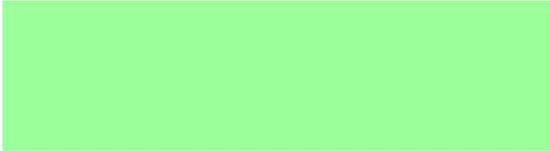


(b)(6)

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



U.S. Citizenship
and Immigration
Services



DATE: **APR 30 2013** Office: CALIFORNIA SERVICE CENTER File: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 California Service Center on October 17, 2011. On the Form I-129 visa petition, the petitioner describes itself as a vending machine retail and repair business established in 2006.¹ In order to employ the beneficiary in what it designates as a bilingual business development specialist 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 June 12, 2012, 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 July 16, 2012. On appeal, the petitioner implies, but does not specifically state, that the director's basis for denial of the petition on the specialty occupation issue was erroneous. In support of this position, the petitioner submitted a brief and additional documentation.

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 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's decision 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, 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)(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

¹ The AAO notes that the petitioner's "Business Plan" and the petitioner's letter in response to the RFE both state that the petitioner was established in 1997. The petitioner did not provide any explanation for this discrepancy. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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 this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a bilingual business development specialist to work part-time for 20 hours per week at a salary of \$18.14 per hour.

In its support letter, dated September 29, 2011, the petitioner provided the following description of the duties of the proffered position:

1. Collect, compile, and organize company's current market updated data and conduct analysis and research of our industry, competitors, and customers. Once familiarized, the alien is required to prepare business summary report to the business owner for further review and consideration in order to establish business policies, business goals and major business decisions regarding financial control, HR and market promotion related activities[.] (10%).
2. Analyze the above research data include [sic] business summary report, our available company resources (financial and manpower), and prepare detailed business expansion plans and new marketing initiatives to be presented to management for approval. (20%)
 - a. We are looking for key areas of opportunity for reaching new potential customers to increase business volume, revenue, and profits. This may involve developing new products and services.
 - b. We are also looking for new strategies for prospecting and pursuing new customers, as well as greater efficiencies in maintaining our business

with existing customers. California is a multicultural market with a large population of Chinese business owners with premises that could be interested in our vending products and services. They are a key target market to focus on.

- c. You will be expected to pitch management your ideas, establishing attainable expectations, and presenting plans of action. We are looking for comprehensive and innovative plans with clearly defined and measurable goals.
3. Direct, participate in, and manage the execution of approved expansion plans and marketing initiatives. (70%)
 - a. This will require hands-on work in the field dealing face-to-face with prospects and existing customers, many of whom will be ethnic Chinese and will be more comfortable communicating in their native language. You must be fluent in Chinese. Additional language fluencies will be an advantage.
 - b. The alien may also be empowered and required to recruit, train, and manage any requisite subordinates to assist the alien or business owner based upon business progress.
 - c. Prepare and provide regular evaluation and progress reports as measured against explicit milestones and goals presented in approved plans and initiatives.

In addition, the petitioner claims that “[f]or a position of this complexity, we require a Bachelor’s Degree in Business Administration, Economics, Management, or a sufficiently related field from an accredited university.” The petitioner submitted a copy of an educational credentials evaluation, dated April 28, 2009, from [REDACTED] stating that the beneficiary’s foreign studies are equivalent to a Bachelor of Arts in Economics degree at *unaccredited* U.S. colleges and universities.

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 the occupational classification of "Business Operations Specialists, All Other" – SOC (ONET/OES Code) 13-1199.00, at a Level I wage.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought and issued a RFE on February 9, 2012. 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 April 5, 2012, the petitioner responded to the RFE and submitted, *inter alia*, (1) a copy of a page from an unspecified publication summarizing an unpublished AAO decision for a business analyst position with a travel agency; (2) a copy of an opinion letter, dated December 20, 2010, by [REDACTED] regarding the business development analyst position; (3) a copy of two job listings for business development specialist positions; (4) copies of three previously submitted job offers from other businesses for business development positions; (5) a copy of the petitioner's previously submitted "Business Plan"; and (6) additional evidence.

