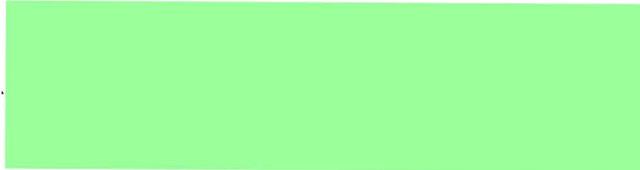




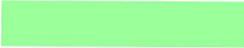
U.S. Citizenship
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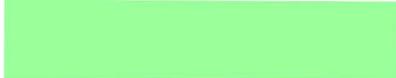
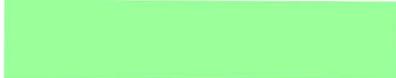
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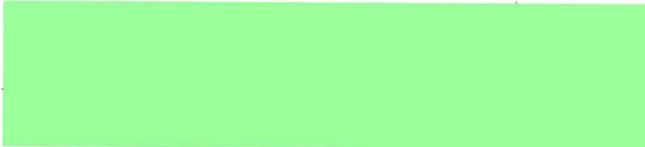
OFFICE: VERMONT SERVICE CENTER

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:

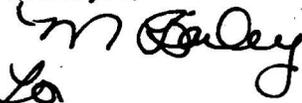


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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.

On the Form I-129 visa petition and supporting documentation, the petitioner describes itself as a company, established in 2001, that owns and operates two restaurants.¹ In order to employ the beneficiary in what it designates as a management analyst position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submitted a brief.

Upon review of the documentation, the AAO found the evidence of record insufficient to establish eligibility for the benefit sought and issued a request for evidence (RFE) on October 10, 2012. In the RFE, the AAO noted that the Labor Condition Application (LCA) submitted with the Form I-129 indicates that the prevailing wage for the occupational category Management Analysts - SOC (ONET/OES) code 13-1111.00, for a Level I position, was \$17.16 per hour. The prevailing wage source is listed as OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.² However, a search of the Foreign Labor Certification (FLC) Data Center, Online Wage Library (OWL) indicates that the prevailing wage for the occupational category of "Management Analysts" for Knox County (Knoxville, TN) was at least \$22.40 per hour when the LCA was submitted to the U.S. Department of Labor (DOL) on July 22, 2010 and certified on July 28, 2010, which is higher than the petitioner's proffered hourly wage of \$17.16.³

¹ In a letter of support dated July 19, 2010, the petitioner stated that it intends to open a third restaurant.

² The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/> (last visited December 17, 2012). The OES All Industries Database is available at the Foreign Labor Certification Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

³ For additional information on the prevailing wage for "Management Analysts" in Knox County, see the All Industries Database for 7/2010 - 6/2011 for Management Analysts at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=13-1111&area=28940&year=11&source=1> (last visited February 13, 2013).

In addition, the section of the Foreign Labor Certification Data Center website containing the dates the LCA was submitted to U.S. Department of Labor (DOL) and certified by DOL is accessible on the Internet at <http://www.flcdatacenter.com/CaseH1B.aspx>. The website states that the employer-specific case information

The AAO requested the petitioner to submit a valid LCA with the correct wage certified on or before the filing of the Form I-129 on August 6, 2010. Counsel for the petitioner responded to the AAO's RFE on November 9, 2012 with a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the director's RFE; (4) the director's denial letter; (5) the Form I-290B and supporting documentation; (6) the AAO's RFE; and (7) the response to the AAO's RFE. 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 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.

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a management analyst to work on a part-time basis (20 hours per week) at the rate of pay of \$343.20 per week (\$17,846 per year). With the Form I-129 petition, the petitioner provided a letter of support dated July 19, 2010, which included a description of the proffered position. Specifically, the petitioner provided the following description of proposed duties:

[The management analyst] will be responsible for evaluating and proposing various ways to improve [the petitioner's] organization's structure, efficiency, and profits. In pursuit of these objectives, the management analyst will perform project, system, policy and/or procedural analysis, including conducting research, determining pertinent issues, summarizing findings, and presenting results. This will be partially accomplished by conferring with management at the restaurants as well as other personnel. The management analyst will also be responsible for reviewing inventory and supplies and then determining the best methods to avoid excess waste which is often a major concern in the restaurant business. [The petitioner] also anticipate[s] that the management analyst will be able to determine the most cost efficient manner in which supplies may be order [sic] in bulk and shared among the restaurants rather than smaller and more costly individual contracts. Overall, the duties of the management analyst will be, in general, as follows:

- establish overall direction and vision as a basis for objectives – 25%
- review [the petitioner's] current policies, structural set-up, staffing, overall operations and activities of the three restaurants – 25%
- determine financial, budgetary, administrative, operational and organizational problems by analyzing relevant data and by interviewing managers and employees – 20%
- develop recommendations and solutions based on data analysis finding and

that appears on FLCDataCenter.com is provided to DOL by employers who submit foreign labor certification applications.

