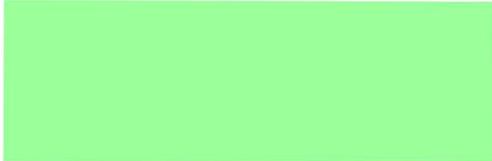


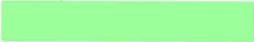


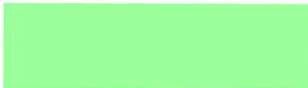
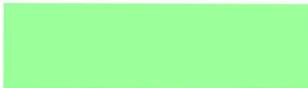
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: FEB 01 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 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, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a manufacturer and marketer of medical devices established in 2004. In order to employ the beneficiary in what it designates as an operations manager position,¹ 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 on the basis of her determination that the petitioner had failed to demonstrate that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

At the outset of this decision, the AAO finds that the petitioner provided as the supporting Labor Condition Application (LCA) for this petition an LCA which does not correspond to the petition, in that the LCA was certified for a wage level below that which is compatible with the levels of responsibility, judgment, and independence the petitioner claimed for the proffered position through its descriptions of the position's constituent duties.² This aspect of the petition undermines the credibility of the petition as a whole and any claim as to the proffered position or the duties comprising it as being particularly complex, unique, and/or specialized.

As will be evident in this decision, the AAO concurs with counsel that the proffered position as described in the record generally aligns with the General and Operations Managers occupational category; and the AAO also concurs with counsel that the full range of duties as presented in the RFE response should be considered. The AAO's independent, *de novo* review thus considered and weighed the entire body of evidence that the petitioner submitted into the record of proceeding; and the AAO also evaluated the proffered position as included within the General and Operations Managers occupational group. Furthermore, the director's finding that the petitioner presented the proffered position as an Industrial Production Manager is withdrawn.

¹ The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 11-1021, the associated Occupational Classification of "General and Operations Managers," and a Level I (entry-level) prevailing wage rate.

² The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this aspect of the petition.

In an attachment to counsel's November 4, 2011 letter, the petitioner stated that the duties of the proffered position would include the following:

- Scheduling the manufacture of inventory implants, instruments, and biologics with all European and U.S. subcontract manufacturing sites;
- Negotiating with U.S. and European manufacturers and suppliers in order to achieve lowest total cost;
- Planning and scheduling Master Operations;
- Planning for the development of systems, and purchasing the systems;
- Utilizing company resources effectively;
- Assuming accountability for the accuracy and impact of planning decisions;
- Developing and implementing planning and purchasing metrics;
- Planning system maintenance and updates to ensure the integrity of planning data;
- Forecasting systems management and coordinating forecasts for all demand channels for assigned projects;
- Acting as a liaison between other departments in order to coordinate product issues needing resolution, particularly issues related to implants and instruments pertaining to French subcontract workers;
- Working with new product teams to develop effective product launch plans;
- Managing products with a shelf life effectively, in order to minimize obsolescence due to expired products;
- Developing supply chains;
- Providing planning and scheduling commitments;
- Performance reporting;
- Complying with governmental, regulatory, and the petitioner's policies and procedures;
- Implementing and maintaining the effectiveness of the quality system as it pertains to planning and purchasing;

- Providing product availability commitments to demand channels in the U.S. and in Europe;
- Working closely with the petitioner's sales and marketing, engineering, accounting, and management to set product budgets;
- Managing the operation the petitioner's information systems, including analyzing system needs, developing appropriate solutions, and implementing upgrades;
- Leading the petitioner through the customization of the current ERP³ system;
- Leading the company by implementing a new document management system in order to establish a framework that will permit the centralization and organization of business processes and achieve better control of the document life cycle with an approach that fits the company's mission and goals; and
- Managing system back-up, storage, and retrieval functions.

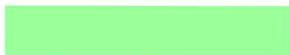
The AAO finds that, even when read in the aggregate, neither the above-quoted duty descriptions, nor any other descriptions in any submission into this record of proceeding, distinguish the proposed duties, or the position that they comprise, as so complex, specialized, and/or complex as to require the practical and theoretical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, as required to establish a specialty occupation in accordance with the definitions at section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii). Rather, the AAO finds that – as illustrated in the list above – the proffered position and its duties are described in terms of numerous but generalized functions that are neither explained nor documented in substantial details that would establish both the substantive aspects of actual work into which their actual performance would translate, and any necessary correlation between knowledge that must be applied in that work and attainment of any particular educational level of highly specialized knowledge in a specific specialty.

