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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

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Date: **JAN 03 2012** 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 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,

Michael T. Kelly

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on September 24, 2009. The petitioner indicated on the Form I-129 petition that it is a for-profit enterprise engaged in real estate development and construction with 8 employees and a gross annual income of approximately \$550,000 and a net annual income of \$30,000.

Seeking to employ the beneficiary in what it designates as a logistical manager/supervisor position, the petitioner filed this H-1B petition in an endeavor to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on November 17, 2009, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel asserts that the director's basis for denial was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submits a brief and additional evidence.

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

For the reasons that will be discussed below, the AAO concurs with the director that the petitioner has not established that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The primary issue before the AAO is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

- (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 the following:

An occupation which requires [(1)] 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 [(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.

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), 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. 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.

The petitioner indicated on the Form I-129 and supporting documentation that it seeks the beneficiary’s services in what it designates as a logistical manager/supervisor at a salary of \$48,000 per year.

The petitioner states in its appeal that “the position has evolved over the last three years into a position that is difficult to define with one job title Where the beneficiary started out initially as a logistical manager, he now has many duties that involve both that of a construction manager and those of a real estate developer.”

The petitioner provided a description of the job duties that the beneficiary would perform in the proffered position. The duties are listed below (along with the percentage of time spent performing the duties):

- Planning and managing logistical activities of real estate development process (10%);
- Sourcing and purchasing of building materials (10%);
- Managing transportation of building materials for real estate development division to include certain logistic activities such as transportation, trans-shipment, planning, etc. and overall coordination for the purchase and sales of these building materials (5%);
- Supervising of construction process which includes coordinating of subcontractors, construction laborers and the sub-processes of the construction process (45%);
- Control on-site building material inventory (10%);
- Using project management tools like plans, budgets and schedules to make construction processes more efficient (5%);

- Control of the financial aspects of the construction processes in general, with the use of professional accounting software and spreadsheets (10%);
- Supervision of the sales process of the developed real estate. Working with real estate brokers to generate real estate sales and to generate customers' feedback in order to make a link between customers' needs and the construction process (5%).

The AAO will first make some preliminary findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

As a matter critically important in its determination of the merits of this appeal, the AAO finds that, as reflected in the list quoted above, the petitioner describes the proposed duties in terms of generalized and generic functions that do not convey either the substantive nature of the work that the beneficiary would actually perform, any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it, or the educational level of any such knowledge that may be necessary. The abstract level of information provided regarding the proffered position and the duties comprising is exemplified by the phrase "[p]lanning and managing logistical activities of real estate development process," above. As with other position and duty descriptions in this record of proceeding, it fails to communicate either the actual work that the function would involve or a necessary correlation between that work and a particular level of a body highly specialized knowledge in a specific specialty.

As discussed immediately below, the AAO also finds that the evidentiary deficiencies just discussed preclude the petitioner from satisfying the earlier-quoted definitions of specialty occupation at section 214(i)(1) of the Act and at 8 C.F.R. § 214.2(h)(4)(ii).

The insufficiently explained functions said to comprise the proffered position – such as managing, supervising, coordinating, and using generally stated tools such as “plans, budgets and schedules” – are not in themselves indicative of the need for attainment of a particular educational level of a body of highly specialized knowledge in a specific specialty. Further, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner' normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

The AAO will now discuss the information presented by the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* with regard to each of the three occupational dimensions that the petitioner asserts as inherent in the proffered position, that is, as just above noted: (1) logistical manager, (2) construction manager, and (3) real estate developer.¹ As will be seen below, the AAO finds the *Handbook* does not support the claim that proffered position qualifies as a specialty occupation. As will be clear in this discussion, the *Handbook* does not remedy the evidentiary deficiencies noted above.

The logistics-manager aspects of the proffered position appear to be encompassed by the *Handbook's* section with regard to the occupational category of Logistician, which, in its entirety, reads as follows:

Logisticians (O*NET 13-1081.00)

Analyze and coordinate the logistical functions of a firm or organization. Responsible for the entire life cycle of a product, including acquisition, distribution, internal allocation, delivery, and final disposal of resources.

