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



U.S. Citizenship
and Immigration
Services

[REDACTED]

D₂

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **FEB 04 2011**

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:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a travel services business with 15 employees. It seeks to employ the beneficiary as an Executive Vice President 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 concluding that the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation.

I. Procedural History

First, the AAO will review the procedural history of this petition and discuss the supporting materials submitted by counsel on appeal. The petitioner filed the present H-1B petition on April 2, 2008. The director issued an RFE on June 11, 2008, and the petitioner responded to the RFE on September 2, 2008. The director then denied the petition on September 10, 2008. The petitioner appealed this decision to deny the petition on October 8, 2008. The AAO dismissed the petitioner's appeal on March 2, 2010, affirming the director's decision and also providing additional grounds for denial beyond the decision of the director, including findings that the petitioner failed to demonstrate that the proffered position is a specialty occupation and that the petitioner failed to submit requested evidence that precluded a material line of inquiry.¹ On June 21, 2010, the AAO issued a Service Motion to reopen these proceedings *sua sponte*, which gave the petitioner an opportunity to submit a brief within 30 days or waive the 30-day period by submitting a request in writing. The AAO issued a Final Briefing Notice on October 18, 2010 extending the petitioner's deadline to submit a brief until December 3, 2010. On October 25, 2010, counsel for the petitioner submitted a second brief dated October 21, 2010 together with additional materials.

In the petition initially submitted on April 14, 2008, the petitioner stated that it is seeking the beneficiary's services as an Executive Vice President. In the March 20, 2008, letter of support, the petitioner claimed that the beneficiary's job description is as follows:

[The beneficiary's] duties will consists [sic] of supervising staff that performs various support services. Supervise mid-level managers, on the other hand, develop departmental plans, set goals and deadlines, implement procedures to improve productivity and customer service, and define the responsibilities of supervisory-level managers. The hiring and dismissal of employees. Oversees the preparation, analysis, negotiation, and review of contracts related to the purchase or sale of equipment, material, supplies, products or services. A bachelor degree in Business Administration is required.

The AAO notes that, in counsel's brief submitted on October 25, 2010, he refers to the proffered position title as "Executive Vice President of Operations" rather than as simply "Executive Vice

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

President," which was the job title used by the petitioner in support of the petitioner and in response to the RFE.

A number of the supporting documents submitted by counsel along with the October 21, 2010 brief were not previously part of the record. These documents are as follows:

1. A copy of an Order from the United States District Court in the Eastern District of Michigan Southern Division.
2. A letter from the petitioner, dated October 18, 2010.
3. New Forms I-129 and supplement H. These forms were signed on October 19, 2010 with the job title of Executive Vice President of Operations, which, as discussed previously, is a different job title from the one provided in the petition forms that were initially submitted. The Form I-129 submitted with counsel's brief lists the worksite as being at a different street address from the previously submitted Form I-129 and the salary, which the petitioner previously stated was \$40,000 per year, has increased in the new Form I-129 to \$60,000 per year. Also, the employment dates requested in the new petition forms attached to the second brief are from October 11, 2010 to October 11, 2013, whereas in the initial petition accepted for processing they were October 1, 2008 to September 26, 2011.
4. A new Labor Condition Application (LCA) that was certified on October 12, 2010 and that covers a period of employment from October 11, 2010 to October 11, 2013.

The letter from the petitioner submitted in support of the October 21, 2010 brief describes the position of Executive Vice President of Operations as follows:

As Executive Vice President of Operations, [the beneficiary] will be responsible for managing and overseeing the operations of the agency, meeting with and negotiating contracts and agreements between the agency and airline travel executives, and executing new business strategies. As part of the day-to-day operations of the agency, the Executive Vice President of Operations will supervise the staff, implement procedures to improve productivity and customer service, and recruit, hire and dismiss employees. The Executive Vice President of Operations will also handle all of the corporate accounts with various airlines, including contract negotiation and arranging all aspects of corporate travel. The position will require occasional travel to meet face-to-face with airline executives, and analyzing data and information pertaining to travel trends and using that information to increase sales and expand business growth.

