



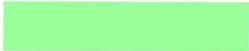
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **APR 29 2013**

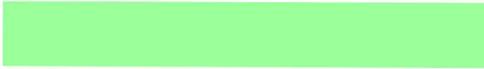
OFFICE: VERMONT SERVICE CENTER

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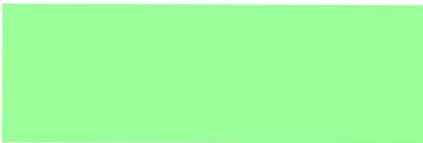
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:

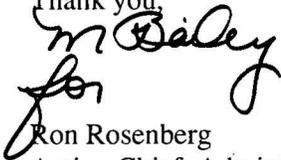


INSTRUCTIONS:

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

If you believe the 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,



Ron Rosenberg
Acting Chief, Administrative Appeals Office

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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 a health care company established in 2010. In order to employ the beneficiary in what it designates as a billing supervisor-medical 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, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

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

The primary issue for consideration is whether the petitioner's 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 applicable statutory and regulatory requirements.

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

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

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

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

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

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

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

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

In the petition signed on April 2, 2012 and supporting documentation, the petitioner indicates that it wishes to employ the beneficiary in a billing supervisor-medical position on a full-time basis at the rate of pay of \$46,051 per year. In the support letter dated April 2, 2012, the petitioner states that the beneficiary will be employed to perform the following duties:

- Supervise the billing and collection operations for the organization;
- Supervise quality control of all automated data entry and billing systems;
- Distribute and check electronic charges and demographic reports from data being entered into the system;
- Maintain up-to-date expertise and knowledge of healthcare billing laws, rules, regulations and developments necessary for the organization to make informed business decisions;
- Prepare and submit claims to various insurance companies;
- Evaluate patients financial status and establish budget payment plans; Manage delinquent accounts, collection agencies, special adjustments and/or write-offs;
- Ensure HIPAA compliance through compliance management processes; [and]
- Implement corporate or departmental policies, procedures, and service standards in conjunction with management.

The petitioner also states that "[t]he standard requirement to perform the above-mentioned job duties with [the] company requires at least a Bachelors Degree in either Management or Public Administration or equivalent will not be able to render the job duties as stated above [errors in the original]."

With the initial petition, the petitioner submitted copies of the beneficiary's academic credentials, including a copy of his Master of Public Administration degree and transcript from [REDACTED] in New Jersey. In addition, the petitioner submitted printouts from the Internet regarding its services.

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "First-Line Supervisors of Office and Administrative Support Workers" - SOC (ONET/OES Code) 43-1011, at a Level II wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 4, 2012. The petitioner was asked to submit probative evidence: (1) to establish that a specialty occupation position exists for the beneficiary; and (2) to establish that the beneficiary is qualified to serve in a specialty occupation position. The director outlined the specific evidence to be submitted.

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On July 12, 2012, 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 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 document stated that the beneficiary will perform the following duties:¹

- Supervise staff by directing workflow, training and evaluating performance. 4 hours/week – 10%
 1. Supervise front desk staff regarding the demographic information of patients is entered in the EMR and administer day to day functioning in the office.
 2. Meet with staff discuss different issues regarding the electronic medical record (EMR) software, resolve any queries regarding the different function of the EMR and helping clinical and administrative staff.
 3. Verify patients insurances and patient's [sic] financial responsibility or eligibility and benefits provide [sic] by the medical insurance in EMR software.
 4. Monitors staff for compliance of the organizations confidentiality policy in accordance to Health Insurance portability and Accountability Act (HIPAA) regulations through exhaustive Compliance Management processes.
- Collect, compile and analyze data from system and Administer the maintenance of correct records for the patients. 6 hours/week – 15%
 1. Verify patients insurances and patient's [sic] financial responsibility or eligibility and benefits provide [sic] by the medical insurance in EMR software.
 2. Generate reports in the EMR regarding number of patient [sic] seen versus supper bill is generated for those patients; determine the correct level of service that will be use [sic] to bill the insurance. The level of service once determined by provider, is translate into a standardized five digit procedure code drawn from the Current Procedural Terminology (CPT) database. Translate the verbal diagnosis into a numerical code as well, drawn from a standardized ICD 10 CM.
 3. Manage accurate charge posting according to the service render by the physician or charges for the particular CPT code / procedure code is generated.
- Prepare and submit the claims. 20 hours / week – 50%
 1. Generate and complete electronic claims batches accurately, timely and

¹ It must be noted for the record that the petitioner references the claims as auto insurance claims. The record provides no explanation for this inconsistency. Thus, the AAO must question the accuracy of the document and whether the information provided is correctly attributed to this particular position and beneficiary.

submit to clearing house electronically, follow up on the electronic claim report with the clearing house. Upon receiving the denial message decipher the message, reconcile it with the original claim, make required corrections and resubmit the claim. Generate the paper claim and print it out on CMS1500 form verify it before send it to the different payers.