- 2008 employment: 100,400
- Projected 2008-18 employment change: Much faster than average
- Most significant source of postsecondary education or training: Bachelor's degree

Clearly, the *Handbook* provides little about the educational credentials of *logisticians*, other than to observe that a "Bachelor's degree" is the "most significant source of postsecondary education and training." Obviously, this information is not indicative of any minimum level and type of education that would be normally required for entry into the occupation. Not only does the *Handbook* not report a bachelor's or higher degree as a minimum entry requirement, but it also does not identify a specific major or academic concentration as a normal requirement for those logisticians who possess a bachelor's degree. Accordingly, the AAO finds that the pertinent section of the *Handbook* neither reports nor indicates that, as an occupational group, logistician positions require, or are usually associated with, at least a bachelor's degree in a specific specialty.

The AAO will now provide relevant comments upon the *Handbook's* chapter regarding Construction Managers as an occupational group.²

¹ The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. All of the AAO's references are to the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

² For the chapter "Construction Managers," see Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition*, Construction Managers, on the Internet at <http://www.bls.gov/oco/ocos005.htm> (visited December 12, 2011).

The AAO first finds that, when compared with the full spectrum of the duties that comprise the construction manager occupation as described in the *Handbook*, the duties of the proffered position, to the extent that they are depicted in the record of proceeding, indicate that the beneficiary may perform some tasks in common with a construction manager, but not that the beneficiary's duties would constitute a construction manager position, and not that they would require the range of specialized knowledge that characterizes construction managers.

The *Handbook's* description of the occupational category "Construction Managers" provides in pertinent part:

Construction managers plan, direct, coordinate, and budget a wide variety of construction projects, including the building of all types of residential, commercial, and industrial structures, roads, bridges, wastewater treatment plants, and schools and hospitals. Construction managers may supervise an entire project or just part of one. They schedule and coordinate all design and construction processes, including the selection, hiring, and oversight of specialty trade contractors, such as carpentry, plumbing, or electrical, but they usually do not do any actual construction of the structure.

Construction managers are salaried or self-employed managers who oversee construction supervisors and personnel. They are often called *project managers*, *constructors*, *construction superintendents*, *project engineers*, *construction supervisors*, or *general contractors*. Construction managers may be owners or salaried employees of a construction management or contracting firm, or they may work under contract or as a salaried employee of the property owner, developer, or contracting firm managing the construction project.

These managers coordinate and supervise the construction process from the conceptual development stage through final construction, making sure that the project gets completed on time and within budget. They often work with owners, engineers, architects, and others who are involved in the process. Given the designs for buildings, roads, bridges, or other projects, construction managers supervise the planning, scheduling, and implementation of those designs. Large construction projects, such as an office building or an industrial complex, are often too complicated for one person to manage. Accordingly, these projects are divided into various segments: site preparation, including clearing and excavation of the land, installing sewage systems, and landscaping and road construction; building construction, including laying foundations and erecting the structural framework, floors, walls, and roofs; and building systems, including protecting against fire and installing electrical, plumbing, air-conditioning, and heating systems. Construction managers may be in charge of one or several of these activities.

Construction managers determine the best way to get materials to the building site and the most cost-effective plan and schedule for completing the project. They divide all required construction site activities into logical steps, estimating and budgeting the time required to meet established deadlines. Doing this may require sophisticated scheduling and cost-estimating techniques using computers with specialized software. (See the section on cost estimators elsewhere in the *Handbook*.)

Construction managers also manage the selection of general contractors and trade contractors to complete specific phases of the project—which could include everything from structural metalworking and plumbing, to painting, to installing electricity and carpeting. Construction managers determine the labor requirements of the project and, in some cases, supervise or monitor the hiring and dismissal of workers. They oversee the performance of all trade contractors and are responsible for ensuring that all work is completed on schedule.

Construction managers direct and monitor the progress of construction activities, occasionally through construction supervisors or other construction managers. They are responsible for obtaining all necessary permits and licenses and, depending upon the contractual arrangements, for directing or monitoring compliance with building and safety codes, other regulations, and requirements set by the project's insurers. They also oversee the delivery and use of materials, tools, and equipment; worker safety and productivity; and the quality of the construction.