- prepare reports for the management – 15%
- assist in the implementation of changes and monitoring overall effects, and propose changes, as deemed necessary – 15%

The petitioner also stated that "[t]his position requires the theoretical knowledge and practical expertise gained through at least a bachelor's degree in management or related field [sic]."

Further, the petitioner submitted an LCA in support of the instant H-1B petition. As already noted, the LCA designation for the proffered position corresponds to the occupational classification of "Management Analysts" – SOC (ONET/OES Code) 13-1111.00, which the petitioner claimed was at a Level I (entry level) wage of \$17.16 per hour.

In addition, the petitioner submitted supporting documentation, including the following: (1) an unsigned 2009 tax return; (2) photos of the petitioner's restaurants; (3) simple layout designs for two restaurants; (4) a menu; and (5) evidence of the beneficiary's academic credentials.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on August 13, 2010. The director outlined the evidence to be submitted. The AAO notes that the director specifically requested the petitioner to submit a more detailed description of the proffered position.

On September 14, 2010, the petitioner and counsel responded by submitting further information regarding the proffered position and additional evidence. Notably, the petitioner did not provide a more detailed description of the duties of the proffered position. The AAO observes that despite the director's finding that the petitioner's description of the proposed duties was vague, the petitioner elected not to provide a detailed description of the duties the beneficiary would perform. No explanation was provided. Specifically, the petitioner submitted a letter dated August 31, 2010, which provided the responsibilities of the proffered position as follows:

[The management analyst] will be responsible for the management, analysis and review of the annual operating and capital budgets. In pursuit of his/her duties, the Management Analyst will gather and organize data from sources and analyze and interpret data collected to prepare reports and policy recommendations for management consideration and use in the business.

In addition, the petitioner stated that "the duties that [the petitioner] require[s] of [the] Management Analyst are so complex and specialized that they can be performed only by a person with at least a bachelors [sic] degree in Business Administration or Masters [sic] Degree in International Management." Later in the same letter, the petitioner claimed that "[t]his knowledge may only be gained through the attainment of a baccalaureate or higher degree or its equivalent in Business Administration."

In response to the RFE, the petitioner and counsel also submitted, in part, (1) an excerpt entitled "Summary Report for: 13-1111.00 – Management Analysts" from the Occupational Information

Network (O*NET) OnLine; (2) a copy of the petitioner's internal job posting for the proffered position; (3) job vacancy announcements; (4) an unsigned 2009 tax return and related financial documents; (5) an organizational chart; (6) business license and seller's permit; (7) a list of the petitioner's job positions; and (8) an internal job posting for the proffered position.

The director reviewed the record of proceeding and determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition on September 24, 2010. Counsel submitted an appeal of the denial of the H-1B petition.

Having laid out the factual and procedural history of this case, the AAO will now review the director's 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. 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.

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 as

described in the record of proceeding.⁴

Upon review of the petitioner's description of the duties of the proffered position, the AAO finds that the petitioner describes the proposed duties in terms of generalized and generic functions that fail to convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will "establish overall direction and vision as a basis for objectives." However, the statement fails to provide any insight into the beneficiary's actual duties, nor does it include any information regarding the specific tasks that the beneficiary will perform. Additionally, the petitioner claims that the beneficiary will "review [the petitioner's] current policies, structural set-up, staffing, overall operations and activities of the three restaurants." The petitioner fails to provide sufficient information to establish the actual work involved in "review[ing]" these aspects of the petitioner's business operations. Additionally, the petitioner fails to demonstrate how the performance of this duty, as described in the record, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

The petitioner further states that the beneficiary will "develop recommendations and solutions" as well as "prepare reports for the management." The petitioner did not provide any further information to establish how the performance of these tasks involves the theoretical and practical application of a body of highly specialized knowledge. That is, the petitioner fails to sufficiently define how these responsibilities require any particular educational attainment. The petitioner further claims that the beneficiary will "assist in the implementation of changes and monitoring overall effects, and propose changes, as deemed necessary." The petitioner's statement fails to convey any pertinent details as to the actual work involved in this task. That is, the petitioner states that the beneficiary will "assist" in this duty, but fails to sufficiently define how this translates to specific responsibilities as the phrase "assist" does not delineate the actual work the beneficiary will perform. Furthermore, the petitioner fails to convey how a baccalaureate level of education (or higher) in a specific specialty, or its equivalent, would be required to perform the task. Thus, the overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations.