In the letter in response to the RFE, dated April 2, 2012, the petitioner provided the following revised description of the duties of the proffered position:

1. Meeting with CEO in evaluation business by preparing opportunity [e]valuation checklist. The checklist may include opportunity and marketability product. Collect, compile, and organize company's current market updated data and conduct analysis and research of our industry, competitors, and customers. Once familiarized, the alien is required to prepare business summary report to the business owner for further review and consideration in order to establish business policies, business goals and major business decisions regarding financial control, HR and market promotion related activities. (10%)
2. Analyze the above research data include [sic] business summary report, our available company resources (financial and manpower), and prepare detailed business expansion plans and new marketing initiatives to be presented to management for approval. (20%)
 - a. We are looking for key areas of opportunity for reaching new potential customers to increase business volume, revenue, and profits. This may involve developing new products and services.
 - b. We are also looking for new strategies for prospecting and pursuing new customers, as well as greater efficiencies in maintaining our business with existing customers. California is a multicultural market with a large population of Chinese business owners with premises that could be interested in our vending products and services. They are a key target market to focus on.
 - c. You will be expected to pitch management your ideas, establishing attainable expectations, and presenting plans of action. We are looking for comprehensive and innovative plans with clearly defined and measurable goals.
 - d. Revise existing insufficient brochures, catalogs and project proposals etc. with proper terminology in bilingual format. Provide clear information in a simple and easily understand [sic] manner. Prepare oral and written business presentation for either potential Chinese Indonesia and Indonesia investors.

3. Direct, participate in, and manage the execution of approved expansion plans and marketing initiatives. (70%)
 - a. This will require hands-on work in the field dealing face-to-face with prospects and existing customers, many of whom will be ethnic Chinese and will be more comfortable communicating in their native language. The incumbent must be fluent in Chinese. Additional language fluencies will be an advantage.
 - b. The alien may also be empowered and required to recruit, train, and manage any requisite subordinates to assist the alien or business owner based upon business progress.
 - c. Prepare and provide regular evaluation and progress reports as measured against explicit milestones and goals presented in approved plans and initiatives.
 - d. Meet with company accounting staffs and CPA for more efficient financial control. The job may include but [is] not limited [to] analyzing income statement[s] and balance sheet[s], recruit[ing] more bilingual sales [sic], conduct[ing] job training and open[ing] more branch offices based upon business progress.
 - e. Prepare more detail [sic] employee self [sic] job evaluation check list for the purpose to [sic] improve staff's service quality and their job performance.

In the letter in response to the RFE, the petitioner stated the following:

All of these job duties will definitely involve business ideas, business economics, and marketing theories and principles. For a position of this complexity, we require a Bachelor's Degree in Business Administration, Economics, Management, or a sufficiently related field from an accredited university.

In the letter in response to the RFE, the petitioner also stated the following, verbatim:

The essential job duties of our job offered is revise our current English promotional materials, translate these documents from English to Indonesian and also conduct research and interview potential Asia investors.

On June 12, 2012, 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. The petitioner submitted a timely appeal.

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. Based upon a complete review of the record of proceeding, the AAO finds that the evidence fails to establish that the position as described constitutes a specialty occupation. 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).

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)(I), 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.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in 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 (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.² However, 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.³ The petitioner asserts in the LCA that the proffered position falls under

² 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.

³ The *Handbook* states the following about these occupations:

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. This page 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

the occupational category "Business Operations Specialists, All Other," which is an occupation for which the *Handbook* does not provide data.⁴

On appeal, the petitioner states that the proffered position could be classified as a combination of both "Marketing Manager" or "Promotional Manager" and "Market Research Analyst."

The AAO reviewed the chapters of the *Handbook* entitled "Advertising, Promotions, and Marketing Managers"⁵ and "Market Research Analysts,"⁶ including the sections regarding the typical duties and requirements for both of these occupational categories, but is not persuaded by the petitioner's claim on appeal that the proffered position falls under a combination of these categories.

The AAO finds that, to the extent that they are depicted in the record of proceeding, the duties of the proffered position, indicate that the beneficiary may perform a few general tasks in common with these occupational groups, but not that the beneficiary's duties would constitute a combination "marketing manager or promotional manager" and market research analyst position. It must be noted that the petitioner failed to provide probative documentary evidence to substantiate its claim on appeal that the beneficiary will primarily, or substantially, perform the same or similar duties, tasks and/or work activities that characterize the occupation of advertising, promotions, and marketing managers and market research analysts. The totality of the evidence in this proceeding, including information and documentation regarding the proposed duties, the petitioner's business operations, and the petitioner's organizational structure, does not establish that the duties of the proposed position are substantially comparable to those of advertising, promotions, and marketing managers and market research analysts. Moreover, in the instant case, this is further signified by the fact that the offered salary of \$18.14 per hour to the beneficiary is approximately \$34.00 less per

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.

