in some environments, but that some employers hire employees with less than a bachelor's degree. For employers requiring a degree, it appears that a degree in any field and/or in an unrelated field is acceptable. The narrative of the *Handbook* emphasizes the importance of work experience. The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

In response to the RFE, counsel submitted an advisory opinion report from [REDACTED] of [REDACTED], Inc. The AAO reviewed the opinion letter in its entirety. However, as discussed below, the report is not persuasive in establishing the proffered position as a specialty occupation position.¹⁰

entry position relative to others within the occupation. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act.

⁹ Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, 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.

¹⁰ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. 8 C.F.R. § 214.2(h)(4)(ii). A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's

In the report, Ms. [REDACTED] asserts that "the position of Sales Manager at [the petitioner's organization] in Miami, Florida, U.S.A. requires an applicant to hold a minimum of the U.S. Bachelor's degree in Business Administration, Marketing or related area awarded by regionally accredited university in the United States or equivalent." It is noted that Ms. [REDACTED] provided a brief description of the petitioner's business and a job description for the proffered position. Upon review of Ms. [REDACTED]'s opinion report, there is no indication that she 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 a bachelor's degree in business administration or related area. She then lists approximately 70 courses, many of which appear to overlap. She 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 Ms. [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. Ms. [REDACTED]'s 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.

Ms. [REDACTED] provides a summary of her qualifications, including her educational credentials and professional experience. Based upon a complete review of Ms. [REDACTED]'s report, however, she has failed to provide sufficient information regarding the basis of her expertise on this particular issue. The documentation does not establish her expertise pertinent to assessing the minimum requirements for entry into the proffered position. Without further clarification, it is not apparent how her education, training, skills or experience would translate to expertise or specialized knowledge regarding educational requirements for the proffered position.

Ms. [REDACTED] makes her assertions "based on [her] academic qualifications and professional experience in the fields of business administration and international education, including transfer credit assessment, foreign credential evaluation and providing opinions for various immigration matters." However, Ms. [REDACTED]'s 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. She claims to be qualified in the fields of business administration and international education, but she did not identify the specific elements of her knowledge and experience that she may have applied in reaching her conclusions here. Moreover, it does not appear that the petitioner notified Ms. [REDACTED] that it designated the proffered position on the LCA as a Level I (entry) position

experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. *Id.*

relative to others within the occupational category. It appears that this information would have been relevant for her assessment of the proffered position.

Moreover, Ms. [REDACTED]'s assertion that the proffered position requires an applicant to hold a minimum of a bachelor's degree in business administration or a related field is inadequate to establish that a 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 and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). In addition to demonstrating that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

Accordingly, the very fact that she attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. Importantly, her statements are not supported by copies or citations of research material that may have been used. She has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty. 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 summary, for the reasons discussed above, the AAO concludes that the opinion letter rendered by Ms. [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by Ms. [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which she reached such conclusions. Therefore, the AAO declines to defer to Ms. [REDACTED]'s findings and ultimate conclusions, and further finds that 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).

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

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

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. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

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

In the Form I-129 and supporting documentation, the petitioner it is a newspaper publisher established in 2005, with 29 employees.¹¹ In its support letter dated April 1, 2013, the petitioner indicated that it serves the Venezuelan expat and immigration community of Miami-Dade, Broward and West Palm Beach Counties and New York City. The petitioner reported its gross annual income as approximately \$1.3 million, and its net annual income as approximately \$67,755. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 511110 – "Newspaper Publishers."¹² The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

¹¹ In a letter dated April 1, 2013, the petitioner states that it has "more than 10 employees."

¹² 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 U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited June 2, 2014).

This industry comprises establishments known as newspaper publishers. Establishments in this industry carry out operations necessary for producing and distributing newspapers, including gathering news; writing news columns, feature stories, and editorials; and selling and preparing advertisements. These establishments may publish newspapers in print or electronic form.

See U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 511110 – Newspaper Publishers on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited June 2, 2014).

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

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 (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

For example, the petitioner submitted advertisements for organizations that do not appear to be similar to the petitioner. Such samples of advertisements include WSJ Custom Studio, Alabama Media Group, and Napa Valley Register. For example, WSJ is a part of Dow Jones, which is described as "a global leader in news and business intelligence" and includes "some of the widest read and most respected brands like Factiva, The Wall Street Journal, Barron's and Smartmoney." The advertisement from WSJ states that it has audiences "from 58 countries and in 29 languages." Similarly, Napa Valley Register is a division of Lee Enterprises, which is "a leading provider of local news, information and advertising in primarily midsize markets, with 46 daily newspapers, rapidly growing digital products and nearly 300 specialty publication in 23 states." Further, its newspapers have circulation of 1.2 million daily and 1.4 million Sunday, reaching more than four million readers daily. In another example, Alabama Media Group is described to include "the Birmingham News, The Huntsville Times, Mobile's Press Register, and the Mississippi Press with up-to-the-minute access of AL.com." Without further information, the advertisements appear to be for organizations that are not similar to the petitioner, and 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. In addition, the advertisement from Gate House Media does not include sufficient information about its organization to conduct a legitimate comparison to the petitioner's business.

Additionally, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, the job postings from Gate House Media and Decision Toolbox state that a bachelor's degree is required, but does not state a specific specialty. Further, the advertisement from WSJ Custom Studio states that a degree is required, with a preference for an individual with a major in marketing/advertising/communication. However, the employer's preference for a particular major is not an indication of a requirement for the position.

