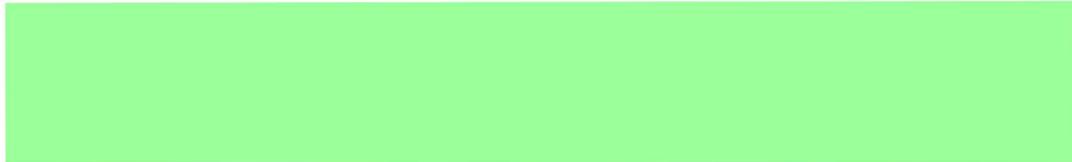
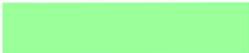


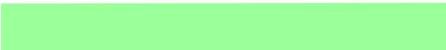


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **FEB 14 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:

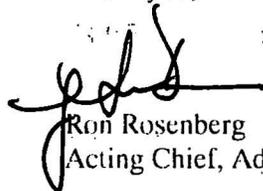


INSTRUCTIONS:

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,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, (“the director”) denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on November 8, 2011. The petitioner stated on the Form I-129 that it is a seafood processor established in 2006 with 75 regular employees and 600 seasonal employees. The petitioner seeks to employ the beneficiary as a production manager and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on February 17, 2012, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel asserts that the director’s basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner’s Form I-129 and supporting documentation; (2) the director’s request for evidence (RFE); (3) the response to the RFE; (4) the director’s denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, with counsel’s brief and additional documentation. The AAO reviewed the record in its entirety before issuing its decision.

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

As a preliminary matter, the AAO notes that even if the petitioner overcame the basis for the director’s denial of the petition (which it has not), the petition must still be denied.<sup>1</sup> Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to submit a Labor Condition Application (LCA) that corresponds to the petition. For this additional reason, which is considered as an independent and alternative basis for the denial of the petition, the petition may not be approved.

In this matter, the petitioner stated that it seeks the beneficiary’s services as a production manager at an annual wage of \$48,360. In the petitioner’s initial letter in support of the petition, the petitioner noted that the beneficiary would be responsible for all phases of seafood production, from the point of seafood reception to the point of product shipment to market. The petitioner stated that as the production manager, the beneficiary would perform the following duties:

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<sup>1</sup> The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). It was in this review that the AAO observed an additional ground for denial of the petition, which, although not noted by the director, nevertheless precludes approval of this petition.

### Production Management (70%)

- Initiate plans and processes to minimize production costs through effective utilization of manpower, equipment facilities and capital
- Assure achievement of business objectives and production schedules while ensuring product standards meet all regulatory requirements and exceed customer expectations
- Establish and maintain a system of accountability throughout the production department, utilizing a strong goal-oriented strategy
- Encourage the development of new production methods and focus on fact-based problem solving concepts
- Ensure that all production supervisors and staff thoroughly understand and follow, without deviation, [the petitioner's] Good Management Practices, HACCP and QC Plans
- Maintain direct communication lines with the Plant Manager, Quality Control Manager and Chief of Maintenance
- Generate and maintain all required production documentation, both regulatory and internal; track product, [sic] by lot through all processes evaluating yield and production efficiency
- Conduct weekly and monthly production meetings with all production supervisory staff
- Oversee and evaluate performance of Production Department employees.

### Resource Management (30%)

- Maintain accurate, real time inventories of all product, process and packaging materials
- Continue to develop and maintain [the petitioner's] Product Traceability Program (Lot Tracking) in our Craig facility
- Coordinate product shipments with [the petitioner's] Shipping Department
- Participate in ongoing facility development team, collaborating with engineering, maintenance and plant management to continuously improve the competitiveness of our production efficiency.

