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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: APR 05 2013 OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. 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,

for Michael T. Kelly
Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on December 1, 2008. On the Form I-129 visa petition, the petitioner describes itself as an IT consulting and solutions business established in 1996, with 800 employees. In order to continue to employ the beneficiary in what it designates as a sales manager position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on March 20, 2009, 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. The petitioner filed an appeal of the decision on April 22, 2009. On appeal, the petitioner asserts that the director's basis for denial of the petition on the specialty occupation issue was erroneous. In support of these assertions, the petitioner submitted a brief and additional evidence.

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

For the reasons that will be discussed below, the AAO finds that the director's decision to deny the petition for failure to establish the proffered position as a specialty occupation was correct. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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

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

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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such, and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation, as required by the Act.

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's continued services in a position that it designates as a sales manager to work on a full-time basis at a salary of $89,000 per year. The petitioner submitted the following information regarding the proposed duties of the proffered position in an addendum[2] to Section 1 of page 7 of the Form I-129 Supplement H:

> Working at our offices, the candidate will manage [the] sales activities of our business:
>
> Direct staffing, training, and performance evaluations to develop and control sales program. Coordinate sales distribution by establishing sales territories, quotas, and goals and advise business partners, vendors, and clients concerning sales and advertising techniques. Assign sales territory to sales personnel. Analyze sales statistics to formulate policy and to assist vendors and business partners in promoting sales. Review market analyses to determine customer needs, volume potential, price schedules, and discount rates, and develop[] sales campaigns to accommodate goals of company. Direct planning and standardization to eliminate unprofitable services from sales line. Represent company at industry association meetings to promote our

[2] The addendum contains a section titled, "[r]esponse to Part 5(2)," the nontechnical job description, which also includes a description of the job responsibilities for the proffered position.

> services. Coordinate liaison between sales department and other sales-related units. Analyze and control expenditures of division to conform to budgetary requirements. Assist other departments within our company to prepare manuals and technical publications. Prepare[] periodic sales report showing sales volume and potential sales. May direct in-house branded software products research and development. May recommend or approve budget, expenditures, and appropriations for research and development work.

In its support letter, dated November 21, 2008, the petitioner provided the following description of the proffered position, which is essentially identical to the aforementioned description that was in an addendum to the petition:

> Manage sales activities of our business: Direct staffing, training, and performance evaluations to develop and control sales program. Coordinate sales distribution by establishing sales territories, quotas, and goals and advi[s]e business partners, vendors, and clients concerning sales and advertising techniques. Assign sales territory to sales personnel. Analyze sales statistics to formulate policy and to assist vendors and business partners in promoting sales. Review market analyses to determine customer needs, volume potential, price schedules, and discount rates, and develop[] sales campaigns to accommodate goals of company. Direct planning and standardization to eliminate unprofitable services from sales line. Represent company at industry association meetings to promote our services. Coordinate liaison between sales department and other sales-related units. Analyze and control expenditures of division to conform to budgetary requirements. Assist other departments within our company to prepare manuals and technical publications. Prepare[] periodic sales report showing sales volume and potential sales. May direct in-house branded software products research and development. May recommend or approve budget, expenditures, and appropriations for research and development work.

In addition, the petitioner claims that "[the petitioner] requires a candidate with a graduate education in Sales/Marketing or Business Administration, and at least a year's experience in business to business sales." The petitioner submitted a copy of the beneficiary's master of business administration degree from [redacted] Iowa and a copy of the beneficiary's bachelor of engineering degree (in its mechanical branch) from [redacted] in Kolhapur, India.

The petitioner also submitted an LCA in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to occupational code "163." In its letter of support, the petitioner states that the *Dictionary of Occupational Titles* (*DOT*) code[3] for the

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[3] The *Dictionary of Occupational Titles,* or *DOT,* was created by the Employment and Training Administration, and was last updated in 1991. It is included on the Office of Administrative Law Judges (OALJ) web site because it was a standard reference in several types of cases adjudicated by the OALJ,

position is "163.167-018." The Occupational Information Network's (O*NET) online DOT crosswalk search for this occupational code for the proffered position reveals that it corresponds to the occupational classification of "Sales Managers" – SOC (ONET/OES Code) 11-2022.00.[4] Furthermore, the prevailing wage listed on the LCA corresponds to a Level II wage.[5]

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought and issued an RFE on January 21, 2009. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted.

On March 6, 2009, the petitioner responded to the RFE and submitted, *inter alia*, (1) the petitioner's letter in response to the RFE; (2) the petitioner's company brochure; (3) a list of the petitioner's employees in the Edison, New Jersey office; (4) the petitioner's organizational chart; (5) an opinion letter, dated February 24, 2009, by in White Plains, New York; and (6) .

