

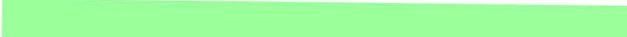


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **AUG 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:



INSTRUCTIONS:

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

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

*for*   
Ron Rosenberg  
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, through counsel, submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on May 9, 2012. On the Form I-129 visa petition, the petitioner describes itself as an "education and training in direct selling industry" business with four employees, established in 2001. In order to employ the beneficiary in a position to which it assigned the job title, "Project Manager," the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner, through counsel, submitted an appeal of the decision. On appeal, counsel submits a brief and contends that the director's basis for denial of the petition was erroneous.

Upon review of the documentation filed with the Form I-129, the director found the evidence insufficient to establish eligibility for the benefit sought and issued a request for evidence (RFE) on August 10, 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 November 1, 2012, counsel for the petitioner responded to the RFE and submitted a response letter and additional evidence. In its response to the RFE, the petitioner provided, *inter alia*, a four-page detailed job description, including the job duties, the time spent on each duty and the substantive knowledge gained through coursework in management and international business required to perform the duties, which for the sake of judicial economy the AAO will not restate herein.

On November 17, 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. Counsel for the petitioner submitted a timely appeal of the denial of the H-1B petition.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's RFE; (3) the petitioner's response to the RFE; (4) the director's notice denying the petition; and (5) the petitioner's Form I-290B and a brief. 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 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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

The AAO notes again that the petitioner described its business as "education and training in [the] direct selling industry." Also, in the Labor Condition Application (LCA) submitted with the Form I-129 the petitioner specified the related NAICS (North American Industry Classification System) code as 611430. The NAICS Internet site provides the following information regarding this industry:

#### **611430 Professional and Management Development Training**

This industry comprises establishments primarily engaged in offering an array of short duration courses and seminars for management and professional development. Training for career development may be provided directly to individuals or through employers' training programs; and courses may be customized or modified to meet the special needs of customers. Instruction may be provided in diverse settings, such as the establishment's or client's training facilities, educational institutions, the workplace, or the home, and through diverse means, such as correspondence, television, the Internet, or other electronic and distance-learning methods. The training provided by these establishments may include the use of simulators and simulation methods.

U.S. Dep't of Commerce, Census Bureau, official Website for the 2012 North American Industry Classification System (NAICS), <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited August 27, 2013).

Based upon the content of the statements and documents that the petitioner provided in the record of proceeding about its business and the varieties of training, or coaching, that the petitioner provides, the AAO also finds that the trainers or coaches whom the beneficiary's duties would support appear to fall within the SOC/O\*NET occupational category 25-3021.00 - Self-Enrichment Education Teachers.

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position titled, "Project Manager," to work on a full-time basis at a salary of \$45,760 per year. In the Form I-129, the petitioner described the proposed duties of the proffered position, as follows:

Plan, execute, and finalize projects for the [REDACTED] and [REDACTED]. This includes acquiring resources and coordinating with team members and third-party contractors or consultants in order to deliver projects according to plan. The Project Manager works with senior management to develop plans for implementation of programs to international markets.

As the Labor Condition Application (LCA) for this petition, the petitioner submitted an LCA that had been certified for use with a job prospect that would be within the occupational classification of "Management Analysts" – SOC (ONET/OES Code) 13-1111.00, and for which the appropriate wage level would be Level I (the lowest of the four assignable wage levels). Accordingly, the AAO will be analyzing the proffered position in light of the petitioner's identification of it as belonging within the Management Analysts occupational group.

In its undated support letter, the petitioner provided the following description of the proffered position:

The Project Manager is responsible for managing the [REDACTED] program and the [REDACTED] program. The role of the Project Manager is to plan, execute, and finalize projects for the [REDACTED] and [REDACTED]. This includes acquiring resources and coordinating with team members and third-party contractors or consultants in order to deliver projects according to plan. The Project Manager works with senior management to develop plans for the implementation of programs to international markets. The Project Manager is also responsible for developing full scale project plans and the associated communications documents.

The AAO finds that this letter provides only generalized assertions of relatively abstract functions that the petitioner asserts for the proffered position. The letter states that the beneficiary will be "managing" the petitioner's two programs, but it does not provide any substantial details about specific, substantive work that such management would entail. Likewise, while the letter asserts that the beneficiary will be engaged in "acquiring resources"

and in “coordinating” with various parties “in order to deliver projects according to plan,” the letter does not describe in any substantial detail what particular substantive tasks would be involved in any of those aspects. So too, the letter does not provide substantive information about the “full scale project plans” and what particular types of concrete work the beneficiary would have to do in “developing” them.

