



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JAN 28 2013

OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a road construction firm with fifteen employees. To employ the beneficiary in what it designates as a construction manager position, the petitioner endeavors 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition on the grounds that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the notice of decision; (5) the Form I-290B and supporting materials; (6) the AAO's RFE; and (7) the petitioner's response to the AAO's RFE. The AAO reviewed the record in its entirety before issuing its decision.

The primary issue for consideration is whether the petitioner's proffered position qualifies as 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 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.

Counsel for the petitioner submitted the following documents with the Form I-129: (1) a letter

(b)(6)

from counsel dated July 20, 2010; (2) a copy of a certified Labor Condition Application (LCA); (3) a copy of the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (hereinafter the *Handbook*) chapter on Construction Managers; (4) a translation of the beneficiary's foreign diploma and transcript;¹ (5) an evaluation by [REDACTED] of the beneficiary's academic credentials dated December 18, 2009; (6) a translation of a "Work Book (Personal Employment History)" of the beneficiary;² (7) a copy of a letter from [REDACTED] dated March 25, 2010; (8) a copy of a letter [REDACTED] dated April 6, 2010; (9) the beneficiary's resume; and (10) a letter from the petitioner dated July 12, 2010.

[REDACTED] concludes in his evaluation that on the basis of the beneficiary's academic studies and work experience, the beneficiary has attained the equivalent of at least a "U.S. degree of Bachelor of Science in Technical Management"

In its letter, the petitioner states that it "builds roads, including asphalt and concrete roads, sidewalks, curbs, driveways, handicap ramps, etc." and that it requires an "experienced professional in the field of road construction to prepare estimates and calculate bids; to prepare documents and oversee projects."

Counsel states the following:

[The beneficiary], in the offered position of Construction Manager, will be responsible for quality control, materials testing and crew workload accounting. She will also prepare estimates and calculate bids; prepare documents and oversee projects. She will be in charge of supervising an entire project and schedule and coordinate construction processes.

Neither the petitioner nor its counsel stated the petitioner's minimum educational requirement for the proffered position.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on October 20, 2010. The petitioner was asked to submit documentation to establish that a specialty occupation position exists for the beneficiary as well as evidence that the beneficiary is qualified for the proffered position. The director outlined the specific evidence to be submitted.

On December 6, 2010, in response to the director's RFE, the petitioner's counsel submitted the following documents: (1) a letter from the petitioner dated November 23, 2010; (2) a copy of a [REDACTED] Bachelor of Arts diploma awarded to [REDACTED] vice president of the petitioner; (3) copies of [REDACTED] 2007 and 2008 Form W-2 Wage and Tax Statements; (4) a copy of [REDACTED]

¹ It is noted that the translation is accompanied by neither the original diploma or transcript nor copies of them.

² It is noted that the translation is not accompanied by the original work book (personal employment history) or a copy of it.

(b)(6)

awarding him the "qualification of Construction Technician" and accompanied by a translation; (5) an excerpt of the *Handbook's* chapter on construction managers; (6) a copy of a job advertisement by [REDACTED] for a principal project manager position; (7) a previously submitted copy of a letter from [REDACTED] (8) a copy of an evaluation by [REDACTED] of the beneficiary's academic credentials and work experience dated December 1, 2010; (9) a copy of an evaluation by [REDACTED] of (a) the beneficiary's academic credentials, (b) the beneficiary's work experience, and (c) the minimum educational requirements of the proffered position, dated November 30, 2010; (10) a letter from the Vice President for Academic Affairs at [REDACTED] stating that [REDACTED] faculty have the authority to grant college level credit for training and experience . . ." dated July 12, 2004; and (11) a letter "To Whom It May Concern" from [REDACTED] University Registrar of [REDACTED] stating that [REDACTED] faculty have the authority to grant college level credit for training and experience . . ." dated September 27, 2010.

In response to the director's RFE, the petitioner stated the following regarding the proffered position:

In order to continue to succeed in our highly competitive environment and to continue to grow, [the petitioner] needs Operations and Construction Manager. Construction Manager at [the petitioner] is responsible for procuring bids documentation, bids planning and estimate calculations, proposals preparations, quality control, materials testing and crew workload accounting. This position entails experience in the field of road construction, including preparation of estimates and bid calculation; preparation of all the documentation and overseeing projects. Construction Manager will supervise an entire project and schedule and coordinate construction process, engineering mechanics, geology and soil science, surveying, road construction materials, road construction planning and economics, among other things.