The AAO makes the following observations that highlight the narrower range of construction-related duties that the petitioner attributes to the proffered position. To the extent that they are described in this petition, the proposed duties do not establish that the beneficiary would perform the following functions that the *Handbook* uses to generally characterize the occupation: “plan, direct, coordinate, and budget . . . construction projects”; supervise the construction (by contrast, the petitioner claims that the beneficiary’s duties would include “[s]upervising of [the] construction process, which includes coordinating of subcontractors, construction laborers and the sub-processes of the construction processes,” which the AAO finds, does not clearly indicate that any direct supervisory control over the actual performance of construction workers would be involved). Further, the AAO finds no documentary evidence that the beneficiary’s services would include the following services also presented by the *Handbook* as characteristic of the Construction Managers occupation:

Construction managers also manage the selection of general contractors and trade contractors to complete specific phases of the project—which could include everything from structural metalworking and plumbing, to painting, to installing electricity and carpeting. Construction managers determine the labor requirements of the project and, in some cases, supervise or monitor the hiring and dismissal of workers. They oversee the performance of all trade contractors and are responsible for ensuring that all work is completed on schedule.

Construction managers direct and monitor the progress of construction activities, occasionally through construction supervisors or other construction managers. They are responsible for obtaining all necessary permits and licenses and, depending upon the contractual arrangements, for directing or monitoring compliance with building and safety codes, other regulations, and requirements set by the project's insurers. They also oversee the delivery and use of materials, tools, and equipment; worker safety and productivity; and the quality of the construction.

In short, the AAO finds that the record of proceeding does not establish that the beneficiary would perform duties constituting a construction manager position.

With regard to the claimed construction manager dimension of the proffered position, the AAO further notes that, even if the petitioner had established this as an authentic feature of the proffered position - which, again, it has not - that would not have fortified the petitioner's claim that the proffered position qualifies as a specialty occupation. In this regard, the AAO here quotes the *Handbook's* information with regard to the educational requirements for entry into the occupation "Construction Managers".

The introduction to the "Training, Other Qualifications, and Advancement" section of the chapter on construction managers in the *Handbook* states the following:

Employers increasingly are hiring construction managers with a bachelor's degree in a construction-related field, although it is also possible for construction workers to become construction managers after many years of experience. Construction managers must understand contracts, plans, specifications, and regulations. Certification, although not required, is increasingly important.

Education and training. For construction manager jobs, a bachelor's degree in construction science, construction management, building science, or civil engineering, plus work experience, is becoming the norm. However, years of experience, in addition to taking classes in the field or getting an associate's degree, can substitute for a bachelor's degree. Practical construction experience is very important for entering this occupation, whether earned through an internship, a cooperative education program, a job in the construction trades, or another job in the industry. Some people advance to construction management positions after having substantial experience as construction craftworkers—carpenters, masons, plumbers, or electricians, for example—or after having worked as construction supervisors or as owners of independent specialty contracting firms. However, as construction processes become increasingly complex, employers are placing more importance on specialized education after high school.

Thus, the *Handbook* does not indicate that "Construction Managers" comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty in the United States.³ The information on the educational requirements in the "Construction Managers" chapter of the *Handbook* indicates, at most, that a bachelor's degree may be increasingly preferred, but not that it is an occupational entry requirement. Moreover, the *Handbook* indicates that work experience and taking classes or obtaining an associate's degree may be acceptable for entry into the occupation. Furthermore, the *Handbook* states that some people advance to construction management positions through work experience alone. Therefore, the proffered position would not qualify as a specialty occupation by virtue of its occupational classification.

The AAO next observes that the *Handbook* neither identifies *real estate developers* as an occupational category nor addresses any educational credentials that may be minimally required to work in that area. In this respect, the AAO also notes that the petitioner fails to define or explain exactly what work would be encompassed by what it abstractly describes as real estate development.

In summary, the AAO finds that the *Handbook* does not support the proposition that the proffered position, as described in the record of proceeding, is one that meets the statutory definition of a specialty occupation.

Additionally, the AAO finds that the content of the Labor Condition Application (LCA) submitted with this petition renders questionable the level of specialization and complexity of the duties and responsibilities that the petitioner claims for the proffered position. More specifically, the petitioner indicated that the proffered position requires a bachelor's degree and claims that the duties are "very complex" and unique. Furthermore, the petitioner stated that it "expects [the] beneficiary to operate with minimal supervision" and that the "beneficiary's level of authority is far beyond of (sic) what is normally encountered in the occupational field." In this regard, however, the AAO notes that the petitioner provided an LCA in support of the instant petition

³ The AAO notes that in this case, the petitioner provided an educational evaluation indicating the beneficiary attained the equivalent of a Bachelor of Science degree in Management Information Systems from an accredited institution of higher education in the United States.