On March 20, 2009, the director denied the petition. 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. Counsel for the petitioner filed an appeal of the denial of the H-1B petition.

The documents submitted on appeal include, *inter alia*, (1) a copy of the Notice of Action, dated December 15, 2005, approving the petitioner's initial H-1B petition for the beneficiary, valid from December 19, 2005 to December 18, 2008; (2) a copy of the petitioner's initial H-1B petition, submitted in December 2005, seeking to employ the beneficiary in the proffered position, and supporting documentation; (3) printouts of documents from the American Immigration Lawyers Association's (AILA) Internet site at http://www.aila.org; (4) copies of documents from AILA/INS Benefits Liaison Meetings; (5) a copy of the USCIS Interoffice Memorandum from William R. Yates, Associate Director for Operations, USCIS, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3 (April 23, 2004); (6) a copy of documents from AILA's InfoNet; (7) a printout of the prevailing wage for the proffered position for the pertinent period, from the DOL Foreign Labor Certificate Data Center's OnLine Wage Library (OWL), at

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especially in older labor-related immigration cases. The *DOT*, however, has been replaced by the O*NET. See http://www.oalj.dol.gov/LIBDOT.HTM (last visited March 5, 2013).

[4] *See* O*NET OnLine's *DOT* Crosswalk Search, located on the Internet at http://www.onetonline.org/crosswalk/DOT?s=163&g=Go (last visited March 5, 2013).

[5] *See* Foreign Labor Certification Data Center, Online Wage Library, located on the Internet at http://www.flcdatacenter.com/OesQuickResults.aspx?code=11-2022&area=20764&year=9&source=1 (last visited March 5, 2013).

http://www.flcdatacenter.com/OesPrintResults.aspx?area=45940&code=112022&year=9&source=; (8) a printout of the Summary Report for Sales Managers from O*NET OnLine's Internet site at http://online.onetcenter.org/link/summary/11-2022.00; (9) a printout of the *Occupational Outlook Handbook's* section on "Sales Representatives, Wholesale and Manufacturing"; (10) a printout from the *DOT* for "163.117-018 – Manager, Promotion (hotel & rest.)"; (11) copies of various job vacancy announcements; and (12) copies of the educational credentials for the petitioner's five sales managers and junior account manager in the Sales and Marketing office.

On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition on the specialty occupation issue was erroneous and contends that the decision (1) is contrary to USCIS policy, as this petition is an extension of the H-1B status previously accorded the beneficiary; (2) is based on an incorrect application of law to the facts in the record at the time of adjudication; and (3) is not supported by substantial evidence because the director failed to adequately consider all of the evidence in the record and explain why relevant evidence was dismissed.

As will now be discussed, based upon its independent, *de novo* review of the totality of the evidence in the entire record of proceeding, including all of the submissions on appeal, the AAO concludes that the director's decision to deny the petition for failure to establish the proffered position as a specialty occupation was correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

First, however, the AAO will address discuss the materially adverse impact of the petitioner's statement that a generalized bachelor's degree in business administration is acceptable for the proffered position.

In the letter in response to the RFE, dated March 5, 2009, the petitioner stated, in pertinent part:

> The present I-129 petition suffices all the general requirements involving "specialty occupation" under INA 101(a) (15) (H) (i) (b). (Emphasis in bold type and underlining removed.)
>
> The petitioner affirms that the job position "Sales Manager" are [sic] specialized in nature, requiring the ability to apply the knowledge associated with the attainment of a Bachelor's-level degree (or higher) in Business Administration, marketing, or a related field, as well as additional experience (at least one year) in the area of business to business sales.

The petitioner's claim that "a Bachelor's-level degree (or higher) in Business Administration, marketing, or a related field" is a sufficient minimum requirement for entry into 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 to the position in question. Since there must be a close correlation

between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

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).[6]

Again, the petitioner in this matter 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 AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of the petition.

On the Form I-129, the petitioner stated that the beneficiary would continue to be employed in a sales manager position. However, as earlier stated, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the

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[6] 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: elsewise, 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.

position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (hereinafter referred to as the *Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[7] As previously discussed, the LCA information indicates that the proffered position falls within 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.[8] The "Sales Managers" chapter of the 2012-2013 edition of the *Handbook* describes the duties of such positions as follows:

> 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
> - 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.

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[7] The *Handbook*, which is available in printed form, may also be accessed on the Internet at http://www.bls.gov/ooh/. The AAO's references to the *Handbook* are to the 2012-2013 edition available online.