The brief on appeal continues in the same generalized and relatively abstract vein as the support letter, as can be seen in its arguing that the responsibilities associated with management of the [redacted] program and management of the [redacted] program render the proffered position “so complex or unique that it can only be performed by an individual with a degree.” Witness, for instance, the following excerpt from pages 8-9 of the brief:

[The Petitioner] is the only company in the United States that provides coaching services to the direct selling industry. The company has spent over ten years of studying industry leaders to create its patented [redacted] service and [redacted] program. The [redacted] is based on [the Petitioner’s] [redacted]™ system, which is designed to deliver the best mediums for coach training: in-classroom facilitation, one-on-one coaching, eLearning, web conferencing, and presentations for the direct selling industry. Petitioner’s letter at 2. The [redacted] program is a comprehensive leadership development program. *Id.* It includes effective coaching and team building exercises, combining interactive activities with valuable self-reflection, personal coaching, and presentation of ideas for sales leaders. *Id.*

The Project Manager is responsible for managing the [redacted] program and the [redacted] program. The role of the Project Manager is to plan, execute, and finalize projects for the [redacted] and [redacted] program. This includes acquiring resources and coordinating with team members and third-party contractors or consultants in order to deliver projects according to plan. The Project Manager works with senior management to develop plans for the implementation of programs to international markets. The Project Manager is also responsible for developing full scale project plans and associated communication documents. As a result of unique and complex responsibilities, the Project Manager requires traits that are [sic] only a degree bearing candidate possesses. The following list from Petitioner’s Project Manager Job Description highlights some of the most demanding components of the position:

- Principles of Management: understand the processes of working with people and resources to accomplish organizational goals; adapting to change; the ability to apply the fundamental management principles of planning, organizing, leading, and controlling; application of these fundamentals in the present environment of globalization, technological change, and increased competitiveness.

- Coordinating business strategy: having the ability to integrate corporate international, business, and functional areas into the strategies of modern business organizations, which include setting objectives, designing strategic plans, allocating resources, organizational structuring and controlling performance;
- Operations Management: forecasting, capacity planning and allocation of resources, quality control, scheduling, and product management;
- International Management: economic, technological, social cultural and political aspects of multinational operations and their effects on the managerial objectives, processes, and strategic decision-making;
- Business Strategy and Policy: integration of corporate, international, business unit, and functional areas strategies of modern business organizations, including setting objectives, designing strategic plans, allocating resources, organizational structuring, and controlling performance;
- International Marketing: the ability to tackle marketing management problems, techniques and strategies necessary to incorporate the marketing concept into the framework of the world marketplace;
- Business Information Systems: information systems management, networking, databases and the role and importance of technology in the business;
- Organizational Behavior in Management: interaction and interdependence between the formal organization and the human being, emphasizing how human behavior and organizational processes can be integrated to achieve organizational effectiveness.

With regard to the above excerpt, the AAO notes in particular that, while the bullet phrases claim that the beneficiary will be involved in the eight different “components,” the evidence in the record of proceeding fails to specifically explain and document whatever substantive work those “components” would actually involve in the day-to-day work of the proffered position.

The petitioner’s response to the director’s RFE includes a five-page document, each page of which addresses the proffered position in three columns, which, in the order of their appearance from left to right in the document, bear the headings “Job Duty/Level of Responsibility,” “Time,” and “Coursework/Theoretical Knowledge Required.” The AAO notes that the columnar comments address the position in several subsets of duties, which, by order of appearance, are “[redacted],” “[The Petitioner’s] Growth Management,” and “[redacted].”

Appended to this five-page chart is a single page, entitled “ [REDACTED] Course Descriptions,” which provides what appears to be university course-catalogue summaries for eight courses, identified as (1) BUS 171 – Business Information Systems – Theory and Practice; (2) MGM 210 (old 300) – Principles of Management; (3) MGM 351 – Operations Management; (4) MGM 350 – Organizational Behavior in Management; (5) MGM -352 – International management; (6) MGM 399 (old 377) – Business Strategy and Policy; (7) MKT 210 - Principles of Marketing; and (8) MKT 370 – International Marketing.