Such generalized information does not in itself establish a necessary correlation between any dimension of the proffered position and a need for a particular level of education; or educational equivalency, in a body of highly specialized knowledge in a specific specialty. The AAO also observes, therefore, that it is not evident that the proposed duties as described in the petitioner's job descriptions, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described by the petitioner, the AAO finds, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that

⁴ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested (even as a part-time position), so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position. Notably, the petitioner did not provide documentation to substantiate the job duties and responsibilities of the proffered position.

Furthermore, upon review of the record of proceeding, the AAO notes that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

For example, in the letter of support (dated July 19, 2010) submitted with the petition, the petitioner stated that "[t]his position requires the theoretical knowledge and practical expertise gained through at least a **bachelor's degree in management** or related filed [sic]." In the August 31, 2010 letter, submitted in response to the director's RFE, the petitioner stated that "the duties that [the petitioner] require[s] of [the] Management Analyst are so complex and specialized that they can be performed only by a person with at least a **bachelors [sic] degree in Business Administration or Masters [sic] Degree in International Management.**" However, further in the letter, the petitioner indicated that the proffered position requires "a **baccalaureate** or higher degree or its equivalent in **Business Administration.**" The petitioner also submitted an internal job posting for the proffered position, in response to the RFE, which indicated that the proffered position requires a **master's degree in management.** (Emphasis added in all examples.) No explanation for the variances was provided.

The petitioner's claim that a bachelor's degree in business administration is a sufficient minimum requirement for entry into the proffered position is 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 demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. 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).⁵

Again, the petitioner in this matter 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 director's decision must therefore be affirmed and the petition denied on this basis alone.

Furthermore, based upon a review of the record of proceeding, the AAO finds that there are additional discrepancies and inconsistencies with regard to the proffered position that preclude the approval of the petition. For instance, there are discrepancies between what the petitioner claims about the occupational classification and level of responsibility inherent in the proffered position set against the contrary occupational classification and level of responsibility conveyed by the wage level indicated on the LCA submitted in support of the petition.

As previously discussed, the petitioner submitted an LCA in support of the instant petition that designated the proffered position to corresponding occupational category of "Management Analysts" - SOC (ONET/OES) code 13-1111.00. The petitioner claims the wage level for the proffered position in the LCA corresponds to a Level I (entry). The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

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.

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

⁵ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

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.⁶ 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.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described 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.

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.

In the instant case, the petitioner and counsel repeatedly claim that the proffered position involves complex, unique and/or specialized tasks. In the July 19, 2010 letter of support, the petitioner indicates that it expects the beneficiary be responsible for "establish[ing] overall direction and vision." "to, i) demonstrate decision-making and problem-solving skills combined with analytical, quantitative and creative skills; ii) have the ability to analyze, recommend and implement process improvements; and iii) have the expertise at implementing and monitoring quality control measures." In response to the RFE, the petitioner claims that the position involves "[f]orecasting of cash flow and expenses [which] requires expertise in economics, statistics, and finance." The petitioner provided inconsistent information regarding its academic requirements for the position but within the record claims that the position requires an individual with master's degree in

⁶ 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 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.

international management/management. The petitioner claims that "the beneficiary will be directly under the president [of the petitioning company]." In response to the RFE and in the appeal, the petitioner and counsel repeatedly state that the duties of the proffered position are complex, unique and/or specialized.

The AAO observes that this characterization of the position and the claimed duties and responsibilities conflict with the wage-rate element of the LCA, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. The wage rate specified in the LCA indicates that the proffered position only requires a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she 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. This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the assertions by the petitioner regarding the demands and level of responsibilities of the proffered position.