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.¹³

Thus, based upon a complete review of the record of proceeding, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

¹³ According to the *Handbook's* detailed statistics on sales managers, there were approximately 359,300 persons employed as sales managers in 2012. *Handbook*, 2014-15 ed., available at <http://www.bls.gov/ooh/management/sales-managers.htm#tab-6> (last accessed June 2, 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 job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that 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, for positions parallel to the proffered position, commonly require at least a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that just these postings (which 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, or its equivalent, for entry into the occupation in the United States.

Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The 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.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including information regarding the proffered position and evidence regarding its business operations. For example, the submission included the following:

- A printout from the Florida Department of State showing that the petitioner is active in the state of Florida;
- Untranslated copies of the petitioner's newspaper publication;
- 2012-2013 Local Business Tax Receipt;
- Certificate of Use issued for the petitioner for advertising/marketing/public relations; and
- Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns.

While the petitioner submitted documents regarding its business operations, the petitioner did not explain how the documents relate to the beneficiary's duties, and the evidence does not establish the relative complexity or uniqueness of the proffered position. A review of the record of proceeding indicates that the petitioner has not demonstrated that the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Additionally, the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.

Further, the petitioner did not provide any academic requirements in its letter of support. In response to the RFE, counsel claims that the petitioner requires a bachelor's degree or equivalent experience. The record of proceeding does not establish that the petitioner requires a bachelor's or higher degree in a specific specialty, or its equivalent.

Moreover, although Ms. [REDACTED] provided a list of courses that she claimed are relevant, it must be noted that she did not establish how such a curriculum is necessary to perform the duties of the proffered position. While a few related courses may be beneficial 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. While counsel claims that the position involves knowledge of "Venezuelans living outside their country," it must be noted that the petitioner has not established why being a Venezuela national, along with a few courses or some industry experience is insufficient preparation for the proffered position.

Moreover, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the Level I wage rate, the beneficiary is only required to have a basic understanding of the occupation. Further, the wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; his work will be closely supervised and monitored; he will receive specific instructions on required tasks and expected results; and his work will be reviewed for accuracy.

Without further evidence, it is not credible that the petitioner's proffered position is complex or unique 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 example, 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."¹⁵ The evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty is not required for the proffered position.

The petitioner claims that the beneficiary has achieved the equivalent of a Bachelor's degree in Business Administration, and "his education meets the 'specialty occupation' standard mentioned above." However, 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). The petitioner and counsel do 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 petitioner has failed to establish the proffered position as satisfying this 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. In addition, the petitioner may submit any other documentation it considers relevant to this criterion of the regulations.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. Upon review of the record of proceeding, the petitioner has not established a prior history of recruiting and hiring for the

¹⁵ For additional information regarding wage levels as defined by DOL, 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.

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 statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to 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 petitioner stated in the Form I-129 petition that it has 29 employees and was established in 2005 (approximately eight years prior to the filing of the H-1B petition). In response to the RFE, counsel stated that the petitioner has not employed a sales manager in the past. However, counsel also asserted that the petitioner "only hires managers and essential personnel with at least a bachelor's degrees." Counsel submitted copies of translated foreign degrees for [REDACTED] and [REDACTED] and educational evaluation reports for [REDACTED] and [REDACTED]

Importantly, the petitioner did not provide the individuals' job duties and day-to-day responsibilities to establish that the duties and responsibilities for these individual are the same or related to the proffered position. It must be noted that the educational level of employees who hold positions that

are not the proffered position (or parallel to that position) is not relevant to the instant issue of whether the proffered position qualifies as a specialty occupation. Further, the petitioner did not submit probative evidence to establish the above-mentioned individuals' current or past employment with the petitioner (e.g., pay statements, Form W-2 Wage and Tax Statements).

Upon review of the record, the petitioner has not provided sufficient 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, or its equivalent.

The petitioner provided information regarding the proffered position and 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 response to the RFE, counsel claims that "[s]ince [the beneficiary] is familiarized with the target market he could implement tailored sales policies for the company." However, there is no further information on how knowledge of Venezuelans living outside of their country would be associated with the attainment of a baccalaureate or higher degree, in a specific specialty, or its equivalent. Moreover, as previously discussed, the petitioner itself does not require a bachelor's or higher degree *in a specific specialty*, or its equivalent.

In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. The AAO reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Sales Managers," and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, the petitioner has not demonstrated that the proffered position is one with specialized and complex duties 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. As previously mentioned, 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."

The AAO also notes that Ms. [REDACTED] states in her report that the duties of the proffered position are "both complex and specialized and include tasks that would require strong analytical and problem-solving abilities acquired in four years of academic study towards the U.S. Bachelor's degree in Business Administration, Marketing or related area." However, there is no indication that the petitioner and counsel advised Ms. [REDACTED] that the petitioner characterized the proffered position as a low, entry-level sales manager position. It appears that Ms. [REDACTED] would have found this information relevant for her opinion letter. Moreover, without this information, the petitioner has not demonstrated that Ms. [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. Therefore, as discussed, Ms. [REDACTED]'s report is not probative evidence to establish the proffered position qualifies as a specialty occupation.

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. 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.

III. BENEFICIARY'S QUALIFICATIONS

A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner has failed to establish that the proffered position requires a baccalaureate or higher degree in a specific specialty or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications.

IV. CONCLUSION AND ORDER

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.