The petitioner also stated that 10-15% of the construction manager's time is spent on the following duties:

[R]esearching the internet and construction newspapers to identify any upcoming public bid offerings and evaluat[ing] which of these potential projects in their scope are suitable for the profile and capabilities of [the petitioner].

According to the petitioner, 20-30% of the construction manager's time is spent on the following duties:

[O]btain[ing] bid documentation from the engineering company in charge of that project and . . . studying the bid, analyzing complicity [sic] of the projects and investigating physical worksite location for possible geological and environmental issues that can affect the volume of work and consequently proposed price.

The petitioner further states that 25-35% of the construction manager's time is spent on

"preparing the bid" which involves the following duties:

[C]alculating estimates for material cost, labor-hours, and expenses for hiring subcontractors, equipment rentals, preparing proposals and contacting subcontractors to obtain and secure their pricing on proposed work; contacting materials suppliers and services providers to obtain and secure their prices as well.

According to the petitioner, "[u]pon winning the bid, begins next stage of the project – preparation for the work and performing the job." The petitioner states that overseeing the project requires an average of 15-25% of the construction manager's time. The petitioner does not state its minimum educational requirement for the proffered position.

In his letter, counsel states that the proffered position "requires not only experience in the field of road construction, but also specialized knowledge of road construction process, engineering mechanics, geology and soil science, surveying, road construction materials, road construction planning and economics related thereto." Counsel also explains that the vice president of the petitioner, [REDACTED] a holder of a bachelor's degree in finance, "was in charge of financial aspect of the bid preparations, utilizing his finance degree" However, according to counsel, [REDACTED] "is pursuing different endeavors and therefore cannot perform the duties previously assigned to him," thus, the petitioner "is willing to hire [the beneficiary]" Counsel also quotes from the *Handbook* and contends that "employers increasingly are hiring construction managers with a bachelor's degree in a construction-related field." Counsel also contends that the beneficiary "has the equivalent of a bachelor's degree in the specific specialty required by the specialty occupation"

The director denied the petition on April 14, 2011, finding that the proffered position does not qualify as a specialty occupation.

On appeal, the petitioner's counsel contends that the director erred in determining that the proffered position does not qualify as a specialty occupation. Counsel also contends that the "occupation of construction manager is a very complex one." Counsel also states that the duties of the proffered position "are so specialized and complex as to require a bachelor's degree in construction management," and thus, "the proposed position is a specialty occupation."

Counsel also submitted the following, *inter alia*, for the first time with the petitioner's appeal: (1) a copy of the beneficiary's foreign diploma and transcript, accompanied by the previously submitted translations; (2) a copy of a "WORK BOOK (PERSONAL EMPLOYMENT HISTORY)" of the beneficiary, accompanied by the previously submitted translation; (3) a copy of a letter from [REDACTED] dated August 6, 2009; (4) a job advertisement by [REDACTED] for a Senior Construction Manager position; (5) a job advertisement by [REDACTED] for a Construction Management position to oversee the Port of Paulsboro construction; and (6) a copy of Appendix A to the Preamble-Professional Recruitment Occupations – Education and Training Categories by O*NET – SOC Occupation.

On November 5, 2012, the AAO sent an RFE to the petitioner. Specifically, the AAO noted the following:

The Labor Condition Application (LCA) filed with the Form I-129 indicates that the prevailing wage for the occupational category of Construction Managers – SOC (ONET/OES) code 11-9021, for a Level I position, is \$32.42 per hour. The prevailing wage source is listed as the Foreign Labor Certification Data Center Online Wage Library.³

A search of the LCA (Case Number I-200-10187-149681) in the U.S. Department of Labor, Employment and Training Administration's iCert Portal System indicates the LCA was submitted to DOL on July 6, 2010,⁴ and it was certified on July 12, 2010. The petitioner signed the LCA on July 16, 2010. However, a search of the Online Wage Library indicates that the prevailing wage for the occupational category of "Construction Workers" for Middlesex County (Monroe Township, NJ) was \$38.82 per hour, for a Level I position, at the time the petition was filed in this matter.⁵

In the LCA, the petitioner stated that the beneficiary would be employed by the petitioner at an hourly wage of \$35 per hour. Thus, the petitioner's offered wage to the beneficiary is below the prevailing wage, for a Level I position, for the occupational classification in the area of intended employment.

