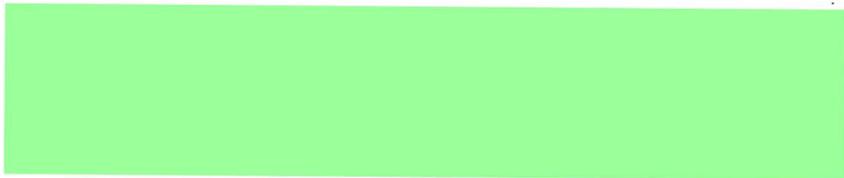




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: FEB 04 2013

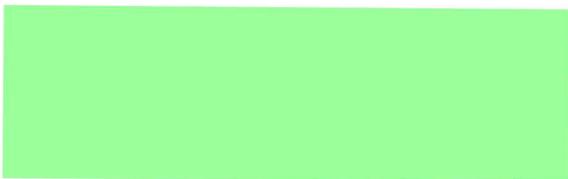
OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:

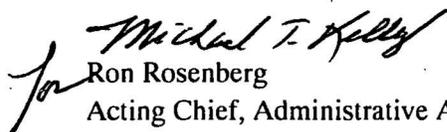


INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a financial transaction processing business with eight employees. It seeks to employ the beneficiary in what it designates as a part-time research analyst position and 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. On appeal, counsel for the petitioner contends that the director's findings were erroneous and submits a brief and additional evidence in support of this contention.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice denying the petition; and (5) the petitioner's Form I-290B and supporting documentation. 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 stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to

be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a research analyst to work on a part-time basis at a salary of \$28.75 per hour. In its support letter, dated April 1, 2011, the petitioner stated that "[t]his position will perform a wide range of duties including formulating mathematical or simulation models of problems related to the feasibility and sustainability of future business expansion," and provided the following description of the proffered position:

- Assist with quantitative and qualitative data collection and analysis and to [sic] assist in the development of the next business markets for expansion, including defin[ing] data requirements, validat[ing] information, applying judgment and statistical tests using statistical software such as SPSS and Excel;
- Research the [W]est [C]oast markets[,] including California;
- Develop a strategic partnership with [W]est [C]oast business banks;
- Collaborate with management and staff to ensure successful implementation of strategic solutions;
- Discuss with management the current problems, clarify and modify objectives and analyze information about alternative courses of action;
- Analyze information about alternative courses of action to determine which solutions will offer the best outcomes; and
- Prepare management reports defining and evaluating problems and recommending solutions.

In addition, the petitioner claims that "[t]he [b]eneficiary . . . is the ideal candidate to fill this position. She obtained her Master's degree in Public Administration from the [redacted] in December 2009[,] as well as her Bachelor's degree in Digital Art/Multimedia Design from the [redacted]"

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Operations Research Analysts" – SOC (ONET/OES Code) 15-2031.00, at a Level I wage.

Upon review of the documentation, the director found the evidence insufficient to establish

eligibility for the benefit sought and issued an RFE on June 17, 2011. 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 July 29, 2011, counsel for the petitioner responded to the RFE and submitted the petitioner's response letter and additional evidence. On page 2 of the RFE response letter, dated July 27, 2011¹, the petitioner reiterated the job description that was submitted in its support letter, dated April 1, 2011. The petitioner also added the percentage of time that the beneficiary would spend performing each of the duties. The petitioner provided the following description of the duties of the proffered position:

- Assist with quantitative and qualitative data collection and analysis and to [sic] assist in the development of the next business markets for expansion, including defin[ing] data requirements, validat[ing] information, applying judgment and statistical tests using statistical software such as SPSS and Excel **(25% of the time)**;
- Research the [W]est [C]oast markets[,] including California **(10% of the time)**;
- Develop a strategic partnership with [W]est [C]oast business banks **(10% of the time)**;
- Collaborate with management and staff to ensure successful implementation of strategic solutions **(15% of the time)**;
- Discuss with management the current problems, clarify and modify objectives and analyze information about alternative courses of action **(15% of the time)**;
- Analyze information about alternative courses of action to determine which solutions will offer the best outcomes **(15% of the time)**; and
- Prepare management reports defining and evaluating problems and recommending solutions **(10% of the time)**. (Emphasis in original.)

