



U.S. Citizenship
and Immigration
Services

D2

[REDACTED]

DATE: **OCT 18 2012**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner:
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:

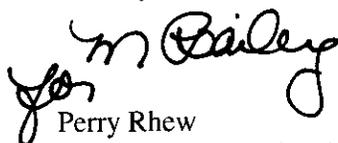
[REDACTED]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as an information technology (IT) business established in 2009. In order to employ the beneficiary in what it designates as a sales and finance manager position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submitted a brief.

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

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

The primary issue before the AAO is whether the proffered 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 an occupation that requires:

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering,

mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as 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.

In the petition signed on December 24, 2010, the petitioner indicates that it wishes to employ the beneficiary as a sales and finance manager on a full-time basis at the rate of pay of \$60,000 per year. In the letter of support, dated December 20, 2010, the petitioner states that it seeks to hire the beneficiary "to specialize in business development and work with client sites to market and develop growth of sales for information technology services and other business services." The petitioner further states that the beneficiary "will also be responsible for managing the financial operations of [the] company." In addition, the petitioner describes the duties of the proffered position as follows:

Direct and coordinate sales to end user client in need of information technology and other business services. Analyze sales statistics to determine sales potential and human resource requirements. Plan, direct, and coordinate the financial activities of the company. Formulate policies, manage daily operations, and plan the use of human resources for end user client.

The petitioner also states that the minimum requirement for the proffered position is a bachelor's degree in business administration, finance or a related area, with a background in business development. The petitioner submitted a copy of the beneficiary's foreign diplomas and transcripts, as well as a credential evaluation from Morningside Evaluations and Consulting finding that the beneficiary's foreign education is equivalent to a U.S. bachelor's degree in business administration.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Sales Managers" - SOC (ONET/OES Code) 11-2022.00, at a Level I (entry level) wage. The petitioner reported that the place of employment would be [REDACTED] Minneapolis, Hennepin County, Minnesota. No other places of employment were provided on the LCA. The petitioner stated that the proffered position would be full-time and listed the rate of pay as \$28.84 per hour.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on January 10, 2011. The petitioner was asked to submit documentation to establish that a specialty occupation position exists for the beneficiary. The petitioner was asked to submit, *inter alia*, (1) a more detailed description of the work to be performed by the beneficiary for the entire requested validity period; (2) evidence to establish a degree requirement is common to the industry in parallel positions among similar organizations; (3) evidence to show that an industry-related professional association has made a bachelor's degree in a specific specialty a requirement for entry into the field; (4) copies of the petitioner's present and past job vacancy announcements for the proffered position; (5) evidence to establish that the petitioner has a past practice of hiring persons with a baccalaureate degree or higher in a specific specialty to perform the duties of the proffered position; (6) a signed copy of the petitioner's filed Federal income tax for 2009; and (7) copies of the petitioner's Quarterly Wage Reports for all employees for the last three quarters. The director outlined the specific evidence to be submitted.

On February 18, 2011, the petitioner and counsel responded by submitting further information regarding the proffered position and additional evidence. In response to the director's RFE, the petitioner submitted a letter dated February 13, 2011, which included a revised description of the duties of the proffered position, along with the percentage of time that the beneficiary will spend performing each duty. Specifically, the petitioner stated that the beneficiary will perform the following duties:

Direct and coordinate sales to end user client in need of information technology and other business services.

- With theoretical knowledge of marketing, market search [sic] and business development, identify companies that require information technology and allied services. **5%**
- With theoretical knowledge of marketing, market research, economics, business and corporate strategy, communicate with potential clients for provision of information technology services. **5%**
- With background knowledge of business development and theoretical knowledge of technology management, conduct a needs analysis of types of services required, timeline of delivery services and benchmarks for progress on project. **5%**
- With background knowledge of business development and theoretical knowledge of project management, develop a plan for information technology services including financial cost, human resource management and vendor agreement. **5%**

Analyze sales statistics to determine sales potential and human resource requirements.

- With theoretical knowledge of strategic human resource management, make recommendation of human resource needs including types of individuals the company needs to hire to meet the client's requirements. **20%**
- With theoretical knowledge of management principles, interview potential candidates to fill the positions to provide information technology and allied services to clients. **20%**
- With theoretical knowledge of management, market research and human resources, provide ongoing assessment of future human resource needs for clients and recommend ongoing recruitment of candidates to fill the positions. Also conduct ongoing assessment of potential sales required to ensure profitability. **20%**

Plan, direct, and coordinate the financial activities of the company.