In a nutshell, the chart seeks to establish that that the duties/responsibility-levels asserted in the first column require applications of knowledge that in turn require completion of the coursework that the petitioner specifies in the third column, which coursework apparently corresponds with courses that the beneficiary completed in obtaining her Bachelor’s degree in International Business and Management from [REDACTED] in Pennsylvania.<sup>1</sup>

The chart asserts the following for the “[REDACTED]” aspects of the proffered position:

<b>Job Duty/Level of Responsibility</b>	<b>Time</b>	<b>Coursework/Theoretical Knowledge Required<sup>2</sup></b>
1. Edit website and update content for the [REDACTED] Section, including promotions and events to enhance communication with new and existing students	3% 1.2 hrs/wk	Principles of Marketing . . . Business Strategy and Policy . . .
2. Edit, load, and send audio and video recordings for classes and live webinars	15% 6 hrs/wk	Business Information Systems . . . Operations Management . . .
3. Schedule [REDACTED] online webinars and live in person sessions; coordinate faculty both international and domestic	3% 1.2 hrs/wk	Principles of Management . . .

<sup>1</sup> The petitioner stated that “[t]o be considered for the [REDACTED] and [REDACTED] [REDACTED], we require the applicant to have a Bachelor’s degree in [sic] the field of business management, with international business studies preferred.” The petitioner further stated that “[the beneficiary] has a Bachelor’s degree in International Business and Management from [REDACTED] [REDACTED] in Pennsylvania and a Master’s degree in Organizational Change from [REDACTED]. While these credentials are not in dispute, the AAO notes that establishing a position as a specialty occupation is not a function of the academic credentials of the beneficiary.

<sup>2</sup> As a matter of adjudicative efficiency, the AAO will not here reproduce the material presented in this column, which, of course, is both available in the record of proceeding and presumably known to the petitioner, who produced it. However, the AAO has reviewed the entirety of that column’s content, and the AAO’s evaluative comments that follow will be based upon that review.

4. Communication with current students working on their accreditation to ensure timely completion, with past students for referral program, and future students to explain program	6% 2.4 hrs/wk	Organizational Behavior in Management . . . Principle of Marketing . . .
5. Communicate with faculty to coordinate sessions	3% 1.2 hrs/wk	Business Information Systems . . . Principles of Marketing . . .
6. Edit faculty and school material such as Power Points, handouts, and faculty notes to ensure consistency in presentations and sessions	9% 3.6 hrs/wk	Business Strategy and Policy . . . Principles of Marketing . . .

The chart continues as follows, now under the subheading “[THE PETITIONER’S] GROWTH MANAGEMENT”:

[Job Duty/Level of Responsibility]	[Time]	[Coursework/Theoretical Knowledge Required]
7. Correspond with the [redacted] for [the Petitioner’s] accreditation process; edit educational content to meet requirements of [redacted]	6% 2.4 hrs/wk	Business Strategy and Policy . . . Principles of Management . . . Principles of Marketing . . .
8. Prepare PowerPoints and materials for live presentations given by Executive Team at speaking events	9% 3.6 hrs/wk	Business Strategy and Policy . . .
9. Communicate with clients for the speaking events to tailor presentations to meet needs of each unique client	6% 2.4 hrs/wk	Principles of Marketing . . . Business Strategy and Policy . . .

The final component of the chart addresses, as follows, what the petitioner identifies as the [redacted] part of the proffered position:

[Job Duty/Level of Responsibility]	[Time]	[Coursework/Theoretical Knowledge Required]
10. Revise and tailor [REDACTED] material for both Universal and Custom programs to ensure language appropriate to industry and country	13% 5.2 hrs/wk	Operations Management . . . International Management . . .
11. Revise online and binder material for [REDACTED] to ensure consistency in all documents	6% 2.4 hrs/wk	Operations Management . . . Principles of Marketing . . .
12. Revise and post updated content to the website and Dropbox for the Executive Team	3% 1.2 hrs/wk	Operations Management . . . Principles of Management . . .
13. Prepare [REDACTED] custom Program proposal for clients; Communicate [with] [REDACTED] Custom Program clients to ensure the content meets their specification and standards; Oversee back and forth revisions and ensure accuracy of final program for [REDACTED] Custom program clients	9% 3.6 hrs/wk	Business Strategy and Policy . . . International Management . . . International marketing . . .
14. Prepare and edit course materials for [REDACTED] program and other events; coordinate review of edits in Spanish and other languages for custom [REDACTED] programs	9% 3.6 hrs/wk	Operations Management. . . International Management . . .