On September 19, 2011, 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 AAO reviewed the record in its entirety and will make some findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position

¹ The AAO notes that pages 1 and 3 of the petitioner's letter that was submitted in response to the RFE, are dated April 1, 2011, whereas page 2, which contains the revised job description incorporating the percentage of time to be spent on each job duty, is dated July 27, 2011. Also, the AAO notes that, save for the addition of the percentage of time spent on each job duty, the petitioner's support letter and the petitioner's letter in response to the RFE, are identical.

as described in the record of proceeding.

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)(1), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The petitioner stated that the beneficiary would be employed in a research analyst position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the evidence in the record of proceeding establishes that the proffered 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 AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.² As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Operations Research Analysts."

The AAO reviewed the information in the *Handbook* regarding the occupational category "Operations Research Analysts." However, the *Handbook* does not indicate that these positions 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 subchapter of the *Handbook* entitled "How to Become an Operations Research Analyst" states the following about this occupational category:

Applicants need a master's degree for most operations research positions, but a bachelor's degree is enough for many entry-level positions. Many schools offer bachelor's and advanced degree programs in operations research, but it is common for analysts to have degrees in related fields.

² All of the AAO's references are to the 2012-2013 edition of the Handbook, which may be accessed on the Internet at <http://www.bls.gov/ooh/>.

Education

Most employers prefer to hire applicants with a master's degree, but many entry-level positions are available for those with a bachelor's degree. Many schools offer bachelor's and advanced degree programs in operations research, management science, or a related field. Many operations research analysts have degrees in other technical fields, such as engineering, computer science, mathematics, and physics.

Because operations research is based on quantitative analysis, students need extensive coursework in mathematics. Courses include statistics, calculus, and linear algebra. Coursework in computer science is important because analysts rely on advanced statistical and database software to analyze and model data. Courses in other areas, such as engineering, economics, and political science, are useful because operations research is a multidisciplinary field with a wide variety of applications.

Continuing education is important for operations research analysts. Keeping up with advances in technology, software tools, and improved analytical methods is vital.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Operations Research Analysts, available on the Internet at <http://www.bls.gov/ooh/math/operations-research-analysts.htm#tab-4> (last visited December 4, 2012).

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.³ This designation is indicative of a comparatively low, entry-level position relative to

³ Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

others within the occupation.⁴ That is, in accordance with the relevant DOL explanatory information on wage levels, this Level I wage rate is only appropriate for a position in which the beneficiary is only required to have a basic understanding of the occupation and would be expected to perform routine tasks that require limited, if any, exercise of judgment. This wage rate also indicates that the beneficiary would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. In the instant case, this is further signified by the fact that the offered salary of \$28.75 per hour to the beneficiary is approximately \$5.00 less per hour than the 2010 median hourly wage of \$34.12 for operations research analyst positions (as listed in the *Handbook*). Further, and significantly for the consideration of this appeal, the LCA wage-level designation here, as it is appropriate only for entry-level positions, indicates that the proffered position would not exceed a relatively low echelon in the pertinent occupational classification.

The *Handbook* does not state that a baccalaureate or higher degree, *in a specific specialty*, or its equivalent is normally the minimum requirement for entry into the proffered position. This passage of the *Handbook* reports that employers prefer to hire an applicant with a master's degree, but a bachelor's degree is enough for many entry-level positions. The *Handbook* states that many schools offer bachelor's degrees and advanced degrees in operations research, management science, or a related field, but the *Handbook* continues by indicating that many operations research analysts have degrees in other technical fields, such as engineering, computer science, math, and physics. The *Handbook* notes that various courses are important to this occupation, including math, statistics, calculus, linear algebra, and computer science. The *Handbook* states that courses in engineering, economics, and political science are also important.