- With theoretical knowledge of accounting and finance, develop a budget for each client site and a macro-budget for the company based on existing and future sales. **2.5%**

- With theatrical [sic] knowledge of corporate strategy, coordinate budget specifications with management and ensure client is appropriately billed for services based on an agreed to budget. **2.5%**

Formulate policies, manage daily operations, and plan the use of human resources for end user client.

- With theoretical knowledge of human resources and management, communicate with client sites to ensure efficient use of human resources for projects and work orders to be given to employees and contractors. **5%**
- With theoretical knowledge of human resources and management, ensure timely completion of work orders through motivated staff and contractors. **5%**
- With theoretical knowledge of human resources and management, develop manuals and written policies for management to ensure compliance with workplace environments. **5%**

According to the petitioner's description, the beneficiary will spend 60% of her time performing three duties relating to analyzing sales statistics to determine sales potential and human resource requirements.

The petitioner also submitted, in part, (1) several job vacancy announcements; (2) Summary Reports from the Occupational Information Network (O*NET) for the occupational categories Sales Managers – SOC (ONET/OES Code) 11-2022.00 and Financial Managers, Branch or Department - SOC (ONET/OES Code) 11-3031.02; (3) printouts from the Foreign Labor Certification Data Center, Online Wage Library (OWL) for Sales Managers – SOC (ONET/OES Code) 11-2022.00 and Financial Managers - SOC (ONET/OES Code) 11-3031; (4) an opinion letter from [REDACTED] and (5) copies of the petitioner's Quarterly Wage Reports for the last three quarters in 2010.¹

The director reviewed the information provided by the petitioner and counsel. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on February 28, 2011. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.

¹ It must be noted that the Quarterly Wage Reports indicate that the petitioner had two employees in the 2nd quarter of 2010, no employees in the 3rd quarter of 2010, and two employees in the 4th quarter of 2010. However, the Form I-129 (signed by the petitioner on December 21, 2010) indicates that the petitioner has four employees. In addition, the petitioner's February 13, 2011 letter, submitted in response to the RFE, indicates that the petitioner has four employees and three senior consultants. 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 issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. 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.

When determining whether a position is a specialty occupation, it is important to consider the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or the equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

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

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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'r 1998). USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1).

Upon review of the record of proceeding, the AAO notes that there are numerous inconsistencies and discrepancies, which undermine the petitioner's credibility with regard to the services the beneficiary will perform, as well as the nature and requirements of the proffered position. This particular aspect is the discrepancy between what the petitioner and counsel claim about the occupational classification and level of responsibility inherent in the proffered position set against the contrary occupational classification and level of responsibility conveyed by the wage level indicated on the LCA submitted in support of the petition.

As previously stated, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational title of "Sales Managers" – SOC (ONET/OES Code) 11-2022.00. The petitioner stated in the LCA that the wage level for the proffered position was Level I (entry) and claimed that the prevailing wage in Hennepin County (Minneapolis, Minnesota) for the proffered position was \$28.84 per hour (\$58,739 per year).² The prevailing wage source is listed as the OFLC Online Data Center.³ The LCA was certified on December 14, 2010 and signed by the petitioner on December 21, 2010.

In a letter dated February 13, 2011, submitted in response to the RFE, the petitioner stated the "the US Department of Labor, through its O*Net website and Prevailing Wage website confirms the position titles of Sales Manager (SOC Code 11-2022) and Financial Manager (SOC Code 11-3131.02)." The petitioner continued by stating that it is "a small company and require a skill set in both professions." The petitioner submitted printouts from O*NET and OWL for the occupational categories "Sales Managers" and "Financial Managers" in support of this assertion.

In the appeal, counsel states that "there are other OOH categories that would have also been appropriate for the position definition and it was a USCIS error to rely solely on the 'Marketing Manager' category when the position is a combination of occupations."⁴ Counsel references the

² It is noted that, if the proffered position were determined to be a higher level position, the prevailing wage required to be paid by the petitioner at that time would have been \$85,779 per year for a Level II position, \$112,819 per year for a Level III position, and \$139,859 per year for a Level IV position.