[8] 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.*, Sales Managers, available on the Internet at http://www.bls.gov/ooh/management/sales-managers.htm#tab-1 (last visited March 5, 2013).

> 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, available on the Internet at http://www.bls.gov/ooh/management/sales-managers.htm#tab-2 (last visited March 5, 2013).

However, the *Handbook* does not indicate that normally the minimum requirement for entry into sales manager positions is at least a bachelor's degree *in a specific specialty*, or its equivalent. This is evident from the discussion in the subchapter of the *Handbook* entitled "How to Become a Sales Manager," which states the following about this occupational category:

> Most sales managers have a bachelor's degree and work experience as a sales representative.
>
> **Education**
>
> Most sales managers have a bachelor's degree, 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.
>
> **Important Skills**
>
> ***Analytical skills.*** Sales managers must collect and interpret complex data to target the most promising areas and determine the most effective sales strategies.
>
> ***Communication skills.*** Sales managers need to work with people in other departments and with customers, so they must be able to communicate clearly.
>
> ***Customer-service skills.*** When helping to make a sale, sales managers must listen and respond to the customer's needs.
>
> ***Managerial skills.*** Sales managers must be able to evaluate how sales staff perform and develop ways for struggling members to improve.

Id., Sales Managers, available on the Internet at http://www.bls.gov/ooh/management/sales-managers.htm#tab-4 (last visited March 5, 2013).

While the *Handbook* states that "[m]ost sales managers have a bachelor's degree," it should be noted that "most" is a rather indefinite adjective which the *Handbook* does not refine with any quantifying data. [9] Therefore, the AAO's statement that "most" sales managers have a bachelor's degree does not equate to a statement that a bachelor's degree is a normal entry requirement for the Sales Managers occupational classification, let alone for any particular position within that classification.

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[9] 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 positions were to require at least a bachelor's degree in a specific specialty it could be said that "most" sales managers positions require such a degree. (Of course, this is a hypothetical example, as the record of proceeding contains no authoritative, empirically supported statement as to the percentage of sales managers who possess such degrees.) It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act.

Further, as clearly evident in the sections on Education and Work Experience quoted above, the *Handbook's* information indicates that, even for those positions within the Sales Managers occupational classification that are held by persons who "have a bachelor's degree," there is no normal requirement that the degree be in a specific specialty.

Additionally, the tenor of those Education and Work Experience sections on Sales Managers is that, in their recruiting and hiring for sales managers, employers put a premium on related work experience, even to the extent that "[e]ducational requirements are less strict for job candidates who have significant experience as a sales representative." It is important to note the following aspect of the *Handbook's* discussion on the factor of related-work experience: the *Handbook* does not state, suggest, or otherwise indicate that the work-experience must be equivalent to any particular level of educational attainment in any specific specialty; and, further, the *Handbook* does not indicate that related work-experience is normally subjected to any objective evaluation standards so as to determine or require that the experience is equivalent to the attainment of any particular level of U.S. educational attainment in any specific specialty.

Accordingly, as the *Handbook* indicates that working as a sales manager does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, the proffered position's inclusion within the Sales Managers occupational classification is not in itself sufficient to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Where, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such a case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. This the petitioner has not done. In this regard, the AAO will separately address, in the order listed, the following evidence upon which the appeal focused: (1) the aforementioned opinion letter from Professor Gould; (2) information excerpted from DOL's Online Wage Library (OWL); (3) information excerpted from the Occupational Information Network (O*NET); and (4) the aforementioned USCIS policy memorandum from William R. Yates, Associate Director for Operations, USCIS, Department of Homeland Security, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity.* HQOPRD 72/11.3 (Apr. 23, 2004) (hereinafter referred to as the Yates memo).

Professor 's opinion letter

The AAO will now address the opinion letter, dated February 24, 2009, that the petitioner obtained from in White Plains, New York. The petitioner submitted the letter as part of its response to the RFE, in order to support its claim that the proffered position is a specialty occupation.

The AAO will now discuss why it accords no probative weight to the letter.

In the letter, Professor states that the proffered position is "a specialty occupation, requiring a bachelor's-level (or higher) educational background in business administration, marketing, or a related area, as well as additional experience (at least one year) in the area of business to business sales (which would ground this underlying academic foundation within the particular sales modality practiced by the employer)."

Professor 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, organizations that he belongs to and/or has served on. He also provided information regarding his research interests, and he provided a partial list of the publications he has written.