The AAO makes several findings with regard to this chart that is partially copied above.

The AAO finds that, to the extent that they are described in the chart, none of the duties provide a substantive foundation for the petitioner's claims about the coursework requirements specified in the third column. Rather, the AAO finds that each and all of the 14 sets of duties do not, as expressed in the chart, indicate the need for any particular level of educational attainment in any particular specialty. If a petitioner claims that a particular duty or set of duties requires the completion of particular college-level coursework, the petitioner must provide evidence establishing that performance of those duties would require practical and theoretical applications of highly specialized knowledge, in the courses' pertinent specialty, that only completion of such courses (or closely related ones) would provide.

The AAO also finds that no requirements for a particular curriculum of coursework in any specific specialty is self-evident in the petitioner's above-quoted descriptions of the duties related as, for representative examples, "Edit website and update content for the [redacted] School Section. . . ."; "Edit, load, and send audio and video recordings for classes and live webinars"; "Correspond with the [redacted] for [the Petitioner's] accreditation process; edit educational content to meet requirements of [redacted]"; "Prepare [redacted] custom Program proposal for clients; Communicate [with] [redacted] Custom Program clients to ensure the content meets their specification and standards; Oversee back and forth revisions and ensure accuracy of final program for [redacted] Custom program clients"; and "Prepare PowerPoints and materials for live presentations given by Executive Team at speaking events."

Thus, the AAO further finds that the third-column's claims of required coursework is conclusory and of no probative value. The petitioner's does not provide an objective, analytical foundation for how it arrived at its assertions from such a skeletal framework of duties that are not accompanied by any independent documentation of their substantive nature and any associated educational requirements.

Again, 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 agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

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.

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.<sup>3</sup> As previously discussed, the petitioner asserts in the LCA that the proffered position falls within the Management Analysts occupational group.

Although the AAO is not persuaded that the proffered position is in fact a Management Analyst position, as claimed, the AAO nevertheless will review the information in the *Handbook* regarding this occupational category.<sup>4</sup>

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<sup>3</sup> 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.

<sup>4</sup> In this regard, the AAO finds that, particularly in the light of the earlier-discussed chart of duties presented in the RFE reply, the totality of evidence simply does not substantiate that the beneficiary would be engaged to any appreciable degree in analyzing the petitioner's organization for efficiency improvements. Also, the evidence of record indicates that the beneficiary would be involved in what

The subchapter of the *Handbook* entitled "What Management Analysts Do" states the following about this occupational category:

Management analysts, often called management consultants, propose ways to improve an organization's efficiency. They advise managers on how to make organizations more profitable through reduced costs and increased revenues.

### **Duties**

Management analysts typically do the following:

- Gather and organize information about the problem to be solved or the procedure to be improved
  - Interview personnel and conduct on-site observations to determine the methods, equipment, and personnel that will be needed
  - Analyze financial and other data, including revenue, expenditure, and employment reports, including, sometimes, building and using sophisticated mathematical models
  - Develop solutions or alternative practices
  - Recommend new systems, procedures, or organizational changes
  - Make recommendations to management through presentations or written reports
  - Confer with managers to ensure that the changes are working
- Although some management analysts work for the organization that they are analyzing, most work as consultants on a contractual basis.

Whether they are self-employed or part of a large consulting company, the work of a management analyst may vary from project to project. Some projects require a team of consultants, each specializing in one area. In other projects, consultants work independently with the client organization's managers.

Management analysts often specialize in certain areas, such as inventory management or reorganizing corporate structures to eliminate duplicate and nonessential jobs. Some consultants specialize in a specific industry, such as

healthcare or telecommunications. In government, management analysts usually specialize by type of agency.

Organizations hire consultants to develop strategies for entering and remaining competitive in the electronic marketplace.

Management analysts who work on contract may write proposals and bid for jobs. Typically, an organization that needs the help of a management analyst solicits proposals from a number of consultants and consulting companies that specialize in the needed work. Those who want the work must then submit a proposal by the deadline that explains how they will do the work, who will do the work, why

they are the best consultants to do the work, what the schedule will be, and how much it will cost. The organization that needs the consultants then selects the proposal that best meets its needs and budget.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Management Analysts, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-2> (last visited August 27, 2013).