Proposed job duties for the position of Vice President of Operations include contract preparation, review, analysis and negotiation, overseeing agency operations and executing new business strategies to improve productivity. A degree and coursework concentrated on business management, finance and organization, like a bachelor's degree in Business Administration, are directly

related to the specific specialty and are required for the position.

In this October 18, 2010 letter, the petitioner has not only changed the position title, but also expanded the beneficiary's duties, adding items such as: "responsible for managing and overseeing the operations of the agency," "meeting and negotiating contracts and agreements between the agency and airline travel executives," and "executing new business strategies." Previously, the petitioner stated that the beneficiary would hire and supervise support staff and mid-level managers as part of the petitioner's opening of new offices, rather than managing and overseeing the agency's operations. Additionally, the petitioner previously stated that the beneficiary would oversee the preparation and review of contracts, rather than meeting with airline travel executives to negotiate contracts. The petitioner did not previously state that the beneficiary would execute new business strategies. The increase in the proffered salary from \$40,000 to \$60,000 per year as well as the change in job location and the newly completed Forms I-129 and LCA provided for the first time through a supplemental brief on a reopened appeal are also clear indicators that the petitioner is attempting to change the nature of the proffered position on appeal. Further, it is apparent from the new Forms I-129 and newly certified LCA with different proposed work dates than were originally requested, along with a new job title, location of employment, and proffered salary, that the petitioner is attempting to use the appeals process to file a new petition.

When submitting documentation on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its October 18, 2010 letter do not clarify or provide more specificity to the original duties of the position, but rather add new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition and not the job description provided in the petitioner's October 18, 2010 letter.²

² It is further noted that the petitioner's new job description detailed in its October 18, 2010 support letter and other evidence submitted in response to the Service Motion may not be considered as part of the record of proceeding for the additional reason that the regulations at 8 C.F.R. § 103.5(a)(5)(ii) governing Service Motions only provide for a "brief" to be submitted, not evidence. As detailed on the Form I-290B, Notice of Appeal or Motion, and its instructions, both of which were incorporated into the regulations via 8 C.F.R. § 103.2(a)(1), additional evidence must be submitted with the appeal or directly to the AAO within 30 days. Any extension request must be presented in a separate letter "attached to Form I-290B", and the AAO may only grant such an extension for "good cause." *Id.*

Here, the petitioner's prior counsel checked box B in Part 2 of the Form I-290B, indicating that a brief and/or evidence would be submitted to the AAO within 30 days, i.e., by Friday, November 7, 2008, and no extension request was attached to the Form I-290B. As such, it appears that all evidence submitted by current counsel in this matter on the petitioner's behalf was done contrary to established regulatory procedure and should not be considered as part of the record. Nevertheless, the regulations do provide a procedure for "new" evidence, i.e., evidence that was not available and could not have been discovered or presented in the previous proceeding, to be submitted in support of a petition. To have such evidence

Additionally, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). The AAO does not have the authority, or the means for that matter, to accept a new petition for processing. Instead, the new petition must be properly filed in accordance with the instructions to that form and must also be accompanied by the requisite filing fees. See 8 C.F.R. § 103.2(a)(1). USCIS does not have the discretion to disregard its own regulations, even if it would benefit a petitioner. See *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C., 1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned). Therefore, the AAO cannot accept into evidence the LCA certified on October 12, 2010, the Forms I-129, H Classification Supplement, and the Form I-129 H-1B Data Collection Supplement that were submitted for the first time on appeal.

The AAO bases its decision on the record of proceeding, which includes counsel's October 21, 2010 brief, but does not include the new petition forms, LCA, and new job title and expanded description presented for the first time in response to a Service Motion for the reasons described *supra*.

II. Director's Decision

Second, the AAO will review the basis for the director's decision – namely, whether the petitioner demonstrated that the beneficiary is qualified to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C).

The petitioner initially submitted a copy of the beneficiary's foreign degree, but not the translation into English, along with a copy of an educational evaluation finding that the beneficiary's four year foreign degree is equivalent to a U.S. bachelor's degree in business administration awarded by a regionally accredited university in the United States.