Based upon a complete review of Professor letter and curriculum vitae, the AAO first finds that the professor has not established that he in fact possesses expertise or specialized knowledge regarding the specific issue on which he opines, namely, the qualification of the proffered position as an H-1B specialty occupation as defined by the applicable statutory and regulatory provisions earlier cited in this decision. Further, neither the letter nor the accompanying curriculum vitae establishes a sufficient factual foundation for the AAO to defer, or accord probative weight, to Professor view on the hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. Without further clarification, it is unclear how his education, training, skills or experience would translate to expertise or specialized knowledge that would be helpful to the AAO with regard to understanding the current recruiting and hiring practices of the petitioner or similar organizations for sales manager positions.

Also, Professo opinion letter does not cite specific instances in which his past opinions have been accepted or recognized as authoritative on the particular issues upon which he opines in this proceeding. Further, there is no indication that the professor has published any work or conducted any research or studies pertinent to the educational requirements for such positions in the petitioner's industry for similar organizations, and there is no indication of that the professor has been recognized by any professional organizations as an authority on those specific requirements.

Next, the AAO observes that the professor's opinion indicates a lack of understanding of the requirements of an H-1B specialty occupation, in that he pronounces as acceptable for the proffered position a degree in business administration, without further specification. As already discussed earlier in this decision, where 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 at 147.

Also, Professor did not provide any documentation to establish his credentials as a recognized authority on the relevant industry-hiring standards. He claims to possess expertise in the field of marketing, business, management, and related fields, but he did not identify the specific elements of his knowledge and experience that he may have applied in reaching his conclusions here. For example, the opinion letter contains no evidence that it was based on scholarly research conducted by Professo in the specific area upon which he is opining. He claims that as an

owner of his own consulting firm, he has "worked with a wide range of client companies, including companies which have undergone sharp and rapid change in the size and scope of business operations." However, he does not provide documentary establishing why USCIS should defer to him in the specific area in which he is opining; nor does he provide an adequate factual and analytical foundation for the ultimate conclusion regarding the education required for the position (for example, statistical surveys, authoritative industry publications, professional studies, supportive DOL publications, or synopses of personal observations of the actual performance of the proffered position within the petitioner's day-to-day operations and associated work products.

Further, Professor does not show how his pronouncement that the proffered position is a specialty occupation is founded upon specific, concrete aspects of the proffered position as specifically performed within the context of the petitioner's business. Additionally, the very fact that the professor concludes a degree requirement from the generalized treatment of the proffered position that appears in his letter undermines the credibility of his opinion. There is no evidence that Professor has visited the petitioner's business, observed the petitioner's sales managers at work, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. He has not provided sufficient facts that support his ultimate conclusions about the educational requirements of the proffered position and the specialty occupation issue.

Professor also states that "it is fully reasonable and a standard operating practice for such a company to ensure that a manager in this area holds a bachelor's-level background in business or marketing. . . ." Here, Professor asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement, such as a labor market survey or study, and, notably, he fails to address the countervailing information that appears in the *Handbook*. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Next there is the fact that the petitioner cites as bases for his opinion documents that he has not provided to USCIS, so as to establish whether his statements actually conform to the documents provided him, whether his findings and ultimate conclusions actually comport with the content of those documents, and whether the documents provided to the professor materially conform to the documentary evidence in the record of proceeding, so as to be relevant to this proceeding. This aspect of the opinion letter itself renders the reliability of the letter for the purposes of this appeal questionable. The letter states that the professor "reviewed a detailed outline of the job duties required for the subject position" – but that outline is not provided. Likewise, the professor's letter, which specifically names the beneficiary on the front cover, states on the last page that the opinion is based "on copies of the original documents provided by the candidate." The letter fails to identify whatever those documents were that were provided by the candidate.

Moreover, Professor states that the beneficiary's "purview will include *supervisory-level* HR responsibility (staffing, training, management, etc.)" and that "[i]n his *senior-level capacity* for the sales and marketing function, . . . [he] will contribute to larger strategic business planning and corporate management and direction." (Emphasis added.) However, it must be noted that there is

no indication that the petitioner advised Professor [redacted] that the petitioner assigned a "Level II" wage rate to the proffered position (under the occupational classification of "Sales Managers"), for employees who will perform *moderately* complex tasks that require *limited* judgment (as indicated by the wage-level on the LCA). Also, from Professor [redacted] statements regarding the position, there is no indication that the petitioner showed him the petitioner's organizational chart, which indicates that the beneficiary would report to the Vice President of Services, along with two other sales managers. The Vice President of Services, in turn, reports to the Senior Vice President of Sales. The organizational chart also does not indicate that the beneficiary would directly supervise any employees to any degree that would match another sales manager [redacted] who appears to supervise a junior account manager [redacted]. It appears that Professor [redacted] would have found the aforementioned information relevant for his opinion letter. Without these basic pieces of information, the petitioner has not demonstrated that Professor [redacted] possessed the requisite information necessary to adequately assess the nature of the petitioner's position, and the job duties and responsibilities. In any event, the professor has not established a persuasive basis for regarding the proffered position as "senior level" or for attributing to the "senior level" organizational status a requirement for attainment of any specific educational level.