As will now be discussed, the *Handbook* indicates that management analysts do not comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

The *Handbook's* subsection "How to Become a Management Analyst" states the following about this occupational category:

Most management analysts have at least a bachelor's degree. The Certified Management Consultant (CMC) designation may improve job prospects.

### **Education**

A bachelor's degree is the typical entry-level requirement for management analysts. However, some employers prefer to hire candidates who have a master's degree in business administration (MBA). In 2010, 28 percent of management analysts had a master's degree.

Few colleges and universities offer formal programs in management consulting. However, many fields of study provide a suitable education because of the range of areas that management analysts address. Common fields of study include business, management, accounting, marketing, economics, statistics, computer and information science, and engineering.

Analysts also routinely attend conferences to stay up to date on current developments in their field.

### **Certification**

The Institute of Management Consultants USA, Inc. (IMC USA) offers the Certified Management Consultant (CMC) designation to those who meet minimum levels of education and experience, submit client reviews, and pass an interview and exam covering the IMC USA's Code of Ethics. Management consultants with a CMC designation must be recertified every 3 years. Management analysts are not required to get certification, but it may give jobseekers a competitive advantage.

### **Work Experience**

Many analysts enter the occupation with years of work experience. Organizations that specialize in certain fields try to hire candidates who have experience in those

areas. Typical work backgrounds include management, human resources, and information technology.

### **Advancement**

As consultants gain experience, they often take on more responsibility. At the senior level, consultants may supervise teams working on more complex projects and become more involved in seeking out new business. Those with exceptional skills may eventually become partners in their consulting organization and focus on attracting new clients and bringing in revenue. Senior consultants who leave their consulting company often move to senior management positions at non-consulting organizations.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Management Analysts, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-4> (last visited August 27, 2013).

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.<sup>5</sup> This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.<sup>6</sup> That is, in accordance with the relevant DOL explanatory

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<sup>5</sup> 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/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>6</sup> 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

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 her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results.

The *Handbook* does not support the assertion that at least a bachelor's degree in a *specific specialty* is normally the minimum requirement for entry into this occupation. While the *Handbook* indicates that a bachelor's degree is the typical entry-level requirement, the *Handbook* does not indicate that a degree in a *specific specialty* is normally the minimum requirement for entry into these positions. The *Handbook* reports that many fields of study provide a suitable educational path for these positions. The *Handbook* identifies common areas of study to include business, management, accounting, marketing, economics, statistics, computer and information science, and engineering. However, counsel has not submitted any evidence to establish that the fields of business, management, accounting, marketing, economics, statistics, computer and information science, and engineering encompass a specific specialty. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 two disparate fields, such as marketing and computer information science, 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.<sup>7</sup> Section 214(i)(1)(B) of the Act (emphasis added).

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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.*

<sup>7</sup> Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Furthermore, the *Handbook* indicates that a common field of study for this occupation is business and that some employers prefer to hire candidates who have an advanced degree in business administration. 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 at 147. Therefore, the *Handbook's* recognition that a general, non-specialty "background" in business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not a normal, minimum entry requirement for this occupation.

Additionally, the AAO finds that the Institute of Management Consultants USA does not require a bachelor's degree in any specific specialty to qualify as a Certified Management Consultant (CMC) at the basic level.<sup>8</sup> This organization's Internet site's section on certification, in part, contains the following information:

**Basic** for consultants with [(1)] a minimum of 3 up to 9 years of management consulting experience as independent or internal consultants with five satisfactory clients evaluations, and [(2)] [(A)] a Bachelor's degree or [(B)] at least 5 years of work experience including 3 years of full time consulting plus significant professional education in management consulting. Pass a [sic] written and oral examinations.

Institute of Management Consultants USA, "How to Become Certified as a CMC," available on the Internet at <http://www.imcusa.org/?page=CERTHOW> (last visited August 27, 2013).

For all of the reasons discussed above, the AAO finds that even if the petitioner had established the proffered position as belonging within the Management Analysts occupational group, that in itself would not be sufficient to establish the proffered position as one for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry – as would be required to satisfy this first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

When, 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.

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<sup>8</sup> The online version of the *Handbook*, visited on August 27, 2013, at <http://www.bls.gov/ooh/business-and-financial/print/management-analysts.htm>, refers to the Institute of Management Consultants USA as one of the organizations to contact for further information regarding management consulting.