Thus, the AAO requested that the petitioner submit a "valid LCA with the correct, required wage **certified on or before July 23, 2010**, the date the instant Form I-129 petition was filed in this matter." The AAO also requested, *inter alia*, evidence that the petitioner is incorporated or is formed as a business entity other than a corporation.

On December 6, 2012, the petitioner, through counsel, responded to the AAO's RFE. Counsel explained that the LCA was initially submitted to DOL on June 22, 2010; however, because of a delay in verifying the petitioner's FEIN, it was not actually verified until July 6, 2010, and certified until July 12, 2010. The petitioner also submitted, *inter alia*, its State of New Jersey Business Registration Certificate.

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 the normal minimum requirement for

³ The Online Wage Library is accessible on the Internet at <http://www.flcdatacenter.com/>.

⁴ The iCert Portal System is accessible on the Internet at <http://icert.doleta.gov/>.

⁵ For additional information on the prevailing wage for "Construction Managers" in Middlesex County, see the All Industries Database for 7/2010 - 6/2011 at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=11-9021&area=20764&year=11&source=1> (last visited Jan. 16, 2013).

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 *Handbook*,⁶ 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. As an initial matter, the AAO finds that the duties of the proffered position most closely relate to the *Handbook's* description of "Construction Managers." With regard to "Construction Managers," the *Handbook* states:

What Construction Managers Do

Construction managers plan, coordinate, budget, and supervise construction projects from early development to completion.

Duties

Construction managers typically do the following:

- Prepare and negotiate cost estimates, budgets, and work timetables
- Select appropriate construction methods and strategies
- Interpret and explain contracts and technical information to workers and other professionals
- Report on work progress and budget matters to clients
- Collaborate with architects, engineers, and other construction and building specialists
- Instruct and supervise construction personnel and activities onsite
- Respond to work delays and other problems and emergencies
- Select, hire, and instruct laborers and subcontractors
- Comply with legal requirements, building and safety codes, and other regulations

Construction managers, often called *general contractors* or *project managers*, coordinate and supervise a wide variety of projects, including the building of all types of residential, commercial, and industrial structures, roads, bridges,

⁶ The director's decision referred to the 2010-2011 edition of the *Handbook*. The AAO's references to the *Handbook* are to the 2012-2013 edition available online. The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>.

powerplants, schools, and hospitals. They oversee specialized contractors and other personnel. Construction managers schedule and coordinate all design and construction processes to ensure a productive and safe work environment. They also make sure jobs are completed on time and on budget with the right amount of tools, equipment, and materials. Many managers also are responsible for obtaining necessary permits and licenses. They are often responsible for multiple projects at a time.

Construction managers work closely with other building specialists, such as architects, engineers, and a variety of trade workers, such as stonemasons, electricians, and carpenters. Projects may require specialists in everything from structural metalworking and painting, to landscaping, building roads, installing carpets, and excavating sites. Depending on the project, construction managers also may interact with lawyers and local government officials. For example, when working on city-owned property or municipal buildings, managers sometimes confer with city council members to ensure that all regulations are met.

For projects too large to be managed by one person, such as office buildings and industrial complexes, a construction manager would only be in charge of one part of the project. Each construction manager would oversee a specific construction phase and choose subcontractors to complete it. Construction managers may need to collaborate and coordinate with other construction managers who are responsible for different aspects of the project.

To maximize efficiency and productivity, construction managers often use specialized cost-estimating and planning software to effectively budget the time and money required to complete specific projects. Many managers also use software to determine the best way to get materials to the building site. For more information, see the profile on cost estimators.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Construction Managers," <http://www.bls.gov/ooh/management/construction-managers.htm#tab-2> (last visited Jan. 16, 2013).

While the *Handbook* reports that "employers increasingly prefer candidates with both work experience and a bachelor's degree in a construction-related field," it does not state that such a degree is a minimum entry requirement. See *id.* at <http://www.bls.gov/ooh/management/construction-managers.htm#tab-4> (last visited Jan. 16, 2013). This is evident in the *Handbook's* discussion in the "How to Become a Construction Manager" section of its chapter on "Construction Managers," which does not specify a standard minimum requirement of a bachelor's degree in a specific specialty or its equivalent for entry into the occupation:

How to Become a Construction Manager

Employers increasingly prefer candidates with both work experience and a bachelor's degree in a construction-related field. However, some construction managers may qualify with a high school diploma and by working many years in a construction trade. Certification, although not required, is becoming increasingly important.