The director's RFE specifically requested that the petitioner provide additional evidence to demonstrate the beneficiary is qualified to perform the duties of a specialty occupation. In response to the RFE, the petitioner provided a letter, dated August 27, 2008, which provides only a vague and generic job description as follows:

considered, however, the petitioner would need to properly file a motion to reopen on this decision within 30 days of its issuance in accordance with 8 C.F.R. § 103.5.

The AAO also notes that even if the new position description provided in the October 18, 2010 letter could be considered by the AAO, the proffered duties of the Executive Vice President of Operations are described in terms of generalized and generic functions, which, the AAO finds, do not convey either the substantive nature of either the specific matters upon which the beneficiary would focus or the practical and theoretical level of accounting knowledge that the beneficiary would have to apply to those matters. As the petitioner failed to establish the educational attainment actually required to perform the position of Executive Vice President of Operations, the petitioner failed to satisfy any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

[The beneficiary] will be assisting the president of the corporation in setting up and managing various branches which the company is currently in negotiation to acquire locations to set up branch offices.

[The beneficiary] will be the Vice President for the corporation. In his capacity, he will be involved in the negotiation process, develop departmental plans for the company, setting goals and deadlines and implementing procedures to improve productivity and customer services. Acquiring the necessary staffing for each location and negotiating with various merchants for rates and percentages. Reviewing and signing of contracts between company and merchants. . . .

The petitioner also provided a copy of the beneficiary's foreign degree certificate, including transcripts, translated into English. The transcripts indicate that the majority of the beneficiary's coursework towards his degree was in accounting with some additional courses in finance, management and law. It is not clear from the position description provided by the petitioner how the coursework taken by the beneficiary directly relates to the duties of the proffered position.

Additionally, the petitioner provided copies of the beneficiary's certificates in airline reservations/ticketing and his experience letters, demonstrating that, since the earning of the beneficiary's foreign degree in 1992, he worked as a travel consultant and a business analyst manager for travel agencies abroad, although no details of the duties performed in these positions were provided. The beneficiary also received certification for completing a three-week course in corporate management.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this

section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The AAO affirms the director's finding that the petitioner did not submit sufficient evidence to demonstrate that the beneficiary is qualified to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C). However, as the director erred in her determination that the credential evaluation provided by the petitioner assesses the beneficiary's education in combination with experience, instead of education alone, this aspect of the director's decision will be withdrawn. The credential evaluation demonstrates that the beneficiary has the U.S. equivalent of a bachelor's degree in business administration through the beneficiary's foreign education alone.

Nevertheless, a degree in business administration alone is insufficient to qualify the beneficiary to perform the services of a specialty occupation, unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field. The beneficiary's coursework must indicate that he or she obtained knowledge of the particular occupation in which he or she will be employed. *See Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm. 1968). However, the petitioner's description of the proffered position is too vague to determine the focus of the beneficiary's duties and thereby prevents a proper assessment of whether the beneficiary possesses the highly specialized knowledge required to be applied in the particular occupation in which he will be employed. Moreover, the credential evaluation provided does not indicate whether the beneficiary's degree in business administration had a particular focus or specialization that is relevant to the proffered position. The petitioner makes no reference to nor draws a nexus between a concentration in the beneficiary's field of study and the duties of the proffered position.

On appeal, the letter from the petitioner dated October 18, 2010 states that the position of Vice President of Operations requires "[a] degree and coursework concentrated on business management, finance, and organization, like a bachelor's degree in Business Administration, are directly related to the specific specialty and are required for the position." The petitioner bases this assertion on the job duties provided by the petitioner on appeal, which include "contract preparation, review, analysis, and negotiation, overseeing agency operations and executing new business strategies to improve productivity." Of these duties, only contract preparation, review, analysis, and negotiation can be considered part of the job description as the other duties were presented for the first time on appeal and constitute a material change to the proffered position, as was discussed previously. Therefore, the petitioner cannot use the duties of overseeing agency operations and executing new business strategies as a basis for its degree requirement.

Additionally, on appeal, the petitioner changes its minimum requirement from a bachelor's degree in business administration to a more general requirement of any degree and coursework

that includes business management, finance, and organization, where a bachelor's degree in Business Administration is just one example. For the reasons discussed earlier, rather than establishing a nexus between the beneficiary's coursework and the duties of the proffered position, the broadening of the acceptable degrees and fields on appeal does exactly the opposite and in fact draws into question the credibility of the petitioner's initial claims that it requires a degree in Business Administration for entry into the occupation.