³ The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Foreign Labor Certification Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

⁴ The AAO notes that the director's decision does not state that the proffered position falls under the occupational category "Marketing Managers." The director stated that "an analysis of the beneficiary's proposed duties reveals that the job being offered is similar to the job of a sales manager." The AAO notes that information regarding the occupational category "Sales Managers" is in the chapter of the *Handbook* (in the 2010-11 edition) entitled "Advertising, Marketing, Promotions, Public Relations, and Sales Managers." In the decision, the director provided direct quotations from the *Handbook* regarding the occupational category "Sales Managers." For example, the director quoted the first section from the *Handbook*, which specifically states the occupational title "sales managers" four times. The record of proceeding is unclear as

occupational categories "Financial Managers" and "Management Analysts" and provides quotations from the *Handbook* in support of the assertion that the proffered position is a specialty occupation. Counsel claims that the academic requirements for the occupational categories "Financial Managers" and "Management Analysts" demonstrate that the proffered position is a specialty occupation. Counsel concludes by stating that "USCIS should have considered the position in its totality as being a combination of occupations."

With respect to the LCA, the Department of Labor (DOL) provides clear guidance for selecting the most relevant O*NET occupational code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the SWA should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

In determining the nature of the job offer, DOL guidance indicates that the first step is to review the requirements of the petitioner's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the petitioner's job offer is used to identify the appropriate occupational classification. If the petitioner believes that its position is described as a combination of O*NET occupations, then according to DOL guidance the petitioner should select the relevant occupational code for the highest paying occupation.

The Online Wage Library lists the prevailing wage for "Sales Managers" as \$28.24 per hour (\$58,739 per year) at the time the petition was filed in this matter, for a Level I position in the area of intended employment; the prevailing wage for "Management Analysts" was \$25.63 per hour (\$53,310 per year); and the prevailing wage for "Financial Managers" was \$37.29 per hour (\$77,563 per year). Thus, accordingly, if the petitioner believed its position "was a combination of occupations" (as stated by counsel), then it should have chosen the relevant occupational code for the highest paying occupation – in this case "Financial Managers." However, the petitioner selected the occupational category "Sales Managers" – a lower paying occupational category for the proffered position.

to the reason that counsel asserts that the director categorized the proffered position under the occupational category "Marketing Managers," as counsel's claim is not supported by the evidence in the record.

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

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.

The AAO notes that under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A),

The petitioner's offered wage to the beneficiary of \$28.84 per hour (as stated on the LCA) is below the prevailing wage for the occupational classification of "Financial Managers" in the area of intended employment. The Level I prevailing wage for the occupational category of "Financial Managers" for a full-time position in the area of intended employment was \$37.29 per hour (\$77,563 per year) at the time the petition was filed in this matter, a difference of over \$17,000 per year.⁵

⁵ When a petitioner seeks to employ a beneficiary in two distinct occupations, it may be appropriate for the petitioner to file two separate petitions, requesting concurrent, part-time employment for each occupation. While not the case here, if a petitioner submits one petition for two distinct occupations and only one aspect of a combined position qualifies as a specialty occupation, USCIS would be required to deny the entire

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational classification in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupational category at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted. Thus, even if it were determined that the petitioner overcame the director's ground for denying the petition (which it has not), the petition could still not be approved due to the petitioner's failure to submit a certified LCA for the proper occupational and wage classification for the proffered position. Thus, for this independent reason, the H-1B cannot be approved.⁶

petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. *See generally* 8 C.F.R. § 214.2(h). Notably, when submitting a separate petition for each occupation, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation, such as the provision of certified LCAs for each occupation and the payment of wages commensurate with the hours worked in each occupation. Thus, in some cases, filing separate petitions would help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion with regard to the proper classification of the position being offered.

⁶ It must be noted that the record contains materially conflicting statements as to the nature of the proffered position. The petitioner designated the proffered position under the occupational category "Sales Managers" on the LCA. In response to the RFE, the petitioner claimed that the relevant occupational categories were "Sales Managers" and "Financial Managers." Then on appeal, counsel *for the first time* stated that the duties of the proffered position are similar to the occupational categories "Sales Managers," "Financial Managers," and "Management Analyst." However, this assertion is not supported by the occupational classification designated by the petitioner in the LCA. The AAO finds it questionable that the petitioner and counsel waited until the RFE and then the appeal to make various assertions regarding the occupational classification for a proffered position – rather than providing such a claim with the initial petition, and choosing the proper designation for the proffered position on the LCA in accordance with DOL guidance.

USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). The petitioner must establish that the position offered to the beneficiary when the petition was filed merits H-1B classification. *See generally Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner (or counsel) may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The regulations at 8 C.F.R. § 214.2(h)(2)(i)(E) state in pertinent part:

The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition.

Thus, because the LCA was certified and supports a "Sales Manager" position, the request by the petitioner and counsel to consider the original petition as a petition for a different occupational classification is, therefore, rejected. Moreover, the AAO finds that, fully considered in the context of the entire record of

Furthermore, upon review of the record of proceeding, the AAO notes that the petitioner's claimed entry requirement of at least a bachelor's degree in "business administration, finance or a related field" for the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the acceptance of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, 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).⁷

In this matter, the petitioner claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Moreover, it also cannot be found that the proffered position is a specialty occupation due to the petitioner's failure to satisfy any of the supplemental, additional criteria at 8 C.F.R.

proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

⁷ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

Id.

§ 214.2(h)(4)(iii)(A). To reach this conclusion, the AAO first turned 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 U.S. 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)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁸ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Sales Managers."

The AAO reviewed the chapter of the *Handbook* entitled "Sales Managers," including the sections regarding the typical duties and requirements for this occupational category.⁹ However, the *Handbook* does not indicate that "Sales Managers" comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty.

The subchapter of the *Handbook* entitled "What Sales Managers Do" states, in part, the following about this occupation:

Sales managers direct organizations' sales teams. They set sales goals, analyze data, and develop training programs for the organization's sales representatives.

Duties

Sales managers typically do the following:

- Oversee regional and local sales managers and their staffs
- Resolve customer complaints regarding sales and service

⁸ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/ocol/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

⁹ For additional information regarding the occupational category "Sales Managers," *see* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Medical and Health Services Managers, on the Internet at <http://www.bls.gov/ooh/management/sales-managers.htm#tab-1> (last visited October 10, 2012).

- Prepare budgets and approve budget expenditures
- Monitor customer preferences to determine the focus of sales efforts
- Analyze sales statistics
- Project sales and determine the profitability of products and services
- Determine discount rates or special pricing plans
- Plan and coordinate training programs for sales staff
- Sales managers' responsibilities vary with the size of the organization they work for. However, most sales managers direct the distribution of goods and services by assigning sales territories, setting sales goals, and establishing training programs for the organization's sales representatives.

In some cases, they recruit, hire, and train new members of the sales staff. For more information about sales workers, see the profiles on retail sales workers and wholesale and manufacturing sales representatives.

Sales managers advise sales representatives on ways to improve their sales performance. In large multiproduct organizations, they oversee regional and local sales managers and their staffs.

Sales managers also stay in contact with dealers and distributors. They analyze sales statistics that their staff gathers, both to determine the sales potential and inventory requirements of products and stores and to monitor customers' preferences.

Sales managers work closely with managers from other departments. For example, the marketing department identifies new customers that the sales department can target. The relationship between these two departments is critical to helping an organization expand its client base. Because sales managers monitor customers' preferences and stores' and organizations' inventory needs, they work closely with research and design departments and warehousing departments.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Sales Managers, on the Internet <http://www.bls.gov/ooh/management/sales-managers.htm#tab-1> (last visited October 10, 2012).

In the instant case, the petitioner and counsel stated *for the first time* in the RFE and the appeal that the proffered position is a combination of occupations. The petitioner and counsel have provided materially conflicting information regarding the proffered position and failed to establish the substantive nature of the work to be performed by the beneficiary. Nevertheless, assuming, *arguendo*, that the proffered position falls under the occupational category "Sales Managers," the *Handbook* does not support the assertion that a baccalaureate or higher degree in a specific specialty, or the equivalent, is normally the minimum requirement for entry into the occupation.

More specifically, the subchapter of the *Handbook* entitled "How to Become a Sales Manager" states, in part, the following about this occupation:

Education

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

Work Experience

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

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

Handbook, 2012-13 ed., Sales Managers, on the Internet <http://www.bls.gov/ooh/management/sales-managers.htm#tab-4> (last visited October 10, 2012).