⁴ The AAO notes that the O*NET Code Connector states that "All Other" titles represent occupations with a wide range of characteristics which do not fit into one of the detailed O*NET-SOC occupations. O*NET data is not available for this type of title. See <http://www.onetcodeconnector.org/ccreport/25-3099.00>.

⁵ For additional information regarding the occupational category "Advertising, Promotions, and Marketing Managers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Advertising, Promotions, and Marketing Managers, available on the Internet at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-1> (last visited April 23, 2013).

⁶ For additional information regarding the occupational category "Market Research Analysts," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Market Research Analysts, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-1> (last visited April 23, 2013).

hour than the 2010 median hourly wage of \$52.05 per hour for advertising, promotions, and marketing managers positions (as listed in the *Handbook*) and approximately \$11.00 less per hour than the 2010 median hourly wage of \$29.12 per hour for market research analyst positions (as listed in the *Handbook*).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the prevailing wage for the proffered position as wage for a Level I (entry level) position on the LCA.⁷ This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.⁸ That is, in accordance with the relevant DOL explanatory information on wage levels, this Level I wage rate is only appropriate for a position in which the beneficiary is only required to have a basic understanding of the occupation and would be expected to perform routine tasks that require limited, if any, exercise of judgment. This wage rate also indicates that the beneficiary would be closely supervised; that his work would be closely monitored and reviewed

⁷ 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.

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.

⁸ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

Id.

for accuracy; and that he would receive specific instructions on required tasks and expected results.

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 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. 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As previously noted, the record of proceeding contains a copy of an opinion letter, dated December 20, 2010, by [REDACTED] regarding business development analyst positions in general. In the letter, [REDACTED] states the following:

Having a bachelor's degree in business administration, economics, and/or finance and at least five years of results-oriented experience is *desired* for candidates applying for business development analyst jobs. (Emphasis added.)

In summary, I concluded that business development analyst position would be categorized as a specialty occupation because this position needs a highly specialized knowledge to fully perform the job.

First, [REDACTED] states her opinion regarding a business development analyst position and not with respect to the proffered position of bilingual business development specialist. Second, [REDACTED] does not specify any studies, surveys, textbooks, DOL resources, publications, references of any kind, or any empirical information as the factual basis of her opinion. Therefore, [REDACTED] did not establish that her opinion was based upon objective, reliable evidence. Additionally, the AAO finds, [REDACTED] did not provide evidence that she possesses any special knowledge in the area of recruiting and hiring practices regarding the type of position here at issue. Additionally, as [REDACTED] opined that attainment of a bachelor's degree or its equivalent in business administration, economics, and/or finance was desirable (not required), her submission would not substantially advance the petitioner's claims. 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).

Additionally, the AAO notes that even if the evidence of record had established a bachelor's degree in business administration – one of the “desired” degrees mentioned by [REDACTED] – as a normal requirement for the type of position here proffered (and such is not the case), that would weigh

negatively against the specialty occupation claim. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). In addition to proving that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

Accordingly, the AAO finds that [REDACTED] letter merits no weight towards establishing the proffered position as a specialty occupation.

Counsel further refers to an unpublished decision in which the AAO determined that the position of business analyst "for a small travel agency" proffered in that matter qualified as a specialty occupation "as long as the job entailed assisting in the expansion and organization of existing business." Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision and that the analysis of the unpublished decision compels a certain result in the case at hand. Additionally, 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

In summary then, 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 within 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. 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 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 petitioner submitted copies of two job vacancy announcements to support its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations.