2. Follow up with the insurance company on the claims and payments for the submitted claims.
3. Work on denial claims, Depending on the denial, filing an appeal with the appropriate documentation and proof for the reconsideration. Work on rejected claim, has not been processed by the insurance due to a fatal error in the information provided. Research on rejected claims corrects it and resubmits.
4. Track the payment with the help of electronic fund transfer (EFT) number on the Insurance company website, third party contractor or clearing house. Download the electronic remittance advices (ERA) to the computer and transfer those files to the EMR software for the payment reconciliation.
5. Post the payment check receives by the insurance according to an Explanation of Benefits (EOB) along with appropriate payment code.

➤ Financial duties. 10 hour / week – 25%

1. Analyze trends affecting accounts receivable and takes appropriate action to realign staff as needed to ensure efficient operation in maintained.
2. Work with Layers on denied auto insurance claim by different auto insurances on Arbitration cases. Accounts receivable follow up; send statements to the patients according to explanation of benefits and member's (patients') responsibility after receiving payments from the insurance.
3. Generate different reports regarding the total revenue, analyze budgeting and finance for the business. Also generate reports of the total number of patients helping doctors to evaluate the work load and efficiency, to improve quality of the care and time management.
4. Act as a technical expert in regards to financial class responsibility to identify and resolve patient billing query; evaluate patient's financial status and establish budget payment plans, manage actions relating to delinquent accounts, collection agencies, special adjustments, and/or write-offs.
5. Check monthly performance, profit and appraisal of policies and procedures for area of responsibility and avoid the error to ensure maximum efficiency at all level of the revenue cycle.

The AAO observes that in the undated letter, submitted in response to the RFE, the petitioner indicates that the proffered position requires "a Bachelor's degree in Public Administration / Health Service Administration or its equivalent and some relevant work experience in the Medical industry or a Master's degree in lieu of the Bachelor's degree and experience."

Notably, in a letter dated July 11, 2012, counsel stated that "[i]n the context of the petitioner's

business, a college degree in public administration or its equivalent is imperative for the Billing Supervisor-Medical position." Counsel further claimed that "[t]his degree requirement is clearly stated in the petitioner's advertisement on their web site for the offered position."

In response to the RFE, the petitioner and counsel submitted, in part, (1) job vacancy announcements; and (2) a list of the petitioner's employees and their job duties.² In addition, the petitioner provided a job posting (printed on October 4, 2011) from its website for the proffered position. The job posting states, in pertinent part, the following: "Bachelor degree in Healthcare or business management *preferred* [emphasis added]."

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on July 25, 2012. Counsel submitted an appeal of the denial of the H-1B petition. With the appeal, the petitioner provided additional evidence.³ The petitioner resubmitted the printout from its website (printed on October 4, 2011) regarding the proffered position. The posting indicates that a "Bachelor degree in Healthcare or business management preferred" for the proffered position.

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. To make this determination, the AAO turns to the record of proceeding. To ascertain the intent of a petitioner, USCIS must look 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. 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

² The Form I-129 petition indicates that the petitioner has five employees. However, the list indicates that the petitioner has seven employees. 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. at 591-92.

³ With regard to the evidence submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not and does not consider the sufficiency of such evidence submitted for the first time on appeal. The appeal will be adjudicated based on the record of proceeding before the director.

sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

The AAO reviewed the record in its entirety and will make some 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.