When reviewing the *Handbook*, the AAO must note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA.¹⁰ This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.¹¹ That is, in

¹⁰ Wage levels should be determined only after selecting the most relevant Occupation Information Network (O*NET) 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.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (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. 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.

¹¹ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may

accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or the equivalent, is normally the minimum requirement for entry into this occupational category. Rather, the *Handbook* states that while most sales managers have a bachelor's degree (no specific specialty is stated), the educational requirements are less strict for job candidates who have significant experience as a sales representative.¹² Notably, the *Handbook* does not state that such experience must be equivalent to a bachelor's degree in a specific specialty. The *Handbook* also reports that work experience is typically required for someone to become a sales manager. Furthermore, the *Handbook* indicates that the preferred duration of work experience varies, but employers usually seek candidates who have at least one to five years of experience.

The *Handbook* does not indicate that employers normally require a degree in a *specific specialty* for entry into the occupation. The *Handbook* reports that courses in business law, management, economics, accounting, finance, mathematics, marketing, and statistics are advantageous for sales manager positions. The AAO notes that in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in

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.

Id.

¹² The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of sales managers have a bachelor's degree (no specific specialty), it could be said that "most" sales managers have such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement (of at least a bachelor's degree in a specific specialty, or the equivalent) for that occupation, much less for the particular position proffered by the petitioner. (As previously noted, the petitioner designated the proffered position as a low-level, entry position relative to others within the occupation.) Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

disparate fields, such as business law, management, economics, accounting, finance, mathematics, marketing, and statistics, would not meet the statutory requirement that the degree be "in the specific specialty."¹³ Section 214(i)(1)(B) (emphasis added). The text suggests that a baccalaureate degree or higher may be a preference among employers of sales managers in some environments, but that some employers hire employees with less than a bachelor's degree. The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or the equivalent, is normally the minimum requirement for entry into the occupation.

As previously discussed, in response to the RFE, the petitioner stated that it required the skill set of a sales manager and a financial manager (specifically stating that "[the petitioner is] a small company and require[s] a skill set in both professions"). In the appeal, counsel states that "there are other OOH categories that would have also been appropriate for the position definition and it was a USCIS error to rely solely on the 'Marketing Manager' category when the position is a combination of occupations." (As previously noted, the director did not state that the proffered position falls under the occupational category "Marketing Managers.") Counsel claimed that the proffered position is a combination of occupations, including the occupational categories "Financial Managers" and "Management Analysts." Counsel concluded by stating that "USCIS should have considered the position in its totality as being a combination of occupations."

The AAO reviewed these occupational categories in its determination of whether the *Handbook* supports the claim that the proffered position qualifies as a specialty occupation. After reviewing the chapters of the *Handbook* dealing with financial managers and management analysts, the AAO is not persuaded by the claims of the petitioner and counsel, and their assertions are not supported by the record of proceeding. The petitioner and counsel have claimed widely divergent occupational categories regarding the proffered position, which are contradicted by the occupational classification designated by the petitioner in the LCA. The AAO incorporates and reiterates by reference its earlier comments in this decision regarding the inconsistencies and discrepancies in the record of proceeding with regard to the nature of the position, as well as the educational credentials that would be required for the actual performance of the beneficiary's work as reported by the petitioner.

As noted earlier, the record contains materially conflicting statements as to the nature of the proffered position. A petitioner (or counsel) may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 176. A petitioner may of course change a material term and condition of employment. However, such a change cannot be made to a petition after it has already been filed with USCIS. Instead, the change must be documented through the filing of an amended or new petition. *See* 8 C.F.R. § 214.2(h)(2)(i)(E). The only recognized legal procedure for amending a previously adjudicated petition is by filing an amended or new petition, with the appropriate fees and a valid LCA. *Id.* The petitioner must establish that the position offered to the beneficiary when the petition

¹³ Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty.

was filed merits classification for the requested benefit. *Matter Matter of Izummi Tire Corp.*, 17 I&N Dec. 249.