Here, although the *Handbook* indicates that a bachelor's or higher degree is required, it also indicates that baccalaureate degrees in various fields are acceptable for entry into the occupation. Therefore, the *Handbook* strongly indicates that a bachelor's degree *in a specific specialty* is not a normal, minimum entry requirement for this occupation, particularly at entry-level. Accordingly, as the *Handbook* indicates that working as a research analyst does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation.

⁴ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

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

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

Finally, in counsel's letter in response to the RFE, dated July 28, 2011, counsel for the petitioner discusses the Job Zone rating of Five in O*NET with respect to the educational requirements for the proffered position. Since this was raised by counsel for the petitioner, the AAO will briefly discuss the Job Zone rating of Five assigned to operations research analysts by O*NET. The AAO finds that an assignment of a "Job Zone Five" rating is not indicative of a specialty occupation. This is evident upon reading the O*NET Online Summary Report for Operations Research Analysts, which addresses the Job Zone rating system.⁵ The section reads as follows:

Job Zone

Title Job Zone Five: Extensive Preparation Needed

Education Most of these occupations require graduate school. For example, they may require a master's degree, and some require a Ph.D., M.D., or J.D. (law degree).

A designation of "Job Zone Five" indicates that a position requires "extensive preparation."⁶ It does not, however, demonstrate that at least a bachelor's degree in a specific specialty or its equivalent is required, and does not, therefore, demonstrate that a position so designated is a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).⁷

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

⁵ The O*NET Online "Summary Report for 15-2031.00 – Operations Research Analysts" can be accessed on the Internet at <http://www.onetonline.org/link/summary/15-2031.00> (last visited December 4, 2012).

⁶ O*NET Online Help, Job Zones, available on the Internet at <http://www.onetonline.org/help/online/zones> (last visited December 4, 2012).

⁷ See *id.* (confirming that Job Zone Five does not indicate any requirements for degrees in specific specialties).

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.⁸ 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)).

To support their assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner and counsel submitted copies of 15 job vacancy advertisements.

In order for the petitioner to establish that another organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Here, the petitioner submits no evidence demonstrating that any of the advertising companies are similar in size and scope to that of the petitioner, an eight-person financial transaction processing business. Thus, the record is devoid of sufficient information regarding the 15 advertising companies to conduct a legitimate comparison of each of these firms to the petitioner. Without such evidence, letters submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and another organization share the same general characteristics, information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements) may be considered. It is not sufficient for the petitioner to claim that the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

⁸ The AAO notes that, in the brief in support of the appeal, the petitioner's own counsel seems to acknowledge that the petitioner cannot satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), when it states "[t]he [proffered position] meets this standard under criteria 2, 3, and 4."

The advertisements that were provided establish, at best, that a bachelor's degree is generally required by the advertising employers for most of the positions posted, but a bachelor's degree or the equivalent in a *specific specialty* is not. In addition, even if all of the job advertisements indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that the submitted advertisements are relevant as the record does not indicate that the posted job advertisements are for parallel positions in similar organizations in the same industry.

Specifically, none of the 15 advertisements indicates that a bachelor's degree in a specific specialty is a requirement for entry into those positions. Nine employers require a bachelor's degree but do not specify any specialty and six employers indicate that a variety of degrees are acceptable. For instance, the advertisement for a research analyst position with The Brattle Group states that the ideal candidate will have "an undergraduate degree in a quantitative discipline (e.g.,] economics, math, finance, engineering, etc.)." The advertisement for a research analyst position with the Fors Marsh Group requires a "Ph[.]D[.] or MA/MS in Industrial/Organizational Psychology." Finally, the advertisement by an anonymous employer "[r]equires a B.A. in Economics, Finance or Mathematics."