Moreover, the AAO finds that the proffered wage of \$17.16 per hour for the occupational category "Management Analysts" at a Level I, is lower than the prevailing wage in the area of intended employment. Specifically, the prevailing wage for "Management Analysts," at a Level I, for Knox County (Knoxville, TN) was \$22.40 per hour when the LCA was submitted to DOL on July 22, 2010 and certified on July 28, 2010.⁷ The AAO notes that the database the petitioner used to determine the prevailing wage was for "7/2009 – 6/2010" and was no longer valid at the time of filing the LCA. That is, at the time the LCA was filed, the FLC Data Center, OWL had already published the prevailing wage database for "7/2010 – 6/2011." Thus, the petitioner should have used the database for 7/2010 - 6/2011, which would have rendered a minimum prevailing wage of at least \$22.40 for "Management Analysts."

In response to the AAO's RFE on this issue, counsel claims that "there must have been a delay in the posting of the new wages or an error by DOL that was corrected at a later date." Counsel further contends that the "prevailing wage that was submitted and approved on the LCA, [sic] was the correct wage based on the information available at the time of submission." Counsel submitted printouts from the FLC Data Center, OWL for 7/2009 – 6/2010 and 7/2010 – 6/2011 for the occupation "Management Analysts" for the area of intended employment. The documents were printed on November 5, 2012. The documentation confirms that the petitioner's offered wage was below the prevailing wage in the area of intended employment as of the time of filing the application.

Upon review of the response to the AAO's RFE, the AAO observes that counsel did not provide any probative evidence to substantiate his claim that there was a delay in the posting of new wages or an error by DOL that was later corrected. Counsel did not submit a printout of the 7/2010 – 6/2011

⁷ It must be noted that the proffered wage of \$17.60 per hour for 20 hours per week equates to \$17,846 per year. The prevailing wage for "Management Analysts," at a Level I, for Knox County (Knoxville, TN) was \$22.40 per hour at the time the LCA was filed, which equates to \$23,296 per year. Thus, the petitioner's offered wage to the beneficiary was \$5,450 per year below the prevailing wage at that time.

prevailing wage database for "Management Analysts" printed in July 2010 showing a different prevailing wage than \$22.40 per hour. He did not provide documentation from DOL announcing that an error had been made or corrected for the prevailing wage determination, nor did he submit any other documentation to support his assertion. Thus, counsel made a supposition but provided absolutely no evidence to substantiate his claim. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted. Thus, even if it were determined that the petitioner overcame the director's ground for denying the petition, for this reason also the H-1B petition cannot be approved. It is considered an independent and alternative basis for denial.

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 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.

The petitioner's statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict, along with the discrepancies in the stated educational requirements for the proffered position, undermines the overall credibility of the petition. The petitioner did not provide a credible explanation for the inconsistencies. The AAO finds that fully considered in the context of the entire record of proceeding, the petitioner failed to establish 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*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

Furthermore, the AAO reviewed the record of proceeding in its entirety and, as will be discussed, finds that the petitioner 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. For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the inconsistencies and discrepancies in the record of proceeding as well as the material evidentiary deficiencies regarding the beneficiary's proposed employment into its analysis below for dismissing the appeal.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by

the AAO when determining these criteria include: whether the DOL's *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

The AAO will now look at the *Handbook*, an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁸ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Management Analysts."

The AAO reviewed the chapter of the *Handbook* entitled "Management Analysts," including the sections regarding the typical duties and requirements for this occupational category.⁹ However, the *Handbook* does not indicate that "Management Analysts" comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "How to Become a Management Analyst" states, in part, the following about this occupation:

Education

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

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

Analysts also routinely attend conferences to stay up to date on current developments

⁸ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

⁹ For additional information regarding the occupational category "Management Analysts," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Management Analysts, on the Internet at <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-1> (last visited February 13, 2013).

in their field.

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

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the wage level of the proffered position as a Level I (entry level) position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Rather, the *Handbook* states that many fields of study provide a suitable education for management analysts. The *Handbook's* narrative indicates that common fields of study include business, management, accounting, marketing, economics, statistics, computer and information science, and engineering. According to the *Handbook*, a range of programs can help people prepare for jobs in this occupation. However, the *Handbook* does not conclude that normally the minimum requirement for entry into these positions is at least a bachelor's degree in a *specific specialty*, or its equivalent.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields (such as business, management, accounting, marketing, economics, statistics, computer and information science and engineering) 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.¹⁰ Section 214(i)(1)(B) of the Act (emphasis added).