The petitioner listed the knowledge and skills that the beneficiary would use in the proffered position but did not indicate that the proffered position required an academic degree. The petitioner also included an apparent advertisement for the proffered position. The job description provided an overview of the duties of the position and although the petitioner noted that the incumbent must have proficient knowledge of HACCP and SSOP, OSHA standards and regulations, fair labor standards, workmen's compensation principles, and knowledge of basic bookkeeping principles, as well as a number of other management, interpersonal and team building skills, the advertisement did not identify the necessity of any academic degree or equivalent experience.

The petitioner also provided its organizational chart, printouts from its website, and information regarding the beneficiary's educational and work experience. The LCA submitted in support of

the instant H-1B petition designated the proffered position as a production manager which corresponds to the occupational classification of "Industrial Production Manager" - SOC (ONET/OES Code) 11-3051, at a Level 1 (entry level) wage.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought and issued an RFE on November 18, 2011. The AAO notes that pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director broad discretionary authority to require evidence to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. A service center director may issue an RFE for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any RFE issued. See 8 C.F.R. § 214.2(h)(9). The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(1), (8), and (12).

With the RFE, the director notified the petitioner that additional documentation was required to establish that the present petition meets the criteria for H-1B classification. The AAO finds that, in the context of the record of proceeding as it existed at the time the RFE was issued, the request for additional evidence was appropriate under the above cited regulations, not only on the basis that the director was seeking required initial evidence, but also on the basis that the evidence requested was material in that it addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it had H-1B caliber work for the beneficiary for the entire period of employment requested in the petition.

In response, the petitioner submitted a letter indicating that the responsibilities of the proffered position: "include a substantial degree of management of human resources, workflow, supervision and accountability, risk and loss mitigation, awareness of engineering and production related terminology, regulations, laws, and dissemination of this material to staff, workers, management." The petitioner noted that its facilities are organizationally complex and "it is important that [it] hire[s] qualified employees, particularly those who will be tasked with upper level managerial duties, so as to ensure compliance with [its] safety, profitability and efficiency standards." The petitioner stated: "the position would often require [the beneficiary] to engage in independent work with minimum management input, have direct communication with various other high level Plant Managers, or be responsible for managing a combined workforce comprising up to 200 employees at a time." The petitioner repeated the previously provided position description and added that it normally requires its production managers to have earned the minimum of a bachelor's degree in engineering, science, business, management or a related subject. The petitioner also included an overview of its production system including a list of general duties performed by the production manager.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To make this

determination, the AAO turns to the record of proceeding. To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that “[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation.”

When determining eligibility for H-1B classification, it is incumbent upon the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor’s degree level of a body of highly specialized knowledge in a specific specialty. The petitioner claims that the position involves a variety of managerial duties and emphasizes that those employees tasked with upper level managerial duties must be qualified. The petitioner adds: “the position would often require [the beneficiary] to engage in independent work with minimum management input, have direct communication with various other high level Plant Managers, or be responsible for managing a combined workforce comprising up to 200 employees at a time.” However, these duties and the level of responsibility inherent within the description when set against the contrary level of responsibility conveyed by the wage level indicated on the LCA submitted in support of the petition undermines the petitioner’s credibility with regard to the actual nature and requirements of the proffered position. That is, the petitioner’s assertions regarding the proffered position are questionable when reviewed in connection with the LCA submitted with the Form I-129 petition. As previously mentioned, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational title of “Industrial Production Manager” - SOC (ONET/OES Code) 11-3051, at a Level 1 (entry level) wage.

We observe that wage levels should be determined only after selecting the most relevant O\*NET occupational 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.<sup>2</sup> Prevailing wage determinations start with an entry level wage and progress to a wage that is commensurate with that of a Level 2 (qualified), Level 3 (experienced), or Level 4 (fully competent worker) 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.<sup>3</sup> The U.S. Department of Labor (DOL)

<sup>2</sup> See DOL, Employment and Training Administration’s *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. November 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>3</sup> A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a “1” to represent the job’s requirements. Step 2 addresses experience and must contain a “0” (for at or below the level of experience and SVP range), a “1” (low end of experience and SVP), a “2” (high end), or “3” (greater than range). Step 3 considers education required to perform the job duties, a “1” (more

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.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels.<sup>4</sup> A Level 1 wage rate is described by DOL as follows:

**Level 1** (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.

The petitioner claims that the duties of the proffered position require the successful incumbent to exercise a high level of responsibility including managing over 200 employees and exercising independence with minimal management input; however, the AAO must question the level of complexity and independent judgment and understanding required for the position as the LCA is certified for a Level 1 entry-level position. The LCA's wage level indicates the position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands and high-level duties and responsibilities of the proffered position. 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).