In order for the petitioner to establish that another organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Here, the record of proceeding contains no evidence that the companies which issued the advertisements are similar in size and scope to the petitioner, a two-person⁹ vending machine retail and repair business. Also, the record lacks information about the two firms that issued the advertisement that would be sufficient for a meaningful comparison between them and the petitioner. When determining whether the petitioner and another organization share the same general characteristics, substantial 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) should be considered. It is not sufficient for the petitioner to claim that the organizations are similar and in the same industry without providing a sound factual basis for such an assertion – and that is not the case here. Likewise, the AAO finds that the evidence of record does not contain sufficient information about either the proffered position or those advertised to establish them as parallel positions in similar organizations in the same industry. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

The AAO further observes that, aside from and in addition to the above discussed failure to establish the relevancy of the advertisements to the particular type of position here proffered, neither of the job-vacancy advertisements specify a bachelor's or higher degree in a specific specialty as a hiring requirement. Additionally, there is the fact that the two advertisements are not supplemented by documentary evidence establishing that the educational credentials that they specify are representative of a common recruiting and hiring practice in the industry.¹⁰

⁹ The AAO notes that on page 16, Personnel Organization Chart, of the Business Plan submitted on appeal, the petitioner handwrote, "No of staff at present: 2."

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 just two job advertisements with regard to

Thus, for the reasons discussed above, the petitioner's reliance on the job vacancy advertisements is misplaced. They do not help establish that organizations similar to the petitioner and in its industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for positions parallel to the one that is the subject of this petition.

Next, the AAO notes will address the copies of three job offer letters, for individuals other than the beneficiary, which the petitioner submitted to support its assertion that its claimed degree requirement is common to the petitioner's industry in parallel positions among similar organizations.

At the outset, the AAO notes that none of these job offer letters are on the letterhead of the businesses extending the job offers. The first job offer letter, dated November 24, 2010, is for a bilingual business development specialist at a real estate investment development firm. The second job offer letter, dated March 17, 2011, is for a business development specialist with what the petitioner states is an import and export business. The third job offer letter, dated November 12, 2010, is for a bilingual business development analyst with what the petitioner states is a real estate business.¹¹ Specifically, none of these job offer letters indicate that a bachelor's degree in a specific specialty is a requirement for entry into those positions. Also, the aforementioned three businesses extending the job offers appear not to be organizations similar to the petitioner, as they are involved in different types of business operations.

Finally, the petitioner also submitted a signed job posting notice for a bilingual finance and business development specialist with [REDACTED] the same employer listed in the third job-offer letter above, which the petitioner identified as a real estate business. Again, then, [REDACTED] is not a similar organization to the petitioner in terms of the type of business. The job posting notice indicates that [REDACTED] requires a bachelor's degree in business administration, economic, finance or related fields. The AAO hereby incorporates its prior discussion that a requirement of a bachelor's degree in business administration is inadequate to establish that a position qualifies as a specialty occupation. Thus, this document is not evidence

determining the common educational requirements for entry into parallel positions in similar companies. *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 bilingual business development specialist at a vending machine retail and repair business 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.

¹¹ The business extending the job offer is [REDACTED]

that that organizations similar to petitioner and in its industry routinely require at least a bachelor's degree in a specific specialty for positions that are parallel to the one proffered here.

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).

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. The AAO finds no basis for finding that such attributes are inherent in the proffered position as described in the record of proceeding, and the AAO also finds that the petitioner has not supplemented the record with any persuasive documentary evidence establishing that the position as described possesses such complexity or uniqueness as would be sufficient to satisfy this criterion.

Also, the AAO finds that the wage level specified in the in the LCA is materially inconsistent with the relative complexity or uniqueness required to satisfy this criterion. The AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates a wage level based upon the occupational classification "Business Operations Specialists, All Other" at a Level I (entry level) wage. This designation is appropriate for positions for which the petitioner expects the beneficiary to have a basic understanding of the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

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.

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.

In summary, for the reasons discussed above, the petitioner has not satisfied the second alternative prong 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 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.

The record of proceeding, however, does not document a prior history of the petitioner's recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty. Therefore, there is no evidentiary basis for the AAO to find that petitioner satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), and the AAO will proceed to the next and last criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The AAO finds that the evidence in the record of proceeding neither focuses upon nor establishes relative specialization and complexity as attributes of the nature of the proposed duties. That is, the proposed duties have not been described with substantive specificity, or supplemented with substantive documentary evidence, establishing their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance would not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

In this regard, the AAO here again incorporates into this analysis its earlier comments and findings with regard to the implication of the Level I wage-rate designation (the lowest of four possible wage-levels) in the LCA. That is, that the proffered position's Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Business Operations Specialists, All Other" and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, the DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation."

As the evidence in the record of proceeding has not established that the nature of the duties of the position are 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, or its equivalent, 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. Accordingly, the appeal will be dismissed, and the petition will be denied.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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