The AAO also finds an independent, additional grounds for discounting Professor [redacted] opinion in the fact that his letter materially expands upon the marketing elements that the evidence in the record of proceeding attributes to the proffered position. Specifically, Professor [redacted] states that "[the beneficiary] will be responsible for directing the sale *and marketing* of the employer's products" and that "he will *conduct market research*." (Emphasis added.) Also, Professor [redacted] references "*branding and marketing initiatives*," as mentioned above. However, the petitioner's description of the job duties for the proffered position contains no mention of such marketing duties.

Finally, the reliability of the professor's opinion as expressed in his letter is further undermined by his claim (in the fourth paragraph at page 2 of the letter) of partial reliance on his experience as a "Sales manager." Upon review of the curriculum vitae, the AAO finds no corresponding entry for a Sales Manager position.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the advisory opinion rendered by Professor [redacted] is not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by Professor [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. Further, the professor appears to have based his opinion, at least, in part, upon documents not included within the record of proceeding, and upon claimed experience as a "Sales manager" for which he has provided no support. Therefore, the AAO finds that the letter from Professor [redacted] does not establish that the proffered position is a specialty occupation. As such, neither Professor [redacted] findings nor his ultimate conclusions are worthy of any deference, and his opinion letter is not probative evidence towards satisfying any criterion of the regulation at 8 C.F.R. §214.2(h)(4)(iii)(A).

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of its discretion, the AAO discounts the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the opinion letter into its analysis of each of the criteria bases in this decision for dismissing the appeal.

The Online Wage Library (OWL)

The AAO acknowledges counsel's reference to the DOL's Online Wage Library (OWL) and that the occupation of sales manager falls within an "Education and Training Code" of "4." Specifically, the OWL states the following:

> Education & Training Code: 4-Work experience, plus a bachelor's or higher degree[10]
>
> **Four: Work Experience, plus a Bachelor's or Higher Degree**
> Most occupations in this category are managerial occupations that require experience in a related non-managerial position.[11]

The OWL's "Education & Training Code: 4" simply indicates that most positions with this code level require work experience and a bachelor's or higher degree. The AAO does not consider the OWL's "Education & Training Code" level to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a *specific specialty*, as that information relates only to "most" positions and does not state that even those positions requiring a degree require one in a specific specialty. [12]

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[10] *See* Foreign Labor Certification Data Center, Online Wage Library, located on the Internet at http://www.flcdatacenter.com/OesQuickResults.aspx?code=11-2022&area=20764&year=9&source=1 (last visited March 5, 2013).

[11] *See* Education and Training Codes for Professional Occupations, located on the Internet at http://www.flcdatacenter.com/TrainingCodes.aspx (last visited March 5, 2013).

[12] Again, 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 positions were to require at least a bachelor's degree in a specific specialty it could be said that "most" sales managers positions require such a degree. (Of course, this is a hypothetical example, as the record of proceeding contains no authoritative, empirically supported statement as to the percentage of sales managers who possess such degrees.) It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. 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

The O*NET information

The AAO will now discuss O*NET's SVP rating referenced by the petitioner in its letter of support, dated November 21, 2008, and by counsel on appeal, and O*NET's designation of a "Job Zone of 4'" for the occupation of "Sales Managers," referenced by counsel on appeal.

A review of O*NET indicates that the Specific Vocational Preparation (SVP) rating for the occupational group pertinent to this petition is "7.0 to < 8.0." The AAO finds that an assignment of an SVP rating of "7.0 to < 8.0" is not evidence that the proffered position – or any other particular position within an occupational group assigned a 7.0 to < 8.0 - requires at least a bachelor's degree or higher in a specific specialty. This finding comports with the O*NET summation of the SVP designation in the related section of the O*NET OnLine Help site at http://www.onetonline.org/help/online/svp. That section reads as follows:

> **O*NET OnLine Help**
>
> **Specific Vocational Preparation (SVP)**
>
> Specific Vocational Preparation is a component of Worker Characteristics information found in the *Dictionary of Occupational Titles* (U.S. Department of Labor, 1991).
>
> Specific Vocational Preparation, as defined in Appendix C of the *Dictionary of Occupational Titles* [(DOT)], is the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.
>
> This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.
>
> Specific vocational training includes training given in any of the following circumstances:
>
> a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);

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specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

b. Apprenticeship training (for apprenticeable jobs only);

c. In-plant training (organized classroom study provided by an employer);

d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);

e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years

Note: The levels of this scale are mutually exclusive and do not overlap.