Counsel's argument on appeal that the beneficiary's bachelor's degree in business administration, which includes coursework in business management, organization, and finance, qualifies him for the position of Executive Vice President of Operations is irrelevant given, as stated earlier in this decision, that the position of Executive Vice President of Operations is a new position being offered for the first time on appeal and therefore cannot be considered in this decision. Additionally, although counsel states that the beneficiary's coursework qualifies him to perform the proffered duties and argues the beneficiary is qualified to handle corporate accounts with various airlines, counsel does not provide a detailed explanation of which courses correspond to which duties and how each course prepares the beneficiary to perform these duties or point to evidence in the record to support this assertion. 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). Therefore, counsel has failed to demonstrate a nexus between a concentration in the beneficiary's realm of study, if such a concentration or specialization exists, and the duties of the proffered position.

Upon review, therefore, it does not appear that the petitioner has demonstrated that the beneficiary satisfies any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C). While the beneficiary does, in fact, possess the equivalent of a baccalaureate degree from an accredited U.S. college or university in business administration, no evidence was provided to demonstrate that the beneficiary holds a United States baccalaureate or higher degree, or its equivalent, in a specific specialty required for entry into a specialty occupation being proffered to the beneficiary, as required by 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(1), (2), and (4). Moreover, as the position description is vague and generic, it is not clear what specific specialty the proffered position requires. The beneficiary does not possess a U.S. degree, nor does the beneficiary hold an unrestricted state license, registration or certification which authorizes him to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment. Therefore, the requirements set forth in 8 C.F.R. § 214.2(h)(4)(iii)(C)(3) are also not applicable to these proceedings.

Therefore, the AAO affirms the director's finding that the petitioner did not demonstrate that the beneficiary is qualified to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C).

III. Additional Grounds of Ineligibility

Third, beyond the decision of the director, the AAO affirms its initial decision and finds that the petitioner failed to demonstrate that the proffered position is a specialty occupation. Section

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily

sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. 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, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

As discussed *supra*, the petitioner provided a vague and generic job description for the proffered position, both initially and in response to the RFE. However, the director's RFE asked for documentation to support a finding that the proffered position is a specialty occupation in addition to evidence demonstrating that the beneficiary is qualified to perform the duties of the claimed specialty occupation. Specifically, the RFE stated in pertinent part that the petitioner must:

Provide a more detailed description of the work to be performed by the beneficiary for the entire requested period of validity. Include specific job duties, the percentage of time to be spent on each duty, level of responsibility, hours per week of work, and the minimum education, training, and experience necessary to do the job. Also, explain why the work to be performed requires the services of a person who has a college degree or its equivalent in the occupational field.

Additionally, if the beneficiary will supervise or direct others submit a copy of a line-and-block organizational chart showing the petitioner's hierarchy and staffing levels. List all divisions in the company. Clearly identify the proffered position in the chart. Also, show the names and job titles for those persons, if any, whose work will come under the control of the proposed position. . . .

The petitioner did not provide any of the evidence requested in the RFE as described above. Instead, the petitioner provided only the letter, dated August 27, 2008, discussed previously.

No other supporting documentation was provided to demonstrate that the proffered position is a specialty occupation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg.

Comm. 1972)). Moreover, the non-existence or unavailability of evidence material to an eligibility determination creates a presumption of ineligibility. See 8 C.F.R. § 103.2(b)(2)(i).

Despite the petitioner's statement in its initial support letter that it requires the beneficiary to assist the petitioner as it expands its operations, the copies of the petitioner's 2006 and 2007 tax returns provided in response to the RFE indicate that the petitioner's revenue decreased by \$3 million in 2007. On appeal, counsel argues that it is precisely because of this decline in revenue that the petitioner requires the beneficiary's services to expand business growth. However, expanding operations and expanding business growth are not one in the same.