It must be noted that the petitioner has provided inconsistent information regarding the minimum requirements for the proffered position. In the initial submission, the petitioner stated that the proffered position requires a bachelor's degree in "either **Management** or Public Administration or equivalent [emphasis added]." Thereafter, in response to the RFE, the petitioner claimed that that the proffered position requires "a Bachelor's degree in Public Administration / **Health Service Administration** or its equivalent **and some relevant work experience in the Medical industry or a Master's degree in lieu of the Bachelor's degree and experience** [emphasis added]." Notably, In a letter dated July 11, 2012, counsel stated that "[i]n the context of the petitioner's business, a college degree in public administration or its equivalent is imperative for the Billing Supervisor-Medical position." Notably, the job posting for the proffered position, submitted in response to the RFE and with the appeal, indicates that a "Bachelor degree in **Healthcare** or **business management preferred**" [emphasis added]." No explanation for the variances was provided.⁴

The AAO notes that a *preference* for a degreed individual is insufficient to establish the proffered position as qualifying as a specialty occupation position. This assertion by the petitioner in its job posting 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.

Furthermore, the AAO observes that the petitioner and counsel indicate that various disciplines are acceptable for the proffered position. More specifically, the petitioner and counsel have indicated that a degree in management, public administration, health services administration, healthcare, or business management is acceptable. 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," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of

⁴ The petitioner has provided inconsistent information as to the academic requirements of the proffered position. 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. 591-92.

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the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," 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. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Again, the petitioner and counsel claim that the duties of the proffered position can be performed by an individual with a degree in management, public administration, health services administration, healthcare, and/or business management. The issue here is that it is not readily apparent that all of these fields of study are closely related or that the fields are directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, simply fails to establish either (1) that the fields (management, public administration, health services administration, healthcare, and/or business management) are closely related fields, or (2) that the fields are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty*, or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

As the evidence of record fails to establish how these dissimilar fields of study form either a body of highly specialized knowledge in a specific specialty, or its equivalent, the petitioner's assertion that the job duties of this particular position can be performed by an individual with a degree in any of these unrelated fields suggests that the proffered position is not in fact a specialty occupation. Therefore, absent probative evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires at least a bachelor's degree in a specific specialty. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Moreover, upon review of the record of proceeding, the AAO finds that there are significant discrepancies with regard to the proffered position. These material conflicts, when viewed in the context of the record of proceeding, further undermine the claim that the proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

As previously stated, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational title of "First-Line Supervisors of Office

and Administrative Support Workers" - SOC (ONET/OES) code 43-1011. The petitioner stated in the LCA that the wage level for the proffered position was Level II and claimed that the prevailing wage in [REDACTED], New Jersey) for the proffered position was \$46,051 per year. The LCA was certified on March 26, 2012 and signed by the petitioner on April 5, 2012.

In the appeal, *for the first time*, counsel states that "the offered position of Billing Supervisor-Medical is analogous to the position of Health and Medical Services Manager." Counsel further states that "the beneficiary's job description is closely related to the position of Medical and Health Services Manager." Counsel cites the academic requirements for medical and health services managers as stated in the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (hereinafter the *Handbook*), in support of his assertion that the proffered position qualifies as a specialty occupation position. While the occupational categories "Medical and Health Services Managers" and "First-Line Supervisors of Office and Administrative Support Workers" may have some general duties in common, they are clearly separate occupational categories. When the duties of the proffered position involve more than one occupational category, DOL provides clear guidance for selecting the most relevant Occupational Information Network (O*NET) occupational code classification.

The "Prevailing Wage Determination Policy Guidance" by DOL 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.

Thus, if the petitioner believed its position was described as a combination of O*NET occupations, then according to DOL guidance the petitioner should have chosen the relevant occupational code for the highest paying occupation. The occupational category "Medical and Health Services Managers" has a significantly higher prevailing wage than the occupational category "First-Line Supervisors of Office and Administrative Support Workers." More specifically, the prevailing wage for "Medical and Health Services Managers" was \$91,374 per year for a Level II position in the area of intended employment. Notably, the petitioner's offered wage to the beneficiary of \$46,051 per year is significantly below the prevailing wage for the occupational category "Medical and Health Services Managers."

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).

As such, the petitioner has failed to establish that it submitted a certified LCA that properly corresponds to the claimed occupation and duties of the proffered position and that it would pay the beneficiary an adequate salary for his work, as required under the Act, if the petition were granted. Thus, for this reason also, the H-1B cannot be approved.

Furthermore, upon review of the record of proceeding, the AAO notes that there are discrepancies between what the petitioner claims about the level of responsibility inherent in the proffered position set against the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of petition.

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.⁵ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL 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.

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

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.

DOL guidance further indicates that a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones would be an indication that a wage determination at Level II would be proper classification for a position. The occupational category "Administrative Services Managers," has been assigned an O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, most occupations in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." See O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3.