U.S. Department of Labor. (1991). *Dictionary of Occupational Titles* (Rev. 4th ed.). Washington, DC: U.S. Government Printing Office. [13]

Thus, contrary to counsel's assertion on appeal, an SVP rating of 7 through 8 does not indicate that at least a four-year bachelor's degree is required, or more importantly, that such a degree must be in a specific specialty closely related to the requirements of that occupation. Therefore, the SVP information is not probative of the proffered position being a specialty occupation.

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[13] The *DOT's* SVP definitional content that the O*NET has fully adopted is at the *DOT's* Appendix C, Components of the Internet Trailer, and it is accessible on the Internet at http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTAPPC.HTM.

Moreover, as previously noted, the petitioner has designated the proffered position as a Level II position on the LCA based on the wage level, indicating that it is a position for which the beneficiary will perform moderately complex tasks that require limited judgment. *See* Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009).

Furthermore, a designation of Job Zone 4 in the O*NET indicates that a position requires "considerable preparation." The O*NET provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. A Job Zone rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Thus, the O*NET does not demonstrate that at least a bachelor's degree in any specific specialty or its equivalent is required, and does not, therefore, indicate that a position so designated is a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).[14]

The Yates memo

Finally, on appeal counsel emphasizes the assertion that the proffered position is the same position in job title and duties as the previously approved H-1B petition filed by the petitioner on behalf of the beneficiary. Counsel also references the Yates memo as establishing that USCIS must give deference to the prior approval or provide a detailed explanation why deference is not warranted.

First, it must be noted that the Yates memo specifically states as follows:

> [A]djudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology International,* 19 I&N 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. *See* 8 C.F.R. § 103.8(d). . . . Material error, changed circumstances, or new material information must be clearly articulated in the resulting request for evidence or decision denying the benefit sought, as appropriate.

Thus, the Yates memo does not advise adjudicators to approve an extension petition when the facts of the record do not demonstrate eligibility for the benefit sought. On the contrary, the memorandum's language quoted immediately above acknowledges that a petition should not be approved, where, as here, the petitioner has not demonstrated that the extension petition should be granted.

Again, as indicated in the Yates memo, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). If the previous nonimmigrant petition was approved based on the same description of duties

[14] *See* the O*NET OnLine Help Center, at http://www.onetonline.org/help/online/zones (confirming that Job Zone 4 does not indicate any requirements for degrees in specific specialties) (last visited March 5, 2013).

and assertions that are contained in the current record, that approval is erroneous, at the least, and may constitute material and gross error on the part of the director. In any event, it would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Second, the Yates memo clearly states that each matter must be decided according to the evidence of record. On appeal, counsel suggests that the director was required to look at the prior record of proceeding dealing with the separate adjudication of the approved H-1B petition filed on behalf of the beneficiary and provide a reason why deference is not warranted. In this regard, the AAO notes that it has reviewed, and fully considered as part of the present record of proceeding, all of the documents that the petitioner has submitted from the record of proceeding pertaining to the prior approved petition. However, the AAO nonetheless finds that neither that documentation nor the related approval of the prior petition to which those documents relate is probative evidence that the proffered position, as described and supported by the evidence in the present petition, satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Further, when any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. Since each petition filing is a separate proceeding with a separate record, in making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). There is no requirement either in the regulations or in USCIS procedural documentation requiring nonimmigrant petitions to be combined in a single record of proceeding.[15] Accordingly, the petitioner errs to the extent that it may be suggesting that the director was required to retrieve and review the entire record of

[15] USCIS does not engage in the practice of reviewing previous nonimmigrant petitions when adjudicating extension petitions. Given the various and changing jurisdiction over various nonimmigrant petitions and applications, requiring previously adjudicated nonimmigrant petitions to be reviewed before any newly filed application or petition could be adjudicated would result in extreme delays in the processing of petitions and applications. Furthermore, such a suggestion, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361.

proceeding of the prior H-1B petition. (The AAO reiterates that it has reviewed, considered, and weighed all of the documents that the petitioner has submitted into the present record of proceeding, including those from the record of the prior petition.)