Here, although the *Handbook* indicates that a bachelor's is the typical entry-level requirement, it also indicates that baccalaureate degrees in various fields are acceptable for entry into the

¹⁰ Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

occupation. In addition to recognizing degrees in disparate fields (i.e., business, management, accounting, marketing, economics, statistics, computer and information science and engineering), the *Handbook* also states that a degree in business is acceptable. As noted above, although a general-purpose bachelor's degree, such as a degree in business, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Therefore, the *Handbook's* recognition that a general, non-specialty degree in business is sufficient for entry into the occupation strongly suggests that a bachelor's degree in a specific specialty is not a normal, minimum entry requirement for this occupation. Furthermore, the narrative of the *Handbook* indicates that a degree in engineering is also acceptable for management analyst positions. The issue here is that the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, it is not readily apparent that a degree in any and all engineering specialties is directly related to the duties and responsibilities of a management analyst. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Accordingly, as the *Handbook* indicates that working in these positions 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.

In response to the director's RFE, the petitioner and counsel submitted an O*NET OnLine Summary Report for the occupational category "Management Analysts" to support the assertion that the proffered position qualifies as a specialty occupation. The AAO reviewed the O*NET OnLine Summary Report in its entirety. However, upon review of the of the Summary Report, the AAO finds that it is insufficient to establish that the position qualifies as a specialty occupation normally requiring at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation. The Summary Report for management analysts has a designation of Job Zone 4. This indicates that a position requires considerable preparation. It does not, however, demonstrate that a bachelor's degree in any *specific specialty* 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). The O*NET OnLine Help Center provides a discussion of the Job Zone 4 designation and explains that this zone signifies only that most, but not all of the occupations within it, require a bachelor's degree. See O*NET OnLine Help Center at <http://www.onetonline.org/help/online/zones>. Further, the Help Center discussion confirms that a designation of Job Zone 4 does not indicate any requirements for particular majors or academic concentrations. Therefore, despite the assertion to the contrary, the O*NET Summary Report is also not probative evidence that the proffered position qualifies as a specialty occupation.

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of the *Handbook's* support on the issue. 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." As previously mentioned, 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)).

The petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position 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 criterion at 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 prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

As stated earlier, 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).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. The petitioner did not submit any documentation from the industry's professional association stating that it has made a degree a minimum entry requirement. The petitioner also did not submit any letters or affidavits from firms or individuals in the industry in support of this criterion of the regulations.

In support of the petitioner's assertion that the proffered position is a specialty occupation position, the record of proceeding contains five job announcements. However, upon review of the evidence, the AAO finds that the petitioner's reliance on the job announcements is misplaced.

In the Form I-129, the petitioner stated that it is a restaurant business established in 2001. The petitioner also stated that it has 24 employees and a gross annual income of \$984,655.00. The petitioner did not provide its net annual income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 722110.¹¹ The AAO notes

¹¹ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is

that this NAICS code is designated for "Full-Service Restaurants." See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 722110 – Full-Service Restaurants, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 13, 2013).

For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings 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 the advertising organization share the same general characteristics, such factors may include 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 that may be considered). It is not sufficient for the petitioner and counsel to claim that the organizations are similar and in the same industry without providing a legitimate basis for such an assertion.

The AAO notes that the petitioner did not provide any independent evidence of how representative the job advertisements are of the advertising employers' recruiting history for the type of jobs advertised. As the advertisements are only solicitations for hire, they are not evidence of the employers' actual hiring practices. Upon review of the documents, the AAO finds that they do not establish that a requirement for a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position.

For instance, the petitioner and counsel submitted a job posting placed by a staffing company [REDACTED] for which no information regarding the actual employer has been provided. In addition, the advertisements include positions with [REDACTED] (online marketplace), [REDACTED] (a company that provides global investment management, risk management and advisory services to institutional and retail clients), [REDACTED] (computer/IT services) and [REDACTED] (a company in the technology industry). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. Consequently, the record is devoid of sufficient information regarding the employers to conduct a legitimate comparison of the organizations to the petitioner. The petitioner and counsel failed to supplement the record of proceeding to establish that the employers are similar to it. That is, the petitioner has not provided sufficient information regarding which aspects or traits (if any) it shares with the organizations.