In the instant case, the petitioner designated the proffered position to a wage level corresponding to as a Level II position. This suggests that the petitioner's academic and/or professional experience requirements for the proffered position would be the same as the preparation listed for Job Zone 3 occupations (i.e., "training in vocational schools, related on-the-job experience, or an associate's degree"). As previously noted, the petitioner has provided inconsistent information regarding the requirements for the proffered position. However, the AAO observes that the petitioner claimed in response to the RFE that the position requires "a Bachelor's degree in Public Administration / Health Service Administration or its equivalent and some relevant work experience in the Medical industry or a Master's degree in lieu of the Bachelor's degree and experience." The stated requirements appear to exceed those for Job Zone 3 occupations. No explanation was provided.

Moreover, in the instant case, the petitioner and counsel claim that the duties of the proffered position are complex, unique and/or specialized.⁶ For instance, in response to the director's RFE,

⁶ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." Level III and a Level IV wage rates are described as follows:

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as 'lead' (lead analyst), 'senior' (senior programmer), 'head' (head nurse), 'chief' (crew chief), or 'journeyman' (journeyman plumber) would be indicators that a Level III wage should be considered.

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified

counsel claims that "the job duties of the offered position are complex and of advanced nature, requiring knowledge of health care management." In addition, in the undated letter, submitted in response to the RFE, the petitioner states that it needs a person with the following requirements:

- Medical back ground who had [sic] through [sic] knowledge about the [sic] all medical procedure also familiar with the [sic] Medical terminology.
- Knowledge and experience about the EMR (Electronic Medical Record) and Different aspect of the Medical billing with Medical Billing Software.
- Strong working knowledge of Medicare and private payer billing and coding, include ICD-9, CPT, and HCPCS codes and HIPAA laws.
- Financial management experience.
- Ability to improve, create and implement Billing processes.

Notably, the petitioner also states that "a Bachelor's degree in Public Administration / Health Services Administration or its equivalent and some relevant work experience in the Medical industry or a Master's degree in lieu of the Bachelor's degree and experience" are required for the proffered position.

The AAO notes that this characterization of the position and the claimed duties, responsibilities and requirements conflict with the wage-rate element of the LCA, which, as reflected in the discussion above, is indicative of a comparatively low-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have attained, either through education or experience, a good understanding of the occupation. Furthermore, he will be expected to perform moderately complex tasks that require limited judgment.

The AAO notes that the petitioner and counsel have provided inconsistent information as to the duties and level of responsibilities of the proffered position. This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the assertions regarding the nature of the position. 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

knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

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.

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).

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 petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational category and wage level 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 occupation at a lower prevailing wage than the one that it claims it is offering to the beneficiary.

The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed. A review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial (which it has not), the petition could not be approved for this reason.

The AAO will now address the director's basis for denial of the petition, namely that the petitioner

failed to establish that it would employ the beneficiary in a specialty occupation position. For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the inconsistencies and discrepancies in the record of proceeding regarding the beneficiary's proposed employment. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

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 make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the 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 *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.⁷ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "First-Line Supervisors of Office and Administrative Support Workers."

The AAO reviewed the *Handbook* regarding the occupational category "First-Line Supervisors of Office and Administrative Support Workers." However, the *Handbook* simply describes this category as "[s]upervise and coordinate the activities of clerical and administrative support workers." The *Handbook* does not provide a detailed narrative account nor does it provide summary data for the occupational category "First-Line Supervisors of Office and Administrative Support Workers." More specifically, the *Handbook* does not provide the typical duties and responsibilities for this category. Moreover, the *Handbook* does not provide any information regarding the academic and/or professional requirements for these positions.

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

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

Data for Occupations Not Covered in Detail

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Data for Occupations Not Covered in Detail, on the Internet at <http://www.bls.gov/ooH/About/Data-for-Occupations-Not-Covered-in-Detail.htm> (last visited April 25, 2013).

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

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

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." 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).

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

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

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference its previous discussion on the matter. The record does not contain any letters from the industry's professional association, indicating that it has made a degree a minimum entry requirement.