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than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

<sup>4</sup> See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. November 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

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

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

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

[Italics added]. The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties of the proffered position, that is, specifically, that corresponds to the level of work and responsibilities that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and responsibilities in accordance with the requirements of the pertinent LCA regulations. For this additional reason the petition may not be approved.

Moreover, as will be discussed further below, the AAO finds that, fully considered in the context of the entire record of proceedings, including the requisite LCA, the petitioner failed to provide a consistent characterization of the nature of the proffered position and in what capacity the petitioner actually intended to employ the beneficiary. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho, supra.*

It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below for dismissing the appeal.

Next, the AAO will address the issue of whether the petitioner established that the proffered position is a specialty occupation. Based upon a complete review of the record of proceeding,

the AAO concurs with the director's ultimate decision 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 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 (5<sup>th</sup> 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), 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 identified the proffered position as a production manager and specified the occupational classification as most closely resembling the proffered position as that of an industrial production manager.

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 the normal minimum requirement for entry into the particular position. The AAO recognizes the U.S. Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>5</sup>

Turning to the *Handbook*’s chapter on the occupation of industrial production managers we find that the *Handbook* confirms that a bachelor’s degree in a specific discipline is not required to perform the duties of the occupation. The *Handbook* indicates:

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<sup>5</sup> All of the AAO’s references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

Most<sup>6</sup> industrial production managers have a bachelor's degree in business administration or industrial engineering. Sometimes, production workers with many years of experience take management classes and become a production manager. At large plants, where managers have more oversight responsibilities, employers may look for managers who have a Master of Business Administration (MBA) or a graduate degree in industrial management.

The *Handbook* also recognizes: “[s]ome industrial production managers begin as production workers and move up through the ranks. They first advance to a first-line supervisory position before eventually being selected for management.” Thus, the *Handbook* reports that there are a variety of paths available to enter into the proffered occupation, not just through an academic degree. This report corresponds to the petitioner’s initial letter and advertisement for its production manager which did not indicate that the position required any academic degree.

In response to the RFE, the petitioner added that the individual in the proffered position would require the minimum of a bachelor’s degree in engineering, science, business, management or a related subject. It must be noted that the petitioner’s claimed entry requirement of at least a bachelor’s degree in “one of a variety” of majors does not denote a requirement in a specific specialty. Although counsel asserts on appeal that the director erred when finding that the proffered position is not a specialty occupation because more than one academic major could provide the appropriate educational background to perform the position duties, we do not find the assertion persuasive.<sup>7</sup>

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<sup>6</sup> Even though the *Handbook* indicates that most industrial production managers have a bachelor’s degree in business administration or industrial engineering, the first definition of “most” in *Webster’s New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is “[g]reatest in number, quantity, size, or degree.” As such, if merely 51% of industrial production manager positions require at least a bachelor’s degree in business administration or industrial engineering or a closely related field, it could be said that “most” industrial production manager positions require such a degree. It cannot be found, therefore, that a particular degree requirement for “most” positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part “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.” § 214(i)(1) of the Act.