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. For this additional reason, the Yates memo does not compel that this appeal be sustained, for, as discussed in this decision, the petitioner has not met that burden in the matter that is the subject of this appeal.

Notwithstanding the foregoing, the AAO reviewed in its entirety the copy of the documents from the initial petition that was submitted by counsel on appeal.[16] A review of the documentation from the previous petition that was approved includes assertions and duty descriptions that are contained in the current record. Accordingly, it appears that, notwithstanding the approval of that petition, the evidence submitted from the record for that initial petition – to the extent that such has been submitted into the current record of proceeding – fails to establish its proffered position as a specialty occupation, for the same reasons discussed above in this decision. Consequently, it would be appropriate for the director to also consider initiating revocation-on-notice proceedings under 8 C.F.R. § 214.2(h)(11)(iii)(A), with particular attention to subparagraph (A)(5), which provides for sending a notice of intention to revoke if the director finds that, in the words of this regulatory provision, "The approval of the petition violated paragraph h of this section or involved gross error."

Next, the AAO notes again that the petitioner designated the prevailing wage for the proffered position as wage for a Level II (qualified) position on the LCA.[17] This designation is indicative of a

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[16] The copy of the initial approved petition, that was submitted on appeal, includes, *inter alia*, a copy of the (1) Notice of Action, dated December 15, 2005, approving the H-1B petition that the petitioner had filed on behalf of the beneficiary; (2) Form I-129; (3) certified LCA; (4) petitioner's letter of support, dated December 7, 2005; (5) beneficiary's educational credentials; (6) beneficiary's resume; and (7) beneficiary's certifications and employment letters.

[17] Wage levels should be determined only after selecting the most relevant Occupational 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) 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.

position a step above of entry-level, but a step below experienced, relative to others within the occupation.[18] That is, in accordance with the relevant DOL explanatory information on wage levels, this Level II wage rate is only appropriate for a position in which the beneficiary would be expected to perform moderately complex tasks that require limited judgment.

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 at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion 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 first alternative prong calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

As previously discussed, the petitioner has not established that its proffered position is one for

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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.

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

> **Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

Id.

which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference its previous discussion on the matter. The AAO notes that the record of proceeding does not contain any submissions from professional associations, individuals or similar firms in the petitioner's industry attesting that a degree requirement is common to the industry for individuals employed in positions parallel to the proffered position. Additionally, the AAO acknowledges that the record of proceeding contains an opinion letter from Professor [redacted] However, as previously discussed, 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 towards establishing the proffered position as a specialty occupation; and the AAO hereby incorporates and adopts into the present analysis its earlier comments, analysis, and findings with regard to Professor [redacted] opinion letter.

Next, the AAO finds that, contrary to the purpose for which they were submitted, the job vacancy announcements (which were submitted on appeal) weigh significantly *against* the proffered position satisfying the particular criterion under discussion or any other criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The most common characteristic of these job vacancy announcements – in fact, common to almost all of them – is their specifying as an educational requirement a "bachelor's degree" alone, that is, without any requirement for a specific major or academic concentration.

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 its equivalent, is common in the petitioner's industry for 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*). Further, as just noted, the AAO finds that, in the aggregate, the collection of job vacancy announcements serves as affirmative evidence that sales managers positions do not normally require at least a bachelor's degree, or the equivalent, in any specific specialty.

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

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of sales manager. Specifically, the petitioner failed to demonstrate how the sales manager duties described require the theoretical and practical application of a body of highly specialized knowledge such that a person with bachelor's or higher degree in a specific specialty or its equivalent is required to perform them.

While some of the courses listed on the copy of the beneficiary's transcript for the master of business administration degree from The [redacted] may be beneficial in performing certain duties of a sales manager position, the petitioner has failed to demonstrate how an established curriculum of such courses culminating in a baccalaureate (or higher) degree in a specific specialty, or its equivalent, are required to perform the duties of the particular position here proffered. In this regard, too, the AAO hereby incorporates and reiterates its previous discussion

and analysis regarding Professor opinion letter and the reasons the AAO does not accord it any probative weight.

While not determinative, the AAO notes that the lack of evidence distinguishing the proffered position by relative complexity or uniqueness is further shown in the LCA submitted by the petitioner in support of the instant petition. Again, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates a wage level based upon the occupational classification "Sales Managers" at a Level II (qualified) wage. This designation is appropriate for positions for which the petitioner expects the beneficiary to perform *moderately* complex tasks that require *limited* judgment.