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

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In the Form I-129 petition, the petitioner describes itself as a health care company established in 2010, with five employees. The petitioner claims that it has a gross annual income of \$500,000. The petitioner did not provide its net annual income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 621340 – Offices of Physical, Occupational and Speech Therapists, and Audiologists. The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments of independent health practitioners primarily engaged in one of the following: (1) providing physical therapy services to patients who have impairments, functional limitations, disabilities, or changes in physical functions and health status resulting from injury, disease or other causes, or who require prevention, wellness or fitness services; (2) planning and administering educational, recreational, and social activities designed to help patients or individuals with disabilities, regain physical or mental functioning or to adapt to their disabilities; and (3) diagnosing and treating speech, language, or hearing problems. These practitioners operate private or group practices in their own offices (e.g., centers, clinics) or in the facilities of others, such as hospitals or HMO medical centers.

See U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 621340 – Offices of Physical, Occupational and Speech Therapists, and Audiologists, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited April 25, 2013).

In support of the assertion that the proffered position is a specialty occupation under this criterion of the regulations, counsel submitted a letter from [REDACTED], Executive Director of [REDACTED] on appeal. The AAO reviewed the letter in its entirety. However, contrary to the purpose for which the letter was submitted, it is not persuasive in establishing the proffered position as a specialty occupation position under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO reviewed the letter and observes that beyond company name, the letter does not provide any information regarding the company's business operations. Without further information, the letter appears to be from an organization that is not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. The record lacks sufficient information regarding the organization to conduct a meaningfully substantive comparison of the business operations to the petitioner. The petitioner and counsel failed to provide any supplemental information to establish that the organization is similar to the petitioner. Thus, from the onset, this prong of the regulations has not been established by the writer.

Furthermore, the writer claims that she "has extensive experience in the field of Medical Billing and Revenue Cycle Management." She lists her job title as "Director." However, the writer fails to provide any information regarding the duties of her current or prior positions. Beyond the writer's self-endorsement, there is no evidence that she has any specialized knowledge of the educational requirements for medical billing supervisors.

The writer claims that the company's "usual minimum requirement to perform the job duties of a

Medical Billing Supervisor position require someone with a baccalaureate degree and demonstrated experience in the Healthcare industry." The writer does not state that such positions require a degree in a specific specialty directly related to the duties of the position. Thus, it appears that a general-purpose degree is sufficient for the company's medical billing supervisor positions. Moreover, the writer failed to provide any specific information regarding the job duties and day-to-day responsibilities for the company's medical billing supervisors. There is no information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, there is insufficient information regarding the duties and responsibilities of the position to determine whether it is the same or parallel to the proffered position. Further, the AAO observes that the writer did not provide probative evidence to corroborate that the company currently or in the past employed individuals in parallel positions to the proffered position, nor did the writer provide documentation to substantiate the claimed academic requirements.⁸ Thus, the writer has failed to submit sufficient evidence of its recruitment and hiring practices. Accordingly, the AAO notes that the petitioner's reliance on the letter from [REDACTED] is misplaced.

In addition, the petitioner and counsel submitted copies of job advertisements as evidence that the degree requirement is common amongst similar organizations for parallel positions in the industry encompassing "offices of physical, occupational and speech therapists, and audiologists." The AAO notes that the petitioner did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of jobs advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

Upon review of the documents, the AAO finds that they do not establish that a requirement for a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position.

For example, the advertisements include positions with [REDACTED] ("a premier provider of business process outsourcing solutions"), an unidentified employer (that describes itself as a "private behavioral healthcare company"), and [REDACTED] ("a full-service consultancy and leading managed markets agency"). 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 a job posting placed by staffing firm [REDACTED] for which little or no information regarding the employer is provided. Consequently, the record is devoid of sufficient information regarding the advertising organizations to conduct a legitimate comparison of the organizations to the petitioner. The petitioner and

⁸ With the appeal, the petitioner submitted a diploma issued to [REDACTED] from [REDACTED]; a pay statement issued by [REDACTED] to [REDACTED] and Form W-2, Wage and Tax Statements, issued by [REDACTED] to [REDACTED]. The record of proceeding does not contain any documentation establishing [REDACTED] position and job duties with [REDACTED]. Moreover, the letter from [REDACTED] does not provide the number of people it currently or in the past has employed in medical billing supervisor positions. Without additional information, the submission of an academic diploma for one employee is insufficient to substantiate any particular recruiting and hiring practices of the company.

counsel 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 these advertising organizations.