The AAO will now discuss the O*NET OnLine Summary Reports submitted by the petitioner in response to the director's RFE. The Summary Reports provided, however, are for 11-2022.00 Sales Managers and 11-3031.02 Financial Managers, Branch or Department. The AAO reviewed the reports, however, the O*NET OnLine Summary Reports are insufficient to establish that the proffered position categorically qualifies as a specialty occupation normally requiring at least a bachelor's degree in a specific specialty. A designation of Job Zone 4 indicates that a position requires considerable preparation. It does not, however, demonstrate that a bachelor's degree in any specific specialty is required, and does not, therefore, demonstrate that a position so designated qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). For additional information, see the O*NET OnLine Help Center, on the Internet at <http://www.onetonline.org/help/online/zones> (explaining that Job Zone 4 signifies only that *most* but not all of the occupations within it require a bachelor's degree). Further, the Help Center's discussion confirms that Job Zone 4 does not indicate any requirements for particular majors or academic concentrations. See *id.* Therefore, despite the petitioner's assertions to the contrary, the O*NET information is not probative of the proffered position qualifying as a specialty occupation.

Next, the AAO will discuss the letter from [REDACTED] submitted by the petitioner in response to the RFE. The letter is dated February 16, 2010. In the letter, [REDACTED] states that the proffered position is a specialty occupation and, therefore, requires a bachelor's degree in business administration or a closely related field. In addition, [REDACTED] states that a bachelor's degree in business administration is considered an industry standard requirement for the proffered position. First, it must be noted that [REDACTED] conclusion that a degree in "business administration" is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. As discussed *supra*, 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 147.

[REDACTED] provided a summary of his education and experience and attached a copy of his curriculum vitae. He described his qualifications, including his educational credentials, professional experience, information regarding his research interests, as well as provided a list of the publications he has written. Based upon a complete review of [REDACTED] letter and curriculum vitae, the AAO notes that, while [REDACTED] may, in fact, be a recognized authority on various topics, he has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. [REDACTED] claims that he is qualified to comment on the position of sales and finance manger because of the positions he holds at various universities and colleges, as well as his professional experience and academic training. However, without further clarification, it is unclear how his education, training, skills or experience would translate to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of information technology companies in the computer systems design services industry (as designated by the petitioner in the

Form I-129 and with the NAICS code) similar to the petitioner for *sales and finance manager* positions (or parallel positions).

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

██████████ provides a list of the job duties for the petitioner's proffered position, and states that the petitioner "has over 15 years of experience providing technical project and consulting solutions and gross annual revenues of over \$1 million." The AAO notes that this information regarding the petitioner is not in accordance with the record of proceeding.¹⁴ ██████████ does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. There is no indication that ██████████ possesses any knowledge of the petitioner's proffered position beyond the job description. The fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. There is no evidence, for example, that ██████████ has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. ██████████ provides general conclusory statements regarding sales and finance manager positions, but he does not provide a substantive, analytical basis for his opinion and ultimate conclusions.

Also, while ██████████ claims that the duties of the proffered position are complex, unique and/or specialized, it must be noted that there is no indication that the petitioner and counsel advised ██████████ that the petitioner submitted an LCA certified for a Level I position, thereby characterizing the proffered position as a low, entry-level sales manager position, for an employee who has only a basic understanding of the occupation. As previously discussed, the wage-rate indicates that the beneficiary would be expected to perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised and her work closely monitored and reviewed for

¹⁴ Both the Form I-129 and the letter of support (dated December 20, 2010) state that the company was established in 2009 (approximately a year before the petition was submitted). Furthermore, the petitioner submitted a copy of its 2010 federal tax return (dated February 5, 2010), which indicates that it was established on December 28, 2009 and that its gross annual income was approximately \$883,500.

accuracy; and that she would receive specific instructions on required tasks and expected results. It appears that [REDACTED] would have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the advisory opinion rendered by [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. There is an inadequate factual foundation established to support the opinion and the AAO finds that the opinion is not in accord with other information in the record.

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

For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding [REDACTED] opinion letter into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Upon review of the totality of the evidence in the entire record of proceeding, the AAO concludes that the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that there is a categorical requirement for at least a bachelor's degree in a specific specialty. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that position is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations or similar firms in the petitioner's industry attesting that a requirement of a bachelor's degree in a specific specialty or its equivalent is common to the industry in parallel positions among similar organizations. Moreover, the AAO acknowledges that the record of proceeding contains an opinion letter from [REDACTED]. However, as previously discussed in detail, the AAO finds that the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

In response to the director's RFE, the petitioner submitted copies of several advertisements 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 the petitioner fails to establish that a requirement of a bachelor's degree (or higher) in a specific specialty, is common to the industry in parallel positions among organizations similar to the petitioner.

