



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE:

MAY 20 2014

OFFICE: CALIFORNIA SERVICE CENTER

FILE:

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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 an interest rate risk management group established in 2003. In order to employ the beneficiary as an operations associate, 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, 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 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.

In the petition signed on March 23, 2013, and supporting documentation, the petitioner indicates that it wishes to employ the beneficiary as an operations associate on a full-time basis at the rate of pay of \$37,500 per year. The petitioner indicates that the beneficiary will be employed at [REDACTED] Cleveland, Ohio. In the support letter dated March 19, 2013, the petitioner states that the beneficiary would be employed to perform the following duties:

- Responsible for ensuring [the petitioner's] clients qualify as an Eligible Contract participant, per Dodd-Frank financial regulations, prior to any swap being executed.
- Maintaining segregation of duties between marketing staff and operations team.
- Trade booking of Interest Rate Derivative Products (interest rate swaps and options including caps, collars, floors) in Derivatives Back Office System (includes new trades, amendments, terminations).
- Daily portfolio valuations for (currently) 29 bank clients, incorporating current market data into Derivatives Back Office System.
- Preparation, distribution and collection of swap documentation, including ISDA Master Agreements and Schedules, Risk Acknowledgements, Trade Confirmations, Dealer Confirmations, etc.
- Generation and transmission of confirmations to end-user counterparties, also ensure accuracy of back-to-back dealer confirmation prior to obtaining client bank signature.
- Loan documentation review to ensure cross-collateralization with the loan and swap product, loan terms match swap structure, and authorized signatories have executed

swap documents.

- Preparation and transmission of all settlement and rate reset notifications, and corresponding reports to bank clients (settlement detail reports, reset reports, etc.).
- Prepare and send electronic NACHA files for swap settlements.
- Monitor receipt of incoming fees from dealer counterparties.
- Monthly report generation for bank clients including, but not limited to mark to market reports, regulatory report data (RC-L and RC-R), pipeline and revenue reports.
- Monitor collateral positions bank clients have with their dealer counterparties to ensure bank is not over-collateralized.
- Interaction with bank clients and their lending customers to resolve any questions, issues or to assist with completion of paperwork.
- Reconcile bank client loan portfolio versus swap portfolio to ensure swap notional does not exceed loan balance, loan balance and swap notional match, loan system is coded to ensure collateral is not released prior to termination of the swap product.

The petitioner does not list the minimum requirements for the position of operations associate in its support letter or in any document submitted with the initial petition.

The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification "Business Operations Specialists, All Other" - SOC (ONET/OES Code) 13-1199, at a Level I (entry level) wage.

With the initial petition, the petitioner submitted a copy of the beneficiary's Bachelor of Arts degree in Finance from [REDACTED] in Missouri, awarded on December 30, 2011.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 22, 2013. The petitioner was asked to submit evidence to establish that the proffered position qualifies as a specialty occupation. The director outlined the specific evidence to be submitted.

On August 9, 2013, in response to the director's RFE, counsel provided additional supporting evidence, including the following documentation:

- A letter from the petitioner with a detailed job description.
- Job listings for operations associate positions.
- The petitioner's position announcement for the position of Associate – Derivative Operations.
- Resumes, offer letter and Forms W-2, Wage and Tax Information, of three employees offered the position of operations associate with the petitioner.

- Executive Summary of, journal articles about, and promotional materials for the petitioner.

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on October 10, 2013. Counsel submitted a timely appeal of the denial of the H-1B petition.

The issue before the AAO is whether the petitioner has established that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

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). 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.

The petitioner asserted that the beneficiary would be employed as an operations associate. However, 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.

Moreover, to ascertain the intent of a petitioner, USCIS looks 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. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, 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."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position requires the theoretical and practical application of a body of highly specialized knowledge attained through at least a baccalaureate degree in a specific discipline, or its equivalent. The AAO finds that the petitioner has not done so.