A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, if the proffered position did require at least a bachelor's degree for entry into the occupation and that degree had to be in one of the general majors identified by the *Handbook*, i.e., construction science, construction management, building science, or civil engineering, the beneficiary would not be qualified for the position, based upon the record of proceeding, as the petitioner failed to demonstrate that the beneficiary has a degree in one of these majors. In other words, even if the petitioner established the proffered position as being a specialty occupation (which it has not), the beneficiary would not be qualified to perform the duties of the occupation based upon the educational evaluation of his academic credentials.

that indicates the occupational classification for the position is "Logisticians" at a Level 1 (entry level) wage.⁴

The AAO finds substantial reason to doubt the credibility of the petition in the fact that, on the one hand, the petitioner expressly claimed that the proffered position is "very complex" and unique, and also stated that it "expects [the] beneficiary to operate with minimal supervision" and that the "beneficiary's level of authority is far beyond of (sic) what is normally encountered in the occupational field." On the other hand, however, the related LCA filed to support the petition is for a Level 1 (entry level) position.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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).

The petitioner should note that the AAO hereby incorporates by reference all of the above comments into the specific discussions of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) which follow below.

The AAO will now specifically address the supplementary regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO turns first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

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

⁴ The petitioner indicated on the LCA that a prevailing wage determination was issued by "Colorado." The AAO notes that when an employer requests a prevailing wage determination, the job is analyzed and categorized based on the employer's job description. Enough information must be given so that an analyst can determine the occupational category and the skill level within that category. In defining the job's occupational category, skill level and prevailing wage rate for the labor market area, the analyst considers the following elements of the job (which are provided by the employer): work tasks, work activities, equipment used, work environment, working conditions, complexity of the job duties, level of judgment and understanding required to perform the job, amount and nature of supervision received, and supervisory responsibilities. In this case, the petitioner did not specify to USCIS the job description that it submitted for the prevailing wage determination. However, based upon the wage rate it appears that the employer did not indicate in its request that the duties are "very complex" and unique, that it "expects [the] beneficiary to operate with minimal supervision" and that the "beneficiary's level of authority is far beyond of (sic) what is normally encountered in the occupational field" (as the petitioner described the proffered position in its appeal to the AAO).

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.

As earlier discussed in this decision, the *Handbook* does not indicate that the proffered position belongs to an occupational group that categorically requires for entry at least a bachelor's degree, or the equivalent, in a specific specialty.

As the *Handbook* does not support the proposition that the proffered position is one that normally requires a minimum of a bachelor's degree, or the equivalent in a specific specialty, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. For the reasons already noted about the evidentiary deficiencies with regard to the nature of this particular position and the duties comprising it, the petitioner failed to do this.

Again, the petitioner has not established that the position belongs to an occupational group for which the *Handbook* indicates a categorical requirement for at least a bachelor's degree, or the equivalent, in a specific specialty. Furthermore, it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty. The AAO also finds that the record of proceeding lacks evidence that remedies these deficiencies.

Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of 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 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.

As previously mentioned, the petitioner indicated that it is a small, for-profit enterprise engaged in real estate development and construction with a gross annual income of approximately \$550,000 and a net annual income of \$30,000.

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

As already discussed, the petitioner has not established that its proffered position falls under an occupational classification for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Furthermore, the petitioner has not provided any documentation to indicate that the industry's professional association has made a degree a minimum entry requirement. Moreover, the petitioner did not submit any letters or affidavits to meet this criterion of the regulations. While the petitioner did submit several job postings, for the reasons discussed below, the petitioner's reliance upon the job vacancy advertisements is misplaced.

The petitioner provided four job announcements in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, upon review of the documents, the AAO finds that they do establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions.

The petitioner provided the following four job announcements:

- A job posting from [REDACTED] Manager/Estimator. The posting states "4 year degree in Construction Management preferred." The posting merely indicates the employer's *preference* for a bachelor's degree; however, a bachelor's degree in a specific specialty is not a minimum requirement for the position. (The posting indicates that at least 5 years of field experience is required for the position.)
- An advertisement from [REDACTED] for a Project Manager – Construction. The advertisement states that the educational level for the position is bachelor's degree but no further information is provided. (The AAO notes that the second page of this advertisement is blank.) Based upon the information provided the advertisement indicates that a bachelor's degree is generally required, but not at least a bachelor's degree or the equivalent in a *specific specialty*. (The advertisement indicates that 5+ years of experience is normally required for the position.)
- A job posting from an unnamed "national development/construction company" for an Assistant Project Manager - Multifamily. No further information regarding the employer is provided. The job posting states that "preference will be given to candidates with a Degree in Civil Engineering or Construction Management." The posting indicates the employer's *preference* for an individual with a degree (in civil engineering or construction management); however, a degree is not a minimum requirement for the position. Furthermore, it appears that any degree, such as an associate's degree, may be acceptable. The posting does not indicate that at least a bachelor's degree is required for the position. (The posting indicates that candidates should have a minimum of 3-5 years of related experience.)