Expanding operations, as described by the petitioner, includes opening several stores in Michigan and, eventually, nationwide and hiring the necessary staff to do so. However, the petitioner has failed to demonstrate how the beneficiary can assist in its expansion of operations if the petitioner's revenues have significantly declined. Expanding business growth was not part of the proffered duties, or job description, except as such growth might result from the petitioner's expansion of operations, should the petitioner demonstrate that it has the means to open new offices and hire additional staff. Given the petitioner's decreased revenue and lack of evidence that it has the means to expand operations, the AAO does not find it tenable that the beneficiary would be hired to assist in the petitioner's expansion of offices and hiring additional staff. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel further argues in his brief submitted on appeal that the proffered position is a specialty occupation because business specialties, including Vice Presidents, are included in the specific list of professions that qualify as specialty occupations under 8 C.F.R. § 214.2(h)(4)(ii). As stated above, 8 C.F.R. § 214.2(h)(4)(ii) reads as follows:

An occupation [1] which 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 [2] which 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.

Contrary to counsel's implication, the occupation of Vice Presidents is not mentioned in the regulation. While highly specialized knowledge in business specialty fields are included in this section, this does not mean that a petitioner, merely by stating that it requires at least a bachelor's degree in business administration, has demonstrated that the proffered position is a specialty occupation. The petitioner must also submit evidence that (1) the proffered duties entail the theoretical and practical application of a body of highly specialized knowledge and (2) the position requires at least a bachelor's degree in a *specific specialty* or its equivalent for entry into the occupation in the United States. *Id.*

Further, while 8 C.F.R. § 214.2(h)(4)(ii) lists “business specialties” as an example of a field in which the application of highly specialized knowledge may be required, the regulation does not state that an occupation in this field meets this first criterion by default. Even if it did, a general business administration degree without a concentration or specialization is not a business specialty. According to *Webster’s New College Dictionary* 1085 (3rd ed. 2008), specialty means both “[a] special occupation, pursuit, aptitude, or skill. . . .” and “[a] special feature or characteristic.” Of all the fields listed as examples in the regulation, only business has the word “specialties” written after it, which means that the regulation was not intended to include business generally as an example of those fields entailing a theoretical and practical application of a body of highly specialized knowledge. The AAO therefore disagrees with counsel that the term “business specialties” can be equated with the field of business administration generally. Instead, the AAO finds that the phrase “business specialties” in the regulation implies the necessity for a specialization or concentration in the field of business administration or other business related fields. Nevertheless, the record does not include a position description that is sufficiently detailed to demonstrate that the proffered position requires the theoretical and practical application of highly specialized knowledge and, as such, the petitioner has failed to establish that the proffered position meets the first criterion of the statutory and regulatory definition of specialty occupation. § 214(i)(1)(A) of the Act; 8 C.F.R. § 214.2(h)(4)(ii).

With regard to the second criterion of the definition of specialty occupation, again the record fails to demonstrate that the petitioner requires at least a bachelor’s degree or the equivalent in a *specific specialty*. Even if the petitioner had submitted sufficient evidence, which it did not do, to demonstrate that the proffered position requires at least a bachelor’s degree in business administration, as discuss *supra*, as the petitioner did not require at least a bachelor’s degree or the equivalent in a business *specialty* or even demonstrate a nexus between the beneficiary’s coursework taken towards his degree and the proffered duties, the petitioner has also failed to demonstrate that the proffered position is a specialty occupation under the second part of the statutory and regulation definition of specialty occupation. § 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii).

Although the petitioner’s failure to establish that the proffered position meets the statutory and regulatory definition of specialty occupation would normally obviate the need to examine this issue further, for purposes of a complete and thorough analysis, the AAO will also review the additional requirements imposed by 8 C.F.R. § 214.2(h)(4)(iii)(A). To that end, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the Department of Labor’s *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry’s professional association has made a degree in a specific specialty 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)).

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.

Counsel argues on appeal, "[a] degree and coursework concentrated on business management, finance, and organization, like a bachelor's degree in Business Administration, are directly related to the specific specialty and are required for the position." However, the petitioner never states that it requires at least a bachelor's degree or the equivalent in business administration with a concentration in business management, finance, and organization, but instead simply states that it requires at least a bachelor's degree in business administration without specifying any requirement of a concentration or specialization in that field. Even in its letter dated October 18, 2010, the petitioner states that "[a] degree and coursework concentrated on business management, finance, and organization, like a bachelor's degree in Business Administration, are directly related to the specific specialty and are required for the position. . . .," but this is not the same as requiring at least a bachelor's degree in a specific specialty.