Furthermore, the petitioner has not established that the advertisements are for parallel positions. The petitioner provided a posting by [REDACTED] which requires a candidate to possess a bachelor's degree and "5 years of related work experience including supervisory experience OR an equivalent combination of education and experience." The petitioner also provided a posting for [REDACTED] that indicates that the position requires a degree and 5 to 10 years of experience. In addition, the petitioner submitted a posting by [REDACTED] which requires a degree and a minimum of five years of experience. (As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level II position.) The advertised positions appear to be for more senior positions than the proffered position, and 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, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, some of the postings ([REDACTED] and an unidentified employer) state that a bachelor's degree is required, but they do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required. 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 position. Although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.⁹ Furthermore, the AAO notes that the advertisement for [REDACTED] states that a "Bachelors Degree Business / Accounting preferred or equivalent experience." Obviously, a *preference* for a degree in business or accounting is not an indication of a *requirement* of a degree in one of these disciplines. Thus, the qualifications listed in the postings do not support a finding

⁹ 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.

that the advertised positions require a *baccalaureate* (or higher degree) in a *specific specialty*, or its equivalent.

The AAO reviewed all of the advertisements submitted by the petitioner. 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. Notably, the advertisements do not establish that a degree requirement in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations to the petitioner.¹⁰

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

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

The AAO acknowledges that the petitioner and its counsel may believe that the proffered position is so complex and/or unique that it can be performed only by an individual with at least a bachelor's degree. In support of this assertion, the petitioner provided documents regarding its business operations, including printouts from its website. The AAO reviewed the documentation in its entirety. However, the petitioner did not submit sufficient probative evidence regarding its business operations or the proffered position to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a

¹⁰ 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 position of billing supervisor-medical for companies 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.

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 billing supervisor-medical position. Specifically, the petitioner failed to demonstrate how the billing supervisor-medical duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While a few related courses may be beneficial, or even essential, in performing certain duties of a billing supervisor-medical position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. As previously noted, the petitioner designated the proffered position as a Level II position (out of four possible wage-levels). This designation is only appropriate for positions for which the petitioner expects the beneficiary to have a good understanding of the occupation to perform moderately complex tasks that require limited judgment relative to others within the occupation.¹¹ Thus, the wage level designated by the petitioner in the LCA is not consistent with claims that the position would entail any particularly complex or unique duties. It appears that such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹²

The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

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

¹¹ As previously discussed, DOL guidance indicates that a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones would be an indication that a wage determination at Level II would be proper classification for a position. The occupational category "Administrative Services Managers," has been assigned an O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, most occupation in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." See O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3.

¹² For additional information on Level IV 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.

and takes particular note of his Master of Public Administration degree. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has thus failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

To merit approval of the petition under this criterion, the record must establish that the imposition of a degree requirement by the petitioner is not merely a matter of preference for high-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 in a specific specialty, or its equivalent.

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

(b)(6)

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.

As previously discussed, the petitioner has provided inconsistent information as to the academic requirements of the proffered position. In response to the RFE, the petitioner submitted a job posting for the proffered position from its website. Notably, the posting states "Bachelor degree in Healthcare or business management preferred." Here, the petitioner does not indicate that a bachelor's degree in a specific specialty, or its equivalent, is required for the proffered position.

Furthermore, in the July 11, 2012 letter, submitted in response to the RFE, counsel claims that "[t]he petitioner has not previously employed a Billing Supervisor-Medical." Counsel further claims that the petitioner has "been using a specialized outside service for medical billing services." On appeal, counsel submits a letter from [REDACTED], President of [REDACTED] and Associates.¹³ The letter confirms that the company provided various accounting services to the petitioner.

The petitioner stated in the Form I-129 petition that it has five employees and was established in 2010 (approximately two years prior to the filing of the H-1B petition). The submission of *one job posting - which indicates that a bachelor's degree is preferred* - does not establish that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position.

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

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

In support of the H-1B petition, the petitioner provided documents regarding its business operations, including printouts from its website. The AAO acknowledges that the petitioner and its counsel may believe 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

¹³ It must be noted for the record that the Internet printout (from the website "Linked In") is a profile for [REDACTED], not [REDACTED]. The document indicates she has served as a director and as a billing office manager, and that she possesses a degree in accounting. The petitioner has failed to establish the relevancy of the document to the instant proceeding.

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

Furthermore, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level II position (out of four possible wage-levels). Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.

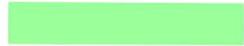
The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the nature of the specific duties of the proffered position is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

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* 381 F.3d 143, 145 (3d Cir. 2004) (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.