- An advertisement from [REDACTED] Project Manager/Job Supervisor. The advertisement states that the educational level for the position is bachelor's degree. Thus, the employer requires a candidate to possess a bachelor's degree, but not at least a bachelor's degree or the equivalent in a *specific specialty*. (The advertisement indicates that 5 to 7 years of experience is required for the position.)

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

The AAO finds that the job announcements support the *Handbook's* information on the educational requirements of "Construction Managers." That is, the job announcements indicate that a bachelor's degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. The job announcements suggest that work experience is important for entering this occupation. However, none of the employers require a bachelor's degree or higher in a specific specialty, or the equivalent, for the advertised positions.

It must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from four advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.⁵

In short, the record of proceeding does not establish that a degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in

⁵ According to the *Handbook's* detailed statistics on construction managers, there were approximately 176,900 persons employed in the construction industry in 2008 and approximately 4,800 in the real estate industry in 2008. *Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos005.htm> (last accessed December 12, 2011). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just four job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that a degree requirement in a specific specialty was common to the industry for construction managers (or parallel positions) among organizations similar to the petitioner, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

organizations 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 the particular position proffered in this petition is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specialty occupation.

In the RFE, the director requested the petitioner provide a description of the duties to be performed by the beneficiary "that are more discretionary, demanding, complex, highly advanced, specialized, or sophisticated – exceeding industry or normal position standards" along with supporting documentation to substantiate the petitioner's claims.

In response to the RFE, the petitioner provided an expanded description of the job duties along with the required skills and knowledge necessary to perform the duties. While the petitioner indicated that the position requires an individual with aptitude in various matters, including strong communication and negotiating skills, extensive knowledge of the construction material market, knowledge of computer software (including Microsoft Excel and Intuit QuickBooks), problem solving abilities and attention to detail, the record of proceeding does not establish that the requisite knowledge could not be developed via a wide range of unrelated degree programs, from job experience alone, from junior college or community college courses, from training provided by vocational programs or by vendors, or by some combination thereof. Moreover, as reflected in this decision's earlier comments about evidentiary deficiencies, the petitioner's failure to convey the substantive nature of the position and the specific matters upon which the beneficiary would focus also manifests itself as a failure to develop a degree of complexity or uniqueness as an aspect of the proffered position that would require a person with a bachelor's degree, or the equivalent, in a specific specialty.

With the appeal, the petitioner submitted two proposals regarding upcoming projects created by the beneficiary to "demonstrate the duties he must perform as a logistical and construction manager for [the petitioner] as a real estate developer." However, the only information regarding the beneficiary is his name and the following description: Holland native, Logistics, Construction, Development. The proposals generally describe the petitioner's projects but do not specify any duties that the beneficiary would perform, nor do the proposals establish that the proffered position involves a level of complexity, uniqueness, or specialization that distinguishes it from logistical manager/supervisor positions whose performance does not require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner also provided a list of college courses studied by the beneficiary and stated "these subjects aim to teach about management, transportation and logistics and policy and decision making, all within a technical environment." While these courses may be beneficial in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of courses leading to a baccalaureate or higher degree in a specific specialty or its equivalent are required to perform the duties of the particular position here. The

petitioner did not establish how such a curriculum is necessary to perform the duties it claims are so complex or unique.

Furthermore, as earlier noted in this decision, the AAO questions the level of specialization and complexity of the duties and responsibilities of the position based upon the LCA with the Form I-129. More specifically, the petitioner indicated that the proffered position requires a bachelor's degree and claims that the duties are "very complex" and unique. Furthermore, the petitioner stated that it "expects [the] beneficiary to operate with minimal supervision" and that the "beneficiary's level of authority is far beyond of (sic) what is normally encountered in the occupational field." In this regard, however, the AAO notes that the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Logisticians" at a Level 1 (entry level) wage.