In addition to the duties listed above taken from the petitioner's support letter, the petitioner provided the following additional description of the proposed job duties in response to the director's RFE:

The Operations Associate interacts daily with assigned clients, marketers and team for the purpose of maintaining excellent client service. The associate must review and maintain complex documents to insure that the proper language is included and all documentation is complete. Once deficiencies have been identified, the associate works to resolve any issues. Based upon the Operations Associates *[sic]* findings, he makes recommendations and assists in the implementation of changes.

Core functional responsibilities of an Operations Associate include: daily communications with various operations groups, accounting groups, relationship managers and senior executives; reconcile accounts and maintain internal record keeping systems; monitoring broker and client portfolios and work to resolve settlement issues; confirm cash flow data with the various custodians and clients; research, correct, and inform the appropriate counterparties of any issues they encounter on a daily basis.

The petitioner additionally listed the percentage of time spent on each duty in the job description for the position of operations associate, as follows:

- Ensure clients qualify as an Eligible Contract participant, per Dodd-Frank financial regulations, prior to any swap being executed. – 3%
- Trade booking of Interest Rate Derivative Products (interest rate swaps and options including caps, collars, floors) in Derivatives Back Office System (includes new trades, amendments, terminations). – 5%
- Daily portfolio valuations for (currently) 29 bank clients, incorporating current market data into Derivatives Back Office System. – 5%
- Preparation, distribution and collection of swap documentation, including ISDA Master Agreements and Schedules, Risk Acknowledgements, Trade Confirmations,

Dealer Confirmations, etc. – 25%

- Generation and transmission of confirmations to end-user counterparties, also ensure accuracy of back-to-back dealer confirmation prior to obtaining client bank signature. – 5%
- Loan documentation review to ensure cross-collateralization with the loan and swap product, loan terms match swap structure, and authorized signatories have executed swap documents. – 25%
- Preparation and transmission of all settlement and rate reset notifications, and corresponding reports to bank clients (settlement detail reports, reset reports, etc.). – 5%
- Prepare and send electronic NACHA files for swap settlements. – 5%
- Monitor receipt of incoming fees from dealer counterparties. – 5%
- Monthly report generation for bank clients including, but not limited to mark to market reports, regulatory report data (RC-L and RC-R), pipeline and revenue reports. – 5%
- Monitor collateral positions bank clients have with their dealer counterparties to ensure bank is not over-collateralized. – 5%
- Interaction with bank clients and their lending customers to resolve any questions, issues or to assist with completion of paperwork. – 5%
- Reconcile bank client loan portfolio versus swap portfolio to ensure swap notional does not exceed loan balance, loan balance and swap notional match, loan system is coded to ensure collateral is not released prior to termination of the swap product. – 2%

In the instant case, it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the AAO finds the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position, or its equivalent. More than 50% of the job duties described involve preparation, distribution, collection, generation, transmission and review of documents. The job description lacks sufficient detail concerning the nature or complexity of the documentation involved, including whether any or all of the documentation such as master agreements and schedules are template or pre-formatted. The job description fails to communicate (1) the complexity, uniqueness and/or specialization of the tasks; and/or (2) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner failed to provide sufficient details regarding the demands, level of responsibilities and requirements necessary for the performance of the duties of the proffered position.

In the instant case, the AAO notes that the petitioner failed to state the minimum requirements of the proffered position in its letter of support (dated March 19, 2013). However, in response to the director's RFE, the petitioner states that it "will not consider a candidate who does not possess a Bachelor's degree at a minimum, and prefer[s] a candidate who possess a Bachelor's degree and one

year work experience.” The AAO observes that the petitioner does not indicate the degree field or state that these requirements relate to the proffered position of operations associate. The petitioner's additional claim that a four-year degree “in finance, operations research, accounting or related field is generally the minimum education requirement by the financial industry” is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly 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 bachelor's degree without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree 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).¹

In the instant case, the petitioner has failed to describe the proffered position with sufficient detail to determine that the minimum requirements are a Bachelor's degree in a specialized field of study. It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring both the theoretical and practical application of a body of highly specialized knowledge and the attainment of at least a bachelor's degree in a specific specialty, or its equivalent. When “any person makes an application for a visa or any other document required for entry, or makes an application for admission, [. . .] the burden of proof shall be upon such person to establish that he is eligible” for such benefit. Section 291 of the Act; *see also Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972).

The AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), and 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

¹ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

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

The U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (hereinafter the *Handbook*) is an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.² In the instant case, the petitioner provided an LCA in support of the petition that indicates the occupational classification for the proffered position is "Business Operations Specialists, All Other." The AAO reviewed the *Handbook* regarding the occupational category "Business Operations Specialists, All Others." However, the *Handbook* simply describes this category as "[a]ll business operations specialists not listed separately." The *Handbook* does not provide a detailed narrative account nor does it provide summary data for the occupational category "Business Operations Specialists, All Others." More specifically, the *Handbook* does not provide the typical duties and responsibilities for this category. Moreover, the *Handbook* does not provide any information regarding the academic and/or professional requirements for these positions.

The AAO notes there are occupational categories which are not covered in detail by the *Handbook*, as well as occupations for which the *Handbook* does not provide any information. The *Handbook* states the following about these occupations:

Data for Occupations Not Covered in Detail

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Data for Occupations Not Covered in Detail, on the Internet at <http://www.bls.gov/ooh/About/Data-for-Occupations-Not-Covered-in-Detail.htm> (last visited April 29, 2014).

Thus, the narrative of the *Handbook* indicates that there are over 160 occupations for which only brief

² 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/>.

summaries are presented. (That is, detailed occupational profiles for these 160+ occupations are not developed.) The *Handbook* continues by stating that approximately five percent of all employment is not covered either in the detailed occupational profiles or in the summary data. The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed.

Accordingly, in certain instances, the *Handbook* is not determinative. When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise qualifies as a specialty occupation under this criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that indicates whether the position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider all of the evidence presented to determine whether a beneficiary qualifies to perform in a specialty occupation. Upon review of the record, the petitioner has failed to do so in the instant case. That is, the petitioner has failed to submit probative evidence that normally the minimum requirement for positions falling under the occupational category "Business Operations Specialists, All Other" is at least a bachelor's degree in a specific specialty, or the equivalent.

The petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. 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 first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 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 authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference its previous discussion on the matter. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions

parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry into those positions.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of eight advertisements as evidence that its degree requirement is standard among its peer organizations for parallel positions in the interest rate risk management industry. The director determined that, although the majority of the listings are from employers in the banking/investment management industries, they are not similar to the petitioner's organization in their type of operations, services provided, years in service, number of employees and amount of gross annual income.³ The director additionally found that two listings do not specify the field of study for the required degree, and two listings indicate only a preference for a specific field of study.

The advertisement from The Execusearch Group lists a minimum requirement of a Bachelor's degree in finance and/or economics. However, the posting indicates that the position is for the staff of a hedge fund, and not Execusearch Group. Therefore, it cannot be determined whether the actual employer is a similar organization in the same industry as the petitioner. The median offered salary listed in the posting is three times the salary offered by the petitioner for the proffered position. The job description in the posting indicates that, unlike the petitioner's proffered position, the posted position is a hybrid of risk and operations. The job duties listed in the posting also indicate a higher level of complexity than the proffered position, including management and dealing with risk.

The posting for ISG Product Operations: Associate – Interest Rate Derivative Confirmation Drafter lists a minimum requirement of a Bachelor's degree with no specific field of study. Further, the name of the employer is not listed and it cannot be determined whether the actual employer is a similar organization in the same industry as the petitioner.⁴

The posting from Wetherby Asset Management lists the qualifications for an ideal candidate as a four-year degree with an emphasis in finance or accounting. However, this posting does not demonstrate that a Bachelor's degree in a specific field of study is required, but rather is preferred.

³ It is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's operations are relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in a specific specialty, or its equivalent. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties.

⁴ On appeal, counsel states that ISG refers to the operations division of Morgan Stanley. Morgan Stanley, a global company with more than 30 offices overseas, cannot be considered a similar organization to the petitioner, which claims to do business in 27 states with 20 employees. See <http://www.morganstanley.com/about/offices/index.html> (accessed April 28, 2014).