The record contains several claims regarding the complexity and specialization of the duties of the proffered position, as well as the position that the beneficiary will occupy within the petitioner's organizational hierarchy. For example, in his October 31, 2011 letter, [REDACTED] a professor at the [REDACTED] whose assertions were submitted as expert testimony,⁴ referenced the proffered position's "specialized duties" and "complex responsibilities."

Counsel made the following assertions in her November 4, 2011 letter:

³ The petitioner did not explain its use of the abbreviation "ERP."

⁴ [REDACTED] letter will be discussed in further detail later in this discussion.



Positions under the Operations Manager include Operations Account Coordinator, Inventory Control and System Specialist[,] and two Inventory Control Specialists. . . .

The nature of the company's product is complex and requires a high level of competence in execution of any decisions regarding their manufacture . . . The manufacture and development of these products requires extensive technical knowledge, and the operations of the company must be managed competently. . . .

The Operations Manager must, among other duties, schedule manufacturing in a way that utilizes company resources effectively and ensures accuracy of planning decisions. The company's information systems are controlled by the Operations Manager, and given the importance of information in making decisions about products, the information must be provided to others in the company in a clear and effective manner. The Operations Manager is also responsible for ensuring compliance with government regulations and quality assurance. . . .

Finally, counsel makes the following arguments in her undated brief submitted on appeal:

[The organizational chart submitted below] shows the amount of responsibility assigned to the proffered position as well as the fact that all other individuals working with the Operations Manager have degrees and/or extensive experience in the medical device field.

* * *

Finally, the job description submitted with the original petition shows a complex position. The duties involve operation planning and scheduling for a company which manufactures medical devices. Such manufacture involves working closely with manufacturing sites and sub contractors in the U.S. and Europe as well as negotiating prices for parts with such other companies. The success of the company depends on competent decision-making by the Operations Manager.

The proffered position is complex due to the nature of the company's product.

However, as will now be discussed, these assertions materially conflict with the wage-level designated in the LCA that the petitioner submitted with the petition. As noted above, the LCA submitted by the petitioner in support of the instant position specifies the occupational classification for the position as "General and Operations Managers," SOC (O*NET/OES) Code 11-1021.00, at a Level I (entry level) wage. The *Prevailing Wage Determination Policy Guidance*⁵ issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

⁵ Available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf (last accessed January 16, 2013).

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 [emphasis in original].

The U.S. Department of Labor (DOL) has clearly stated that its LCA certification process is cursory, that it does not involve substantive review, and that it makes the petitioner responsible for the accuracy of the information entered in the LCA. With regard to LCA certification, the regulation at 20 C.F.R. § 655.715 states the following:

Certification means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Likewise, the regulation at 20 C.F.R. § 655.735(b) states, in pertinent part, that “[i]t is the employer’s responsibility to ensure that ETA [(the DOL’s Employment and Training Administration)] receives a complete and accurate LCA.”

Further, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) also makes clear that certification of an LCA does not constitute a determination that a position qualifies for classification as a specialty occupation:

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

The petitioner’s assertions regarding the proposed duties’ level of complexity and specialization, as well as the level of independent judgment, responsibility, and the occupational understanding required to perform them, are materially inconsistent with the petitioner’s submission of an LCA certified for a Level I, entry-level position. The LCA’s wage level (Level I, the lowest of the four that can be designated) is only appropriate for a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels quoted above, this wage rate is appropriate for positions in which that the beneficiary is only required to have a basic understanding of the occupation; will be expected to perform routine tasks requiring limited, if any, exercise of judgment; will be closely supervised and her work closely monitored and reviewed for accuracy; and will receive specific instructions on required tasks and expected results.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the proffered position's educational demands and level of responsibilities. 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

It should be noted that, for efficiency's sake, the AAO's discussion and findings regarding the material conflict between assertions in the petition and the LCA wage-level are hereby incorporated as part of this decision's later analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Aside from the adverse impact of the LCA wage-level against the overall credibility of the petition, the AAO will now discuss that additional issue raised by the LCA which was noted at the outset of this decision, namely, the fact that the LCA does not appear to correspond to the instant petition.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

As previously noted, the conflict between the LCA and the petition adversely affects the merits of the petition, because it materially undermines the credibility of the petition's statements with regard to the nature and level of work that the beneficiary would perform.