Education

It is increasingly important for construction managers to have a bachelor's degree in construction science, construction management, architecture or engineering. As construction processes become increasingly complex, employers are placing more importance on specialized education.

More than 100 colleges and universities offer bachelor's degree programs in construction science, building science, or construction engineering. These programs include courses in project control and management, design, construction methods and materials, cost estimation, building codes and standards, and contract administration. Courses in mathematics and statistics are also relevant.

An associate's degree combined with work experience may be enough for some positions. A number of 2-year colleges offer construction management or construction technology programs.

In addition, those with a high school diploma and years of relevant work experience will be able to work as construction managers, though they will do so primarily as self-employed general contractors.

Id. It cannot be found, therefore, that the "Construction Managers" chapter in the 2012-2013 edition of the *Handbook* indicates that construction manager positions, as a whole, require at least a bachelor's degree level of knowledge in a construction-related field. *Id.*

As the *Handbook* indicates that the proffered position does not belong to an occupational classification for which there is a standard requirement of at least a bachelor's degree in a specific specialty, or its equivalent, and as the duties of the proffered position as described in the record of proceeding do not indicate that the particular position proffered in this petition is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 requirement of a bachelor's or higher 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.

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* reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Furthermore, for the reasons discussed below, the petitioner's reliance upon the job vacancy advertisements it submitted is misplaced.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of three advertisements.⁷ The advertisements provided, however, establish at best that a bachelor's degree is generally required for most of the positions posted, but a bachelor's degree or the equivalent in a *specific specialty* is not. In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that the submitted advertisements are relevant as the record does not indicate that the posted job announcements are for parallel positions in similar organizations in the same industry.

Specifically, the first advertisement, which is for a principal project manager position with [REDACTED] states only that it *prefers* a "B.S. in Civil Engineering." The advertisement also states that [REDACTED] prefers a "[v]alid professional Engineering License in NY/NJ," and a "[m]inimum of 15 to 20 years of related work experience including recent New Jersey Turnpike Authority and New Jersey Department of Transportation highway/bridge design projects." Thus, the advertised position does not require a minimum of a bachelor's degree in a specific specialty or its equivalent. Also, the record lacks sufficient evidence to establish the petitioner as being similar to the advertising company in terms of its size and the type and level of services provided such that they could be found to be similar organizations.

The second advertisement, which is for a Senior Construction Manager position with [REDACTED] states that it *prefers* a "4-year degree in civil engineering or construction-related field (or equivalent construction-related work experience), as well as 20 plus years of experience in field construction is required." Thus, again, the advertised position does not require a minimum of a bachelor's degree in a specific specialty or its equivalent. Also, the record lacks sufficient evidence to establish the petitioner as being similar to the advertising company in terms of its size and the type and level of services provided such that they could be found to be similar

⁷ As noted above, the petitioner submitted one advertisement in response to the director's RFE and two advertisements with its appeal. The AAO's discussion of the advertisements is in the order in which the advertisements were submitted.

organizations. In addition, the advertised position is for a senior-level construction manager position whereas the proffered position is an entry level position for an employee who has only basic understanding of the occupation, as indicated by the petitioner's designation of the proffered position as a Level I position on the LCA submitted in support of the petition. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. As such, the record lacks sufficient evidence demonstrating that the advertised position is a parallel position.

The third advertisement is for a construction management position with [REDACTED] at the Port of Paulsboro. The position requires, *inter alia*, "15 years of marine construction management experience" and an "undergraduate degree from an accredited 4-year university and at least ten (10) years of related experience." The record, however, lacks sufficient evidence to establish the petitioner as being similar to the advertising company in terms of its size and the type and level of services provided such that they could be found to be similar organizations. Furthermore, as the proffered position is not a marine construction management position, it cannot be found to be a parallel position.

As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.⁸

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 also has not satisfied 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 record does not demonstrate any complexity or unique nature of the proffered position that distinguishes

⁸ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just three job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of construction manager in a 14- or 15-employee road construction firm required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

it from similar but non-specialty degreed or even non-degreed employment under the second prong of the criterion. A review of the record indicates that the petitioner has failed to credibly demonstrate what duties the beneficiary will be responsible for or perform on a day-to-day basis. Nevertheless, even assuming the beneficiary will perform the duties as described, these duties do not entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty or its equivalent, especially as compared to other construction manager positions for which the *Handbook* indicates no such minimum entry requirement for this occupational category.