Moreover, this newly stated requirement on appeal differs from the petitioner's initially stated requirement of a bachelor's degree in Business Administration. Further, no evidence is submitted that the beneficiary's bachelor's degree in business administration is concentrated in business management, finance, and organization. Nor does the petitioner demonstrate a nexus between the proffered duties and the types of courses taken towards a bachelor's degree in business administration with a concentration in business management, finance, and organization such that a specialty could be ascertained. Nevertheless, even if such a nexus had been established, that the beneficiary may have taken some classes in these areas is not the same as his having a degree with a recognized and/or designated concentration in these areas, and the credential evaluation submitted does not indicate that the beneficiary's bachelor's degree in Business Administration had a concentration or specialization. Again, 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. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

On appeal, counsel argues that the proffered position falls under the *Handbook's* section on Top Executives. Again, counsel bases part of this argument on the newly described position of Executive Vice President of Operations, which, as discussed previously, cannot be accepted into evidence as it constitutes a material change to the position initially proffered. Moreover, the description provided by the petitioner for the proffered position is so vague and generic that the AAO cannot determine under which section of the *Handbook*, 2010-11 edition, the position falls.

The AAO therefore disagrees with counsel that sufficient evidence was submitted to demonstrate that the proffered position falls under the *Handbook's* section on Top Executives.

The AAO notes, however, that even if the petitioner were to demonstrate, which it did not do, that the proffered position falls under the *Handbook's* section on Top Executives, this in and of itself would not be sufficient evidence that the proffered position meets the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or otherwise qualifies as a specialty occupation. Under the section on Training, Other Qualifications, and Advancement, the *Handbook* states that "*The formal education and experience required by top executives vary as extensively as their responsibilities do*, but many of these workers have at least a bachelor's degree and considerable experience." (Emphasis added.) The *Handbook* then goes on to state as follows:

Many top executives have a bachelor's or master's degree in business administration, liberal arts, or a more specialized discipline. The specific type and level of education required often depends on the type of organization for which top executives work. College presidents and school superintendents, for example, typically have a doctoral degree in the field in which they originally taught or in education administration. (For information on lower level managers in educational services, see the Handbook statement on education administrators.)

Some top executives in the public sector *have a degree in public administration or liberal arts.* Others might have a more specific educational background related to their jobs. (For information on lower level managers in health services, see the Handbook statement on medical and health services managers.)

Many top executive positions are filled from within the organization by promoting experienced lower level managers when an opening arises. In industries such as retail trade or transportation, for example, *individuals without a college degree may work their way up within the company* and become executives or general managers. When hiring top executives from outside the organization, those doing the hiring often prefer managers with extensive managerial experience.

(Emphasis added.) Thus, the *Handbook* indicates that working as a top executive does not normally require a degree *in a specific specialty* and, in fact, it indicates that individuals in industries similar to that of the petitioner "may work their way up within the company" "without a college degree." Given this finding by DOL's Bureau of Labor Statistics and given that the evidence of record does not distinguish the proffered position from the type of position that requires no more than a general bachelor's degree in Business Administration or Liberal Arts without a particular specialization or concentration, even if the petitioner could demonstrate that the proffered position falls most closely within the *Handbook's* section on top executives, this in and of itself does not prove that the proffered position is more likely than not a specialty occupation.

Counsel confuses the statement in the *Handbook's* section on Top Executives that "many top executives have a bachelor's or master's degree in business administration, liberal arts, or a more