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

The AAO notes that on appeal counsel cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for the proposition that "[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge."

The AAO agrees with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." 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 (or its equivalent)" 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 two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," 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 the Act (emphasis added). For the aforementioned reasons, however, the petitioner has failed to meet its burden and establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties.

In any event, counsel has furnished insufficient evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.<sup>9</sup> The AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

The AAO further notes that on appeal, counsel contends that "it is improper to apply rigid classifications in the [*Handbook*] which fail to take into account an individual employer's

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<sup>9</sup> It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. The AAO further notes that the service center director's decision was not appealed to the AAO. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, the AAO may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by the AAO in its *de novo* review of the matter.

business needs” and cites to *Unico American Corp. v. Watson*, 1991 WL 11002594 (C.D. Cal. Mar. 19, 1991).<sup>10</sup> The AAO is not persuaded by counsel's comments.

The AAO notes that counsel's reliance on *Unico* is misplaced, not only because counsel has failed to establish how the facts in *Unico* are analogous to the facts of the instant petition, but also because that case had been adjudicated under regulations that predated the adoption of the specialty occupation standard into the H-1B program.

Furthermore, as previously discussed, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. at 715. The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In any event, the AAO bases its decision upon the totality of the evidence in the record of proceeding bearing upon the specialty-occupation issue, and without sole or excessive reliance upon the relevant information contained in the *Handbook*.

Upon review of the totality of the evidence in the entire record of proceeding, the AAO concludes that the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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)).

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<sup>10</sup> The AAO notes that counsel mistakenly refers to the name of the case as “*Unico Corp. v. Watson*,” whereas the case is titled *Unico American Corp. v. Watson*.

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 AAO notes that the record of proceeding does not contain any submissions from professional associations, individuals or similar firms in the petitioner's industry attesting that a degree requirement is common to the industry for individuals employed in positions parallel to the proffered position. Thus, 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. Specifically, the petitioner failed to show that the project manager duties as described in this record of proceeding comprise a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty. In this regard, the AAO finds in particular that while the petitioner and counsel may have pronounced this position as so complex and unique, and likewise advocate the position as being so complex or unique as to satisfy this criterion, the record of proceeding lacks substantive evidence sufficient to establish that the position is so complex or unique. In this regard, the AAO finds that the documentary evidence with regard to the work that the beneficiary would perform is largely promotional and not sufficiently specific as to exactly what substantive aspects of the position, as it would actually be performed, would render the position so complex or unique as to require a person with at least a bachelor's degree in a specific specialty.

Aside from and in addition to the deficiency of substantive evidence pertinent to this criterion, the AAO also finds that the aforementioned wage level for which the LCA was certified is materially inconsistent with the complexity or uniqueness needed to satisfy this criterion.

Again, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates a wage level based upon the occupational classification "Management Analysts" at a Level I (entry level) wage. This wage level 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 she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

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.

Further, the AAO finds, from another perspective, that the evidence of record does not establish that this position is distinguishable as more complex or unique than positions that the *Handbook* indicates as being within the Management Analyst occupational group but not held by persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

Therefore, because, for all of the reasons stated above, the petitioner has failed to show that the proffered position is so complex or unique that it can be performed only by a person with at least a baccalaureate degree in a specific specialty or its equivalent, the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) has not been satisfied.

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.

On appeal, counsel states that the proffered position "is an entirely new position offered by [the petitioner]." Thus, the record of proceeding is devoid of any documentation that establishes a prior history, by the petitioner, of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

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

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

Upon review of the record of the proceeding and the chart with the revised job duties submitted in response to the RFE, the AAO notes that the petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. There is insufficient evidence to establish that the duties of the project manager position require 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 AAO finds that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. The chart with the revised job duties submitted in response to the RFE indicates that the beneficiary will spend the largest chunk of her time (15% or 6 hours per week) "edit[ing], load[ing] and send[ing] audio and video recordings for classes and live webinars." The nature of these duties (and others listed on the chart) do not appear to be particularly specialized and complex. 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 their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

In this regard, the AAO here 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 "Management Analysts" 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."

The petitioner has submitted insufficient evidence to satisfy this criterion of the regulations. That is, the petitioner has not established that the nature of the duties of the position is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. 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.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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