Further, the petitioner has not identified any specific duties that elevate the position to one that would require the education obtained through or equivalent to a four-year university program in a specific discipline. Thus, the petitioner has not established that a baccalaureate or higher degree or its equivalent is common to the industry in parallel positions among similar organizations or, in the alternative, that the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific discipline. The petitioner has therefore failed to establish the alternative prongs of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the record of proceeding does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty. While the petitioner submitted a diploma alleged to be awarded to an employee of the petitioner, [REDACTED] there is no evidence in the record establishing that [REDACTED] was working as a construction manager or performing the duties of the proffered position. Moreover, the diploma awarding a Bachelor of Arts degree to [REDACTED] does not denote a specific specialty. In any event, previously hiring only one employee with a bachelor's degree in the required specific specialty does not establish a pattern that the petitioner normally requires, as opposed to prefers, someone with at least a bachelor's degree in the specific specialty or its equivalent for the proffered position. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).⁹

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. Again, relative specialization and

⁹ While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 387. In other words, if a petitioner's 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").

complexity have not been developed by the petitioner as an aspect of the proffered position. Even if relative specialization and complexity had been developed, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than construction manager positions that are not usually associated with at least a bachelor's degree in a specific specialty.¹⁰

The AAO will now discuss [REDACTED] opinion that the proffered position "would be considered a specialty occupation requiring the complex and specialized knowledge of a U.S. Bachelor's degree in Construction Management, Civil Engineer [sic], Construction Science, or closely related field." The AAO finds no probative value in the opinion rendered by [REDACTED]. The opinion is not based upon sufficient information about the construction management position proposed here. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS 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).

Specifically, the content of [REDACTED] letter does not demonstrate that his opinion is based upon sufficient information about the particular position at issue. First, there is no indication that [REDACTED] a professor of Information Systems and Management, has any experience as a construction manager, or any experience in the construction industry. Second, the letter reveals that his knowledge of the position is limited to the duties provided to him by the petitioner. Third, [REDACTED] does not relate any personal observations of the petitioner's operations or of the work that the beneficiary would perform, nor does he state that that he has reviewed any projects or work products related to the proffered position. Fourth, [REDACTED] opinion does not relate his conclusions to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for his conclusions about the educational requirements for the particular position here at issue.

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.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a

¹⁰ As noted above, the petitioner has designated the proffered position as a Level I position on the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. See U.S. Dept of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage. 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).

specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications except to note that, in any event, the combined evaluations by [REDACTED] and [REDACTED] of the beneficiary's education and work experience submitted by the petitioner are insufficient to establish that the beneficiary possesses the equivalent of a U.S. bachelor's degree in any specific specialty.

Specifically, as the claimed equivalency was based in part on experience, there is no evidence that the evaluators have authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience and that the beneficiary also has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. See 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and (D)(1).

Furthermore, while the evaluations by [REDACTED], [REDACTED], and [REDACTED] all state that the education equivalency was based in part on experience, none of the evaluations discuss the beneficiary's specific experience gained in the construction management field and that she has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. The AAO notes that neither the beneficiary's "workbook" nor the three experience letters discuss any of the beneficiary's duties related to construction management. Furthermore, the AAO notes that the letters by [REDACTED] an alleged "co-worker" of the beneficiary from 2003 to 2007, do not state where they worked together. Moreover, the signatures on the two letters are so different in appearance that they appear to have been penned by two different people.

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. Where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791. As a reasonable exercise of its discretion the AAO discounts the opinions by [REDACTED] as not probative with respect to the beneficiary's qualifications. As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in any specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

Finally, beyond the decision of the director, the petition must also be denied due to the failure of the petitioner to offer a wage equal to or greater than that required by law. Section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), states in pertinent part that the petitioner must offer wages that are at least the actual wage paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question or the prevailing wage for the occupational classification in the area of employment, whichever is greater. As noted above, a search of the LCA (Case Number I-200-10187-149681) in the DOL, Employment and Training Administration's iCert Portal System indicates the LCA was submitted to DOL on July 6, 2010, and it was certified on July 12, 2010. The petitioner signed the LCA on July 16, 2010. The

petitioner attested on the LCA that it would pay the beneficiary \$35.00 per hour; however, a search of the Online Wage Library indicates that the prevailing wage was \$38.82 per hour, for a Level I position, at the time the LCA was filed in this matter.

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 LCA. *See* section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A). As the petitioner has failed to offer a wage that is equal to or greater than the prevailing wage, the petition must be denied for this additional reason.

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.