<sup>7</sup> Counsel attaches a copy of an unpublished decision (*Residential Finance Corporation v. USCIS*, 2:12-cv-00008, 2012) issued in the U.S. District Court for the Southern District of Ohio, Eastern Division, in support of his assertion. However, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

In this matter, the petitioner indicated that several general fields (engineering, science, business, management or a related subject) would be acceptable to properly perform the duties of the position. However, there must be a close correlation between the required "body of highly specialized knowledge" and the position. Accordingly, a minimum entry requirement of a degree in two or more disparate and general fields, such as those the petitioner finds acceptable in this matter, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

The petitioner in this matter has not explained how the degrees in the general fields cited require essentially the same body of highly specialized knowledge. For example, a business administration degree is a general degree – it does not include the same core competencies as required by an engineering degree or a science or management degree. These majors, without specialization, are inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). To reiterate general degrees supported by a wide range of coursework do not meet the statutory requirement that the degree be "in *the* specific specialty." Moreover, it is not readily apparent that the acceptable fields of study are closely related or are directly related to the duties and responsibilities of the particular position proffered in this matter. The petitioner claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation.

The overarching reason for the AAO's dismissal of this appeal is that the proposed duties as described in the record do not establish that performance of the proffered position requires the theoretical and practical application of at least a bachelor's degree level of highly specialized knowledge in a specific specialty, as required by the H-1B specialty occupation provisions of the Act and their implementing regulations. The petitioner's descriptions of the proposed duties are limited to general managerial functions which, even when read in the context of the evidence

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(b)(6)

submitted in support of the petition, do not convey the educational level of any body of highly specialized knowledge that the beneficiary would apply theoretically and practically.

Neither the *Handbook* nor the petitioner's description of duties supports the proposition that the proffered position is one that meets the statutory and regulatory provisions of a specialty occupation. As the *Handbook* does not support the proposition that the proffered position is one that normally requires a minimum of a bachelor's degree, or the equivalent in a specific specialty, to satisfy this first alternative criterion at 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 qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue.

In that regard, counsel on appeal references the DOL's O\*NET designation of Job Zone 3 – Education and Training Code for the occupation of industrial production manager; however this designation does not demonstrate that a bachelor's degree in a specific specialty is required, and does not, therefore, demonstrate that a position so designated is in a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Moreover, the actual discussion regarding the Job Zone 3 designation explains that this zone signifies only that most occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree. Therefore, the O\*NET information is not probative of the proffered position qualifying as a specialty occupation.

The AAO has also reviewed the expert opinion letter prepared by [REDACTED], Lead Faculty and Area Chair in the College of Undergraduate Business Administration & Management Information Systems at the [REDACTED] concluded that the proffered position of production manager requires the services of someone with advanced training through a bachelor's program in business administration, management, or a closely related field. [REDACTED] does not list the reference materials on which he relies as a basis for his conclusion. It appears that [REDACTED] did not base his opinion on any objective evidence, but instead restates the proffered position description as provided by counsel. 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).

Moreover, D [REDACTED] finds that the proffered position requires the attainment of a bachelor's degree or its equivalent in business administration, management or a related field. Even if established by the evidence of record, which it is not, the requirement of a bachelor's degree in business administration is inadequate to establish that a position qualifies as a specialty occupation. Again as observed above, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. *Cf. Matter of Michael Hertz Associates, supra*. In addition to proving that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. §

214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). Therefore, the AAO finds that the letter from Dr. Jelen does not establish that the proffered position is a specialty occupation.

The petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that there is a requirement for at least a bachelor's degree in a specific specialty. In addition, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that this position is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry. Further, as found above, the LCA submitted with the petition undermines the petitioner's claim that the position requires the performance of duties for which a baccalaureate or higher degree or its equivalent in a specific specialty 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 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 requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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.

Again, 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 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

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. The record does not include other persuasive evidence from other firms or individuals in the industry attesting that only degreed individuals are routinely employed and recruited for similar position.