specialized discipline. . . .” as indicating that at least a bachelor’s degree or the equivalent in a specific specialty is required for this occupation. As previously discussed at length, a bachelor’s degree or higher in the field of “business specialties” as stated under 8 C.F.R. § 214.2(h)(4)(ii) cannot be equated with a bachelor’s degree in business administration generally. Additionally, the wording in the *Handbook*, which discusses not only a degree in business administration as being acceptable for top executives, but also a degree in liberal arts “or a more specialized discipline,” means that the *Handbook* acknowledges that the fields of business administration and liberal arts are general and not specialized. Moreover, it is noted again that the *Handbook* states that some people without a college degree can also become Top Executives. This is not to say that certain positions falling under the Top Executive classification cannot qualify as specialty occupations. However, specialty occupations require both (1) the theoretical and practical application of a body of highly specialized knowledge and (2) the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States. Therefore, as the *Handbook* indicates that many Top Executive positions may only require a bachelor’s or higher degree in a general field, like business administration or liberal arts, and not a *specific specialty*, the mere demonstration that someone falls under the *Handbook*’s section on top executives is not sufficient in and of itself to prove that the position is also a specialty occupation.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or its equivalent, in a specific specialty closely related to the position’s duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor’s degree, in a specific specialty, 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.

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

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor’s degree in a specific specialty. On appeal, counsel provides an Advisory Opinion Report from [REDACTED], dated May 18, 2009. Upon review, however, the opinion rendered by the evaluator is not probative. [REDACTED], who is the [REDACTED]

[REDACTED] states that she has qualifications and experience in the field of international education. Despite her experience in preparing credential evaluation reports, neither her advisory opinion report nor any other evidence of record substantiates that she is qualified as an expert on the hiring

practices and recruitment of company executives. The record does not indicate that the evaluator has adequate knowledge of the particular issue here. She does not address or demonstrate knowledge of the petitioner's particular business operations other than the basic and vague description provided by the petitioner in the support letter. She does not relate any personal observations of those operations or of the work that the beneficiary would perform, nor does she state that she has reviewed any projects or work products related to the proffered position. The AAO may, in its discretion, use as advisory opinions 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. 1988).

In his October 21, 2010 brief, counsel argues that [REDACTED] has reviewed and written assessment reports of credentials from all over the world and written opinions for cases regarding specialty occupations, managerial capacity and specialized knowledge since 1993, and is therefore an expert on specialty occupations. However, counsel does not address the AAO's previously expressed concerns that [REDACTED] does not have first-hand observation or knowledge of the petitioner's business operations.

Further, even if the AAO were to acknowledge [REDACTED] as an expert, her Advisory Opinion Report states only that the proffered position requires at least a "U.S. Bachelor's degree in Business Administration or related area awarded by a regionally accredited university in the United States or equivalent. . . ." As discussed at length in this decision, a requirement of at least a bachelor's degree or the equivalent in business administration does not constitute a requirement of at least a bachelor's degree or the equivalent in a specific specialty. Even if established by the evidence of record, which it is not, the requirement of a bachelor's degree in business administration 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. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove 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 establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. Again, USCIS interprets 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proffered 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).

Consequently, the AAO finds that the letter from [REDACTED] does not establish that the proffered position is a specialty occupation. The petitioner has therefore failed to provide any documentation evidencing a common degree-in-a-specific-specialty requirement in positions that

are both: (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner.

The petitioner has also not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." As the position description is so vague, the evidence of record is not sufficient to establish what, if any, degree is required for the proffered position. However, even if the AAO were able to accept the petitioner's statement without corroborating evidence that it does require at least a bachelor's degree or the equivalent in business administration or a related field, as discussed previously, the field of business administration, without a demonstrated concentration or specialization, does not constitute a *specific specialty*. See § 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii).

Next, as the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).³

Additionally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As mentioned earlier, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than positions that are not usually associated with a degree in a specific specialty.

Therefore, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). For this reason also, the petition will be denied.

³ To satisfy this criterion, the record must establish 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.

Fourth, also beyond the decision of the director, the AAO finds that the petitioner failed to submit requested evidence that precluded a material line of inquiry. The petitioner and counsel did not provide additional documentation and details about the proffered position that were specifically requested by the director in the RFE for the purpose of obtaining further information that would establish whether the proffered position is a specialty occupation. As stated earlier, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Although this additional ground of ineligibility was also previously identified by the AAO in its initial decision, counsel does not address this issue in his October 21, 2010 brief. Therefore, the petition will be denied for this additional reason.

IV. Conclusion

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO also affirms the director's decision that the beneficiary is not qualified to perform the duties of a specialty occupation.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a de novo basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed, and the petition will be denied.

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