In the Form I-129, the petitioner described itself as an information technology company established in 2009. The petitioner stated that it has four employees. On the Form I-129, the petitioner designated its operations under the North American Industry Classification System (NAICS) code 541512 – Computer Systems Design Services.¹⁵ The NAICS website describes this industry as follows:

This U.S. industry comprises establishments primarily engaged in planning and designing computer systems that integrate computer hardware, software, and communication technologies. The hardware and software components of the system may be provided by this establishment or company as part of integrated services or may be provided by third parties or vendors. These establishments often install the system and train and support users of the system.

See U.S. Dep't of Commerce, U.S. Census Bureau, 2007 NAICS Definition, 541512 – Computer Systems Design Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed October 10, 2012).

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

¹⁵ According to the Department of Commerce, U.S. Census Bureau, the North American Industry Classification System is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy, and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last viewed October 10, 2012).

the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner and counsel to claim that the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. As previously discussed, 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Notably, the petitioner and counsel did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documentation, the petitioner fails to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

For instance, the advertisements include positions with the government; Target; T-Mobile USA, Inc. (leading company of mobile communications); Nestle Nutrition; Valspar Corporation ("global leader in the paint and coatings industry"); UnitedHealth Group ("managed care and health insurance"); Novartis ("biotechnology/pharmaceuticals" – health care company); and Sensient Technology ("leading global manufacturer and marketer of colors, flavors, and fragrances"). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. Furthermore, the petitioner submitted job postings for which little or no information regarding the employers is provided. For example, the petitioner submitted a posting for MRI Network (a recruitment agency); advertisements by The Ladders (an online job-matching service, the actual employers are often not identified); Ingenix and OptiumHealth ("part of a family of companies that makes UnitedHealth Group one of the leaders across most major segments of the US health care system"); Ajilon Professional ("world leader in the CPG industry"); RSC Equipment Rental; and Robert Half Finance and Accounting (recruitment agency). The record is devoid of sufficient information regarding the advertising employers to conduct a legitimate comparison of the organizations to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

Moreover, some of the advertisements do not appear to be for parallel positions. That is, the positions do not appear to have similar duties and requirements to the proffered position. For example, the position with the Mosaic Company is for a financial systems manager, and the position requires a degree and at least eight years of experience, including 4+ years of leadership experience, 5+ years of management experience working with a large complex company with over \$1 billion in sales and global operations, 4+ years of financial systems experience, 2+ years of working closely

with the advertising employer. The position with Ingenix and the position with Sensient Technology require a degree and seven years of relevant experience. A position with T-Mobile is for a Sales Engineer 2. Some of the advertised positions appear to be more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Additionally, contrary to the purpose for which the advertisements were submitted, some of the postings do not establish that at least a bachelor's degree in a specific specialty, or the equivalent, is required for the positions. For example, some of the postings state that at least a bachelor's degree is required, but they also indicate that a range of disciplines are acceptable. Thus, the postings do not indicate that the employers require at least a bachelor's degree in a *specific specialty* that is directly related to the occupation. As previously discussed, 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 position.

The AAO reviewed all of the advertisements submitted by the petitioner. However, 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.

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

Moreover, although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the proffered position for organizations similar to the petitioner required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the 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.

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

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

Upon review of the record of proceeding, the AAO finds that the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of sales and finance manager. That is, the AAO reviewed the record in its entirety and finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty or its equivalent. That is, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position that would require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

In a letter dated February 13, 2011 the petitioner stated that the beneficiary will work with clients in need of complex and unique services. The petitioner further stated the proffered position requires theoretical knowledge of marketing, market search, business development, technology management, project management, strategic human resource management, management principles, accounting, finance, and corporate strategy. In addition, the petitioner claimed that the position requires practical knowledge of business development. The AAO notes that 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.¹⁶

In the instant case, the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. Specifically, the petitioner failed to demonstrate how the sales and finance manager duties as described require the theoretical and practical application of a body of highly specialized knowledge such that a