By way of comparison, the AAO notes that a position classified at a Level IV (fully competent) position is designated by the DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." Thus, the wage level designated by the petitioner in the LCA for the proffered position is not consistent with claims that the position would entail any particularly complex or unique duties or that the position itself would be so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty.

The AAO finds that the evidence of record does not establish that this position as more complex or unique than the broad range of sales manager positions which the *Handbook's* indicates are performed by persons without at least a bachelor's degree in a specific specialty. Further, the AAO finds, that, as evident in the duty descriptions quoted early in this decision from the record of proceeding, the petitioner has described the proposed duties, and the position that they comprise, exclusively in terms of generalized functions generic to the Sales Manager occupational classification in general. Such information, the AAO finds, does not serve to distinguish the proffered position as more complex or unique than the general range of sales manager positions – for which the *Handbook* indicates no normal requirement for persons holding at least a bachelor's degree, or the equivalent, in a specific specialty.

In other words, the record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

Consequently, as the petitioner fails to show that the proffered position of sales manager is more complex or unique than other sales manager positions that can be performed by a person without 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 the equivalent, for the position.

Of course, the AAO will necessarily review and consider whatever evidence the petitioner may have submitted with regard to its history of recruiting and hiring for the proffered position and with regard to the educational credentials of the persons who have held the proffered position in the past.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the position.

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 the evidence of record does not support the claim that the proffered position in fact requires such a specialty degree or its equivalent to perform its duties, the position 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 a 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 AAO acknowledges that, in response to the RFE, the petitioner provided a list of its full-time employees currently working at the Edison, New Jersey work location, which includes, *inter alia*, such employees' names, position titles, and educational background. The list appears to indicate that the petitioner employs five sales managers. The petitioner did not submit supporting evidence of such purported employees' educational requirements in its response to the RFE, and now the petitioner's counsel submits these employees' educational credentials on appeal. However, contrary to the purpose for which these employees' educational credentials were submitted, the submitted documentation does not establish that the petitioner normally requires a bachelor's degree in a specific specialty, or the equivalent, for the position.

Counsel for the petitioner submitted copies of the credential evaluations for two of the sales managers, indicating that one has the equivalent of a master of business administration degree with

a concentration in marketing and information systems and the other has the equivalent of a master of business management degree. However, for the remaining three sales managers, counsel only provided copies of their foreign degrees with no credential evaluations. Moreover, the foreign degree for appears to be a foreign degree in electronics and communication engineering. Therefore, this documentation indicates that the petitioner does not normally require a bachelor's degree in a specific specialty closely related to the performance requirements of the proffered position, or the equivalent, for the proffered position. Rather, the information submitted indicates that the petitioner has accepted degrees in disparate specialties for the position of sales manager but has not established that those disparate types of degree each convey at least a bachelor's degree level of a body of highly specialized knowledge that is directly related to the performance requirements of the proffered position.

In any event, in light of the fact that the petitioner has been in existence since 1996, the educational information presented on such few persons is insufficient to demonstrate a history of whatever educational credentials the petitioner may have set as recruiting and hiring standards for any appreciable period of time relevant to the present petition.

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

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

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. Upon review of the record, the AAO finds that the generalized extent to which the proposed duties are described in the record do not establish the duties as sufficiently specialized and complex to satisfy this criterion.

As evident in the petitioner's generalized and relatively abstract duty descriptions quoted earlier in this decision (reflected in such unelaborated terms as "Manage," "Direct," "Coordinate," "Assign," "Analyze," "Review," and "Assist . . . with"), the petitioner has limited its information about the duties to generalized statements of generic Sales Mangers functions which do not convey the substantive nature of the actual work that their performance would require, the practical and theoretical applications required to perform them, the substantive knowledge in any specific specialty that would be required, or any usual association between such aspects of the proposed duties and knowledge usually associated with attainment of at least a bachelor's degree or the equivalent in a specific specialty. Put another way, 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 usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

Additionally, in this regard, the AAO here incorporates into this analysis its earlier comments and findings with regard to the implication of the Level II wage-rate designation in the LCA. That is, that the proffered position's Level II wage designation is appropriate for positions for which the petitioner expects the beneficiary to perform moderately complex tasks that require limited judgment relative to others within the occupational category of "Sales Managers" and hence one not likely distinguishable by relatively specialized and complex duties usually associated with at attainment of at least a bachelor's degree in a specific specialty. The AAO notes that, while they do weigh against satisfaction of the present criterion, this and the prior observations regarding the LCA wage rate were neither decisive in, nor necessary for, the AAO's determination to dismiss this appeal.

As the evidence of record fails to establish that the nature of the duties of the position 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.

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.