The AAO will now address the director's determination that the proffered position is not a specialty occupation. 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 meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position’s title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 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 the specific specialty as the minimum for entry into the occupation, as required by the Act.

The aforementioned letter from [REDACTED] a Professor of Operations Management and Management Science at the [REDACTED], does not establish that the proffered position is a specialty occupation or that it meets any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) enumerated above. In his October 31, 2011 letter, [REDACTED] discussed the credentials he believes qualify him to opine upon the proffered position; repeated the job duties proposed for the beneficiary as provided by the petitioner; briefly described the petitioner’s business operations; asserted that the proffered position requires an individual with a bachelor’s degree in business management, information technology, or a related area; and claimed that it is standard practice for a company such as the petitioner to hire an operations manager with at least a bachelor’s degree in business management, information technology, or a related area.

However, the AAO finds that neither [REDACTED]’s academic status, as described by him, nor his resume, nor his writings, establish him as one with expert knowledge, or as one who has been accepted as a recognized authority, in the area in which he opines, namely, the academic requirements for performing the duties of a particular position within this occupational classification, let alone such a position in a relatively small company describing itself on the Form I-129 as engaging in the business of “manufacturing and marketing of medical devices.” Further,

his submission is superficial and conclusory, for it does not specify and discuss any studies, surveys, or other authoritative publications, and, significantly, it does not discuss the pertinent occupational information provided in the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*).

Nor did [REDACTED] list whatever studies, surveys, or other reference materials on which he relied as a basis for his statements, or indicate whether he visited the petitioner's business premises or spoke with anyone affiliated with the petitioner, so as to ascertain, and base his opinion upon, the substantive nature, and the substantive educational requirements, of the proposed duties and the proffered position as they would be actually performed. It appears that [REDACTED] did not base his opinion on any objective evidence, but instead simply restated the duties of the proffered position as provided by the petitioner. Nor did he address the petitioner's certification of the LCA for a Level I, entry-level position and its place, if any, in his evaluation. 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).

For all of these reasons, the AAO finds that the letter from [REDACTED] is not probative evidence that the petitioner has satisfied any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The AAO recognizes the aforementioned *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.⁶ The AAO agrees with the petitioner that the duties of the proffered position generally align with those of General and Operations Managers as outlined in the *Handbook*. The *Handbook's* discussion of the duties and educational requirements of general and operations managers is located within its chapter entitled "Top Executives," which states, in pertinent part, the following:

Top executives devise strategies and policies to ensure that an organization meets its goals. They plan, direct, and coordinate operational activities of companies and public or private-sector organizations. . . .

Top executives typically do the following:

⁶ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

- Establish and carry out departmental or organizational goals, policies, and procedures
- Direct and oversee an organization's financial and budgetary activities
- Manage general activities related to making products and providing services
- Consult with other executives, staff, and board members about general operations
- Negotiate or approve contracts and agreements
- Appoint department heads and managers
- Analyze financial statements, sales reports, and other performance indicators
- Identify places to cut costs and to improve performance, policies, and programs

* * *

General and operations managers oversee operations that are too diverse and general to be classified into one area of management or administration. Responsibilities may include formulating policies, managing daily operations, and planning the use of materials and human resources. They make staff schedules, assign work, and ensure projects are completed. In some organizations, the tasks of chief executive officers may overlap with those of general and operations managers.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Top Executives," <http://www.bls.gov/ooh/management/top-executives.htm#tab-2> (accessed January 16, 2013).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

Although education and training vary widely by position and industry, many top executives have at least a bachelor's degree and a considerable amount of work experience. . . .

Many top executives have a bachelor's or master's degree in business administration or in an area related to their field of work. College presidents and school superintendents typically have a doctoral degree in the field in which they originally taught or in education administration. Top executives in the public sector often have a degree in business administration, public administration, law, or the liberal arts.

Top executives of large corporations often have a Master of Business Administration (MBA).

Top executives who are promoted from lower level managerial or supervisory positions within their own firm often can substitute experience for education. In industries such as retail trade or transportation, for example, people without a college degree may work their way up to higher levels within the company and become executives or general managers.