¹⁶ For example, as previously mentioned, in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields would not meet the statutory requirement that the degree be "in *the* specific specialty." Section 214(i)(1)(B) (emphasis added). Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty.

bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a *specific specialty*, or its equivalent, is required to perform the duties of the proffered position.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Sales Managers" at a Level I (entry level) wage. The wage level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.¹⁷

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." Notably, the prevailing wage for a Level IV position is significantly higher than the petitioner's offered wage. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

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

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

To merit approval of the petition under this criterion, the record must 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-

¹⁷ For additional information on wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner stated in the Form I-129 petition that it has four employees and that it was established in 2009. It appears that the position of sales and finance manager is a new position. The record is devoid of information to satisfy this criterion of the regulations.

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

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is

usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Upon review of the record of the proceeding, the AAO finds that the petitioner has not provided probative evidence to satisfy this criterion of the regulations.

The petitioner has not presented the proposed duties with sufficient specificity and substantive content to establish relative specialization and complexity as distinguishing characteristics of the duties of the proffered position, let alone that they are at a level that would require knowledge usually associated with attainment of at least a bachelor's degree, or the equivalent, in a specific specialty. Thus, also, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge requiring attainment of at least a bachelor's degree in a specific specialty or the equivalent.

In this regard, the AAO hereby incorporates its earlier findings with regard to the implication of the Level I wage-rate designation (the lowest of four assignable levels) in the LCA. That is, that the Level I wage designation of the proffered position is indicative of a low, entry-level position, and hence, one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation."

As the evidence in the record of proceeding does not establish that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

Beyond the decision of the director, the AAO finds that the petitioner (1) failed to comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B), and (2) failed to provide an LCA that corresponds to the position.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

Service or training in more than one location. A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations.

Additionally, DOL regulations governing Labor Condition Applications states that "[e]ach LCA shall state . . . [t]he places of intended employment." 20 C.F.R. § 655.730(c)(4) (emphasis added). "Place of intended employment" is defined as "the worksite or physical location where the work actually is performed by the H-1B . . . nonimmigrant." 20 C.F.R. § 655.715. Moreover, the instructions for Section G of Form ETA 9035 require that the employer list the place of intended employment "with as much geographic specificity as possible" and notes that the employer may identify up to three physical locations, including street address, city, county, state, and zip code, where work will be performed. Petitioners who know that an employee will be working at additional worksites at the time of filing must include all worksites on Form ETA 9035. Failure to do this will result in a finding that the employer did not file an LCA that supports the H-1B petition.

In this case, the petitioner stated in the Form I-129 that the beneficiary's work location would be [REDACTED] Minneapolis, MN 55410, and the beneficiary's home address at [REDACTED] Bloomington, MN 55420. In the LCA (section G), the petitioner states that the beneficiary's intended work site is [REDACTED] Minneapolis, MN 55410. The petitioner fails to mention the beneficiary's home office address in Bloomington, MN in the LCA.

Here, the petitioner has failed to submit the required itinerary to comply with 8 CFR § 214.2(h)(2)(i)(B)). Additionally, the petitioner failed to submit an LCA specific to each work location for the beneficiary, in compliance with DOL regulations. Therefore, the petition must be denied for these additional reasons.

Finally, beyond the decision of the director, the petitioner has also failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation. Even if the proffered position were a specialty occupation, which it is not, the beneficiary would not qualify to perform the duties of that specialty occupation based on her education credentials, because it has not been demonstrated that the beneficiary possesses a degree in a specialized field of study.

Specifically, while an evaluation of the beneficiary's academic credentials prepared by Morningside Evaluations and Consulting states that the beneficiary possesses the equivalent to a U.S. Bachelor of Business Administration degree, it fails to designate any specific business specialty. The AAO notes that a general 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. *Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm'r 1968). The petitioner must demonstrate that the beneficiary obtained knowledge of the particular occupation in which he or she will be employed. *Id.* Thus, even if the petitioner had demonstrated that the proffered position requires at least a bachelor's degree in a specific specialty or its equivalent, the petition could not be approved, because the

petitioner failed to demonstrate that the beneficiary has taken courses or gained knowledge considered to be a realistic prerequisite to any specific specialty within the field of business. For this additional reason, the petition must be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The 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.