Wage levels should be determined only after selecting the most relevant *O*NET* occupational code classification. Then, a prevailing-wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.⁶ Prevailing wage determinations start with an entry level wage (i.e. Level 1) and progress to a wage that is commensurate with that of a Level 2 (qualified), Level 3 (experienced), or Level 4 (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁷ The DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

The DOL describes a Level 1 wage rate as follows:

Level 1 (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform

⁶ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

⁷ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

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.

The petitioner claimed that the duties of the proffered position are "very complex" and unique. Furthermore, the petitioner stated that it "expects [the] beneficiary to operate with minimal supervision" and that the "beneficiary's level of authority is far beyond of (sic) what is normally encountered in the occupational field." However, the AAO must question the level of complexity of the duties and responsibilities of the proffered position, the level of independent judgment required and the amount of supervision received as the LCA is certified for a Level I entry-level position.

By virtue of the related wage level specified therein, the LCA indicates the position is actually a low-level, entry position relative to others within the occupation. Based upon this wage rate, the beneficiary is a beginning level employee who has only a basic understanding of the occupation. He will be expected to perform routine tasks that require limited, if any, exercise of judgment. The beneficiary will work under close supervision, and he will receive specific instructions on required tasks and expected results. His work will be closely monitored and reviewed for accuracy.

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

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

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

Moreover, the AAO also finds that, aside from the LCA issue, and as reflected in this decision's earlier discussions of evidentiary deficiencies regarding the proffered position and the duties comprising it, the petitioner has failed to document such complexity or uniqueness in the position that it would necessitate a person with at least a bachelor's degree in a specific specialty. 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)). Likewise, 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).

Consequently, as the petitioner failed to show that the proffered position is so complex or unique that it can be performed only by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the AAO will consider the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is satisfied if the petitioner establishes that it normally requires a degree or its equivalent in a specific specialty for the position.

The third criterion entails an employer demonstrating that it normally requires a degree 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 contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position.⁸

⁸ 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

In the instant matter, the petitioner indicated in its letter dated November 1, 2009 that "no employees have been working for the petitioner in a similar position in the past." With the appeal, the petitioner provided a letter stating it had not "had the need to hire additional managers yet therefore it is difficult to indicate what [the] petitioner would *normally* require from applicants for the position of Logistical Manager."

The petitioner indicated that it employs the beneficiary and another manager "in the Colorado area for its projects and both these employees have a master's degree level of education." However, there is insufficient information in the record to determine whether the other managerial position is similar to the proffered position. For example, the petitioner did not provide the job duties and day-to-day responsibilities of the other managerial employee. The petitioner did not indicate the knowledge and skills required for the position, or provide any information regarding the complexity of the job duties, independent judgment required or the amount of supervision received. The petitioner failed to include the educational and experience requirements for the position. As a result, it is impossible to determine if the position is similar or related to the proffered position.

The AAO notes that the petitioner claims repeatedly that the duties of the proffered position can only be employed by a degreed individual. While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d 384. In other words, if a petitioner's degree requirement is only symbolic and 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"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The evidence does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty. Therefore, 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.

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.

As already noted, the AAO here incorporates by reference its earlier discussions regarding the abstract, generalized, and generic terms by which the petitioner describes the proposed duties. As reflected in those discussions, and as evident in the actual terms used in the record, they fail to convey the proposed duties with sufficient specificity as to establish the level of relative specialization and complexity required to satisfy this criterion. Further, the AAO finds, the record of proceeding does not supplement the duty descriptions with documentary evidence remedying this failure.

As the petitioner failed to establish that the nature of the specific duties is so specialized and complex that their performance would require knowledge usually associated with at least a bachelor's degree, or the equivalent, in specific specialty, the AAO 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 the proffered position qualifies as a specialty occupation under any one of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Beyond the decision of the director, the AAO also finds that, for the reasons previously discussed with regard to the LCA submitted to support this petition, it appears that the petitioner has failed to file with the petition an LCA that corresponds to it.

As previously stated, the regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, it appears that the petitioner has failed to submit an LCA that corresponds to this petition, that is, specifically, that corresponds to the level of work and responsibilities that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and responsibilities in accordance with the requirements of the pertinent LCA regulations. For this reason also, the petition must be denied. In this regard, the petitioner should note that the AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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