Id. at <http://www.bls.gov/ooh/management/top-executives.htm#tab-4>

These statements from the *Handbook* do not indicate that a bachelor's degree or the equivalent, in a specific specialty, is normally required for entry into this occupation. Instead, it finds that these positions generally impose no specific degree requirement on individuals seeking employment. The statement that "many" top executives, which include general and operations managers, have college degrees is not synonymous with the "normally required" standard imposed by this criterion. To the contrary, such a statement does not even necessarily indicate that a majority of top executives possess such a degree. While the *Handbook* indicates that top management positions may be filled by individuals with a broad range of degrees, its subsequent discussion of the training and education necessary for such employment clearly states that companies also hire executives based on lower-level experience within their own organizations or management experience with another business. Moreover, the *Handbook* does not state that those positions which do require a bachelor's degree or the equivalent require that the degree be in a specific specialty.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in the general and operations manager category is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

Finally, as already noted, the petitioner submitted an LCA that was certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

Nor do the five job vacancy announcements contained in the record of proceeding satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). First, the petitioner has not submitted any evidence to demonstrate that the positions being advertised in these vacancy announcements are "parallel" to the one being proffered here.⁷ Second, the petitioner has not submitted any evidence to demonstrate that any of these advertisements is from a company "similar" to the petitioner. The petitioner has submitted no evidence to establish that any of these advertisers are similar to the petitioner in size, scope, scale of operations, business efforts, expenditures, or other fundamental dimensions. Nor has the petitioner established that the job-vacancy announcements require a bachelor's degree, or the equivalent, in a specific specialty.⁸ Nor does the petitioner submit any evidence regarding how representative these advertisements are of the industry's usual recruiting and hiring practices with regard to the position advertised. Again, simply 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 165.⁹

⁷ [REDACTED] and the [REDACTED] all require work experience. However, as noted above, the petitioner submitted an LCA that was certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.

⁸ The "confidential" company advertising its vacancy through [REDACTED] and [REDACTED] require a bachelor's degree, but they do not require that it be in a specific specialty.

⁹ Furthermore, according to the *Handbook* there were approximately 1,767,100 persons employed as general and operations managers in 2010. *Handbook* at <http://www.bls.gov/ooh/management/top-executives.htm#tab-6> (last accessed January 16, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the five submitted vacancy announcements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as 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.

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary would perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty. The duties proposed for the beneficiary are similar to those outlined in the *Handbook* as normally performed by general and operations managers, and the petitioner's description of the duties which collectively constitute the proffered position lacks the detail and specificity required to establish that they surpass or exceed the duties performed by typical general and operations managers in terms of complexity or uniqueness. As noted above, the *Handbook* indicates that the performance of these typical duties does not require a bachelor's degree, or the equivalent, in a specific specialty. The AAO finds further that, even outside the context of the *Handbook*, the petitioner has simply not established complexity or uniqueness as attributes of the proffered position, let alone as attributes with such elevated responsibilities as to require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Also, the AAO incorporates here by reference and reiterates its earlier discussion regarding the LCA and its indication that the proffered position is a low-level, entry position relative to others within the occupation. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate is indicative of a position where the beneficiary would perform routine tasks that require limited, if any, exercise of independent judgment; would be closely supervised and monitored; would receive specific instructions on required tasks and expected results; and would have her work reviewed for accuracy.

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 these five job-vacancy announcements established that the employers that issued them routinely recruited and hired for the advertised positions only persons with at least a bachelor's degree in a specific specialty closely related to the positions, it cannot be found that these five job-vacancy announcements that appear to have been consciously selected could credibly refute the statistics-based 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.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties constitute a position so complex or unique it can be performed only by an individual with at least a bachelor's degree, or the equivalent, in a specific specialty.

Consequently, as it did not show that the particular position for which it filed this petition is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position. The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and with regard to employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. 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 proffered position.¹⁰ In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the actual performance requirements of the position

¹⁰ Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within the occupation.

necessitate a petitioner's history of requiring a particular degree in its recruiting and hiring for the position. *See generally* *Defensor v. Meissner*, 201 F. 3d at 387. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proposed position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The record does not indicate whether the petitioner has ever employed an operations manager. Although the fact that a proffered position is a newly-created one is not in itself generally a basis for precluding a position from recognition as a specialty occupation, certainly an employer that has never recruited and hired for the position cannot satisfy the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

As the petitioner has failed to demonstrate a history of recruiting and hiring only individuals with a bachelor's degree, or the equivalent, in a specific specialty for the proffered position, it has failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The AAO finds that the petitioner has failed to provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

Furthermore, both on its own terms, and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level I is indicative of duties of relatively low complexity.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

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 [emphasis in original].

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

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

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, Level II wage rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

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

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

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

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