The petitioner has provided two advertisements to demonstrate that there is an industry-wide requirement for at least a bachelor's degree in a specific discipline for the proffered position. The first advertisement is for a production manager I for a food products company which requires a business management or related college degree. The second advertisement is for a production supervisor for an undescribed company which indicates that a bachelor's degree is preferred or a minimum of two years plant experience. Neither advertisement provides sufficient information to determine that the advertising organizations are similar to the petitioner. We also observe that the petitioner did not provide any independent evidence of how representative these

job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices. It must also be noted that even if both of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these two advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position required a bachelor's or higher degree in a specific specialty or its equivalent for organizations that are similar to the petitioner, it cannot be found that such a limited number of postings 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 normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

Thus, based upon a complete review of the record, the petitioner has not established that at least a bachelor's degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has also failed to 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." The evidence of record does not include sufficient consistent and probative evidence to distinguish the proffered position as unique from or more complex than a position that does not require a baccalaureate or higher degree in a specific discipline. The AAO also hereby incorporates by reference and reiterates its earlier discussion that the LCA for the proffered position indicates the proffered position is a low-level, entry position relative to others within the occupation. Based upon the wage level, the beneficiary is only required to have a basic understanding of the occupation. Furthermore, based upon that LCA wage level, the beneficiary is expected to perform routine tasks that require limited, if any, exercise of independent judgment. Additionally, contrary to the petitioner's statements, the certified LCA submitted with the petition indicates that the beneficiary's work will be closely supervised and monitored and he will receive specific instructions on required tasks and expected results.

The record does not sufficiently demonstrate how the duties of the proffered position 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. Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions that do not require 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 AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) -- the employer normally requires a degree or its equivalent for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position when considering this criterion.

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 a specific specialty, 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 performance requirements of the position.

In the instant matter, in response to the director's RFE, the petitioner claimed that it normally required its production managers to have earned the minimum of a bachelor's degree in engineering, science, business, management or a related subject. The petitioner indicated that a recent hire for the proffered position at another of its plants possessed over 20 years of seafood industry experience, twelve years of which were earned managing seafood production plants. The petitioner noted that this individual also held an associate of applied sciences diploma. The petitioner included an evaluation of this individual's academic and work history prepared by [REDACTED] who opined that this individual had attained the equivalent of at least a bachelor of business administration degree from an accredited institution of higher education in the United States. Although the evaluation of this individual's academic and work history is questionable on several levels,<sup>8</sup> suffice it to say, that as observed above, accepting a general purpose business degree, without specific specialization, is tantamount to an admission that the proffered position is not in fact a specialty occupation.<sup>9</sup>

Moreover, 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

<sup>8</sup> For example, the petitioner does not provide the underlying evidence that [REDACTED] reviewed, if any. Further, the record does not contain evidence that [REDACTED] is qualified to provide academic credit for work experience.

<sup>9</sup> The petitioner in this matter claims that it has been in business since 2006 and that it operates facilities in [REDACTED] however, the petitioner has identified only one individual it hired for the position of production manager. The petitioner's failure to identify the educational and work background of other employees in the proffered position raises concerns regarding the petitioner's actual educational requirements for the proffered position.

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 384. In other words, if a petitioner's degree requirement is only symbolic and 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").

In this matter, the petitioner has not provided evidence establishing that it normally hires production managers who possess a bachelor's degree or its equivalent in a specific discipline. Accordingly, the petitioner has not established that it normally requires at least a bachelor's degree, or the equivalent, in a specific specialty for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Moreover, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position on the LCA as a low, entry-level position relative to others within the occupation. The petitioner designated the position as a Level 1 position (out of four possible wage levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation."<sup>10</sup> Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and/or complex duties as such a position would likely be classified at a higher-level, requiring a significantly higher prevailing wage. The petitioner has not provided sufficient probative evidence to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Again, the petitioner's acceptance of a degree in a generalized field of study only confirms that the proffered position is not a specialty occupation. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements 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 additional, supplement requirements 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. Thus, the appeal will be dismissed and the petition denied for this reason.

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<sup>10</sup> *See* DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. May 9, 2005), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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