The posting from Threshold Group LLC lists the qualifications as a Bachelor's degree with a business emphasis (finance or accounting) desired. However, this posting also does not demonstrate that a Bachelor's degree in a specific field of study is required, but rather is preferred.

The two postings from BNY Mellon list a minimum requirement of a Bachelor's degree in accounting or related field. However, the postings state that BNY Mellon delivers investment services in 36 countries and more than 100 markets. This also cannot be considered similar to the petitioner's organization. Further, the job description in the posting includes significant duties not listed in the petitioner's proffered position, including budget management and capitalized project spending.

The posting from Admission Possible lists that a Bachelor's degree is required for an operations associate, but fails to list a specific field of study. Further, the posting describes Admission Possible as a non-profit organization dedicated to helping low-income high school students earn admission to college in Minnesota and Wisconsin. No correlation between Admission Possible and the petitioner's business can be identified.

The posting from Prudential lists the qualifications as a Bachelor's degree preferably in Finance/Economics/Accounting. This posting also does not demonstrate that a Bachelor's degree in a specific field of study is required, but rather is preferred.

The advertisements provided establish at best that a bachelor's degree is generally required, but not at least a bachelor's degree in a *specific specialty* or its equivalent. In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that the submitted advertisements are relevant in that the posted job announcements are not for parallel positions in similar organizations. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.

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

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

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the business analyst position. Specifically, 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. Further, the petitioner failed to demonstrate how the operations associate duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study

leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even essential, in performing certain duties of a business analyst 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 particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. More specifically, the petitioner designated the proffered position as a Level I (entry level) position. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.⁵ That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

Without further evidence, the record does not establish 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 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."⁶

The AAO observes that the petitioner has indicated that the beneficiary's academic background and experience in the industry will assist him in carrying out the duties of the proffered position. 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

⁵ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes 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.

⁶ For additional information regarding the Level IV wage level 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.

of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify at any time in the record 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. Consequently, as the petitioner fails to demonstrate 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, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

To merit approval of the petition under this criterion, the record must establish that the imposition of a degree requirement by the petitioner (or by the client / end-client) is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the position. In the instant case, in response to the director's RFE, the petitioner submitted its position announcement for the position of Associate – Derivative Operations, as well as resumes, offer letters and Forms W-2 for three employees to whom it claims to have offered the position of Operations Associate. The petitioner's position announcement states that the petitioner's "ideal candidate will be a recent college graduate (Bachelor's Degree) with 1+ years work experience." The announcement indicates only that the petitioner prefers candidates with a Bachelor's degree, but not that a degree is required to perform the proposed duties. The petitioner also states in its response to the director's RFE that it "will not consider a candidate who does not possess a Bachelor's degree at a minimum, and prefer a candidate who possess a Bachelor's degree and one year work experience." Here again, the petitioner fails to specify a field of study for the Bachelor's degree it requires.

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed 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 created a 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 20 employees and was established in 2003 (approximately ten years prior to the filing of the H-1B petition). The petitioner submitted 3 resumes and offer letters for individuals they claim to have hired in this position. The offer letters are dated 2008, 2011 and 2013. The evidence does indicate a history of hiring individuals with bachelor's degrees, but the offer letters do not give the job duties for the operations associates. As the record does not establish whether these positions are similar in scope and complexity to the one offered to the instant beneficiary, these documents are insufficient to establish this criterion.⁷ The record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

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

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

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

Furthermore, 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 occupation. The petitioner designated the position as a Level I position

⁷ Based on the petitioner's website, the petitioner employs 9 people in marketing, 2 in senior-level operations, and a technology team to total 18-20 employees. It is unclear whether the 3 resumes submitted represent all of the petitioner's operations associates, or only a portion. Further, the evidence submitted does not indicate the respective levels of employment of each individual.

(the lowest of four possible wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." As previously discussed, 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" and requires a significantly higher wage.

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)(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. For this reason, the appeal must be dismissed and the petition denied.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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