Furthermore, as the aforementioned advertising entities include diverse businesses such as applied research consulting, public-sector market intelligence, a global membership association, NORC at the University of Chicago, Georgetown University, and the International Finance Corporation, they cannot be found to be similar organizations to the petitioner in terms of the type of business nor in size or scope. Thus, for the reasons discussed above, the petitioner's reliance on the job vacancy advertisements is misplaced. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.⁹

Thus, based upon a complete review of the record, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common in the petitioner's industry for positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, for the

⁹ Additionally, although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just four job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of research analyst at a financial transaction processing business required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of research analyst. Specifically, the petitioner failed to demonstrate how the research analyst duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. In the letter of support, dated April 1, 2011, the petitioner stated the following:

During her [master's degree] studies at the [redacted] [the beneficiary] took classes which gave her the skills needed to perform her current¹⁰ job duties[,] such as Statistical Application; Analytical Techniques[,] which included analytical techniques conventionally used in the [sic] planning, formulation and implementation[,] such as forecasting techniques and cost-benefit analysis; [and] Information Resource Management[,] where she learned computer programs used in developing and managing information necessary for decision-making[,] including the development and management of databases and the use of software applications for decision-making in both individual and distributed computing contexts.

While some of the courses listed on the copy of the beneficiary's transcript for the Master of Public Administration from the [redacted] may be beneficial in performing certain duties of a research analyst position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate (or higher) degree in a specific specialty, or its equivalent is required to perform the duties of the particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates a wage level based upon the occupational classification "Operations Research Analysts" at a Level I (entry level) wage. This designation is appropriate for positions for which the petitioner expects the beneficiary to have a basic understanding of the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that 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

¹⁰ The petitioner used the words, "her current job duties," in the context of the proffered position and the AAO must therefore question whether the beneficiary was working for the petitioner while this H-1B petition was pending an outcome. The AAO notes that the beneficiary's authorization for Optional Practical Training (OPT) employment, as a benefit of the beneficiary's former F-1 visa status, expired on February 22, 2011, before the filing of this H-1B petition on April 13, 2011.

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.

The evidence of record does not establish that this position is significantly different from other research analyst positions such that it refutes the *Handbook's* information that there are various acceptable degrees for entry into the occupation. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

Consequently, as the petitioner fails to demonstrate how the proffered position of research analyst is so complex or unique relative to other research analyst positions that can be performed by a person without at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or the equivalent, for the position. Of course, the AAO will necessarily review and consider whatever evidence the petitioner may have submitted with regard to its history of recruiting and hiring for the proffered position and with regard to the educational credentials of the persons who have held the proffered position in the past.

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

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree-requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not

meet the statutory or regulatory definition of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.

Counsel for the petitioner stated, in a letter dated July 28, 2011 and submitted in response to the RFE, that the proffered position is a newly created position. Thus, the record of proceeding 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.

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

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

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. The AAO acknowledges that the petitioner believes its proffered position involves specialized and complex duties. However, upon review of the record, there is insufficient evidence to establish that the duties of the research analyst 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 notes that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish 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 "Operations Research 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. Thus, the petitioner has not established that the duties of the position are 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.

Based upon its review of the totality of the evidence in this record of proceeding, the AAO also finds that the petitioner has not established that the beneficiary would actually perform the services of an operations research analyst if this petition were approved. For this separate and independent reason also, the petitioner has failed to establish that the particular position for which this petition was filed is a specialty occupation.

The AAO acknowledges the petitioner's claims to the effect that the beneficiary's work would require the quantitative applications and methodologies that characterize the Operations Research Analysts' occupational classification. However, the record of proceeding is devoid of any documentary evidence that supports these claims in any substantial manner. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). 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).

Further, the AAO notes that the academic transcript submitted into the record is not indicative of sufficient operational-research-analyst-related coursework to reflect that the beneficiary would be applying at least a bachelor's degree level of a body of highly specialized knowledge in operations research analysis or any closely related field, if this petition were approved. One cannot apply what one has not learned. The AAO also finds that the petitioner's focus on just a few courses reflects this deficiency. Doubt cast on any aspect of the petitioner's proof may, of

course; lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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

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