Furthermore, some of the advertisements do not appear to be for parallel positions. More specifically, the petitioner and counsel provided a posting for a management analyst position with [REDACTED] which requires a degree with a "minimum [of] 8-10 years of applicable experience." Additionally, the petitioner and counsel submitted a job posting by [REDACTED] which requires candidates to possess a degree in business (finance / account management) and "ten years of

classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited February 13, 2013).

experience (eight years [of experience] with a Master's degree)." In addition, the petitioner and counsel submitted a posting by [REDACTED] which requires a degree and "5-10 Years [of] Experience)." As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) position. The advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Contrary to the purpose for which the advertisements were submitted, some of the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, three of the postings ([REDACTED]) state that a bachelor's degree is required, but they do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required.¹² As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the position. Although a general-purpose bachelor's degree 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). Furthermore, the AAO notes that the advertisement for [REDACTED] simply states that a "[c]ollege degree or equivalent work experience" is required, but does not specify the level of education required (e.g., associate's degree, baccalaureate). Thus, the qualifications listed in the posting do not support a finding that the advertised position requires a *baccalaureate* (or higher degree) in a *specific specialty*, or its equivalent.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. The evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions.¹³

¹² The posting for [REDACTED] lists the qualifications for the advertised position as including a "[b]achelor's degree – preferably in Business, Finance, or Computer Science." Obviously, a *preference* for a degree in business, finance or computer science is not an indication of a *requirement* of a degree in one of these disciplines.

¹³ 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 these 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 management analyst for

Thus, based upon a complete review of the record, the petitioner has not established 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. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

The AAO acknowledges that in the appeal, counsel claims that the proffered position involves complex and/or unique duties. In the instant case, the record of proceeding contains documentation regarding the petitioner's business operations, including a few photographs of the petitioner's restaurants; simple layout designs of the petitioner's restaurants; the petitioner's menu; financial documents (such as an unsigned copy of the petitioner's 2009 federal tax return and related documents); a list of the petitioner's job positions; a copy of the petitioner's business license and seller's permit; and an organizational chart. However, upon review of the record of proceeding, the AAO finds that the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of management analyst. That is, the AAO reviewed the record in its entirety and finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. Further, the AAO hereby incorporates into this analysis this decision's earlier comments and findings regarding the information and evidence provided with regard to the proposed duties and requirements and the position that they are said to comprise. As reflected in those earlier comments and findings, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position that would require the services of a person 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 management analyst. Specifically, the petitioner failed to demonstrate how the management 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. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even required, in performing certain duties of a management

companies that are similar to the petitioner requires a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

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 that the position is a low-level, entry position relative to others within the occupation. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, the wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; her work will be closely supervised and monitored; she will receive specific instructions on required tasks and expected results; and her work will be reviewed for accuracy.

Without further evidence, it is simply not credible that in the instant case the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. A Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹⁴

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

The AAO observes that the petitioner has indicated that the beneficiary's academic background will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Consequently, as the petitioner fails to demonstrate 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, 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 its equivalent, for the position. The

¹⁴ For additional information on Level IV wage levels, 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.

AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

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 performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

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 under employ 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 the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the 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.

The petitioner stated in its July 19, 2010 letter that it had not previously employed an individual in the proffered position or a similar position. In response to the RFE, the petitioner submitted a copy

of an internal job posting for the proffered position.¹⁵ The document states that it was posted from July 1, 2010 to July 30, 2010. Notably, the H-1B petition was submitted to USCIS a few days later. The petitioner did not provide any further documentation regarding its recruitment history for the proffered position. The AAO notes that in response to the RFE, the petitioner also submitted a list of its job positions. According to the petitioner, none of the positions on the list require at least a baccalaureate in a specific specialty, or its equivalent.

The petitioner stated in the Form I-129 petition that it was established in 2001 (approximately nine years prior to the submission of the H-1B petition). The submission of *one internal posting over a nine year period* is not persuasive in establishing that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position.

Upon review of the record, the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, 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 the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

In the instant case, the petitioner and counsel claim that the proffered position qualifies as a specialty occupation under this criterion of the regulations. In support of the H-1B petition, the petitioner provided information regarding its business operations, including a few photographs of the petitioner's restaurants; simple layout designs of the petitioner's restaurants; the petitioner's menu; financial documents (such as an unsigned copy of the petitioner's 2009 federal tax return and related documents); a list of the petitioner's job positions; a copy of the petitioner's business license and seller's permit; and an organizational chart. However, the petitioner has not provided probative evidence to satisfy this criterion of the regulations. The AAO notes that 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 that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the petitioner has not provided probative evidence to support its claim. The AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category of "Management Analysts." The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation."

¹⁵ The job posting states a requirement of a master's degree in management. As previously discussed, the petitioner has provided inconsistent information regarding its academic requirements for the proffered position and no explanation has been provided.

Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.

The petitioner has submitted inadequate probative 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 the 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.

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 1043, *aff'd*, 345 F.3d 683; see also *Soltane v. DOJ*, 381 F.3d 145 (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 is denied.