

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: JUN 14 2013 OFFICE: CALIFORNIA 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)

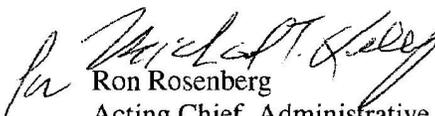
ON BEHALF OF PETITIONER:

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

On the Form I-129 visa petition, the petitioner describes itself as an institution of higher education¹ established in 1949. In order to employ the beneficiary in what it designates as an enrollment counselor² position,³ the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of her determination that the petitioner failed to demonstrate that the proffered position qualifies for classification as a specialty occupation.

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

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

Beyond the decision of the director, the AAO finds an additional aspect which, although not addressed in the director's decision, nevertheless also precludes approval of the petition, namely, the petitioner's failure to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation.⁴ For this additional reason, the petition must also be denied.

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 611310, "Colleges, Universities, and Professional Schools." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "611310 Colleges, Universities, and Professional Schools," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed Apr. 30, 2013).

² The petitioner titled the proffered position "Education Specialist (Counselor) II" on the Form I-129. In its undated letter of support, it described the position as "Education Specialist (Enrollment Counselor)." On the document entitled "Position Description and Requirements" that it submitted in response to the director's RFE, the petitioner labeled the position "Enrollment Counselor."

³ The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 25-9099, the associated Occupational Classification of "Education, Training, and Library Workers, All Other," and a Level II (qualified) prevailing wage rate.

⁴ The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional ground for denial.

I. The Petitioner and its Proffered Position

In its undated letter of support, the petitioner described itself as a prestigious, regionally-accredited Christian university which emphasizes individual attention for traditional undergraduate students and working professionals. The petitioner claimed that the beneficiary would perform the following duties:

- Providing advice and counseling to currently-enrolled international students and potential students toward completing and obtaining their degrees;
- Instructing and guiding students in their online classrooms to ensure their levels of participation meet requisite academic standards; and
- Discussing and facilitating the understanding of financial requirements and ensuring that students take advantage of all options.

In a document entitled "Position Description and Requirements" that the petitioner submitted in response to the director's RFE, the petitioner summarized the position as follows:

The primary role of the Enrollment Counselor is to recruit, enroll, and retain qualified students into one of the University's degree programs. The Enrollment Counselor is responsible for communicating with prospects who have inquired about the University. They will be required to reviews [sic] the prospects['] academic history and if admissible guide the prospect through the application process. The Enrollment Counselor is responsible for reviewing the admission process, which includes a pre-evaluation of transcripts, the payment process, and introducing the student to the Online Learning environment. It is the Enrollment Counselor[']s responsibility to ensures [sic] students understand the tools available to promote success and remains a point of contact for the student as they complete their degree. The Enrollment Counselor partners with Student Services Support to ensure all enrolled students are processing academically to graduation.

The petitioner claimed that the beneficiary would perform the following tasks:

- Maintaining a professional demeanor with all internal and external stakeholders and communicating appropriately with all parties;
- Adhering to established compliance guidelines;
- Demonstrating ethical decision-making and critical thinking skills in all interactions;
- Contacting inquiring prospects via telephone and informing them of the petitioner and its programs;

- Providing prospective students with the necessary steps to receive a pre-evaluation;
- Representing the petitioner as an educated advisor who is familiar with higher education and can assist students through the various steps as part of their-decision making process;
- Sharing his knowledge of the petitioner's process and procedures for admission, evaluations of transfer credit, etc.;
- Keeping current on policy and procedural changes, and incorporating those changes into daily operations as established by the petitioner's management and its Employee Development Department;
- Determining whether the petitioner has a program that will meet a prospective student's needs by listening, probing, and recognizing and considering the needs of the prospective student;
- Directing prospective students to appropriate programs that will meet their needs and answering any questions they may have about program requirements, transfer credits, admissions guidelines, etc.;
- Communicating the petitioner's values, benefits, and differentiating features to prospective students in a professional and academically-oriented manner;
- Discussing payment options and answering questions to help students make informed decisions regarding how to pay for school;
- Anticipating potential concerns of qualified prospective and/or currently-enrolled students and taking appropriate actions to alleviate or troubleshoot them;
- Serving as the primary point of contact for students who have applied for admission or are in their first academic year at the university;
- Explaining the [REDACTED] platform and guiding students through it so they can utilize the system with ease;
- Sharing university expectations accurately in order to ensure the long-term success of enrolled students;
- Communicating and helping students use the petitioner's services and helping them progress through the program;
- Serving as a member of a graduation team, which includes financial counseling, academic counseling, and admissions representatives;

- Communicating and strategizing with graduation teammates to make certain student needs are met and addressed in a timely manner;
- Monitoring student activity in the classroom and other established benchmarks in order to ensure academic progression;
- Achieving daily, weekly, and monthly goals as defined by the beneficiary's supervisor and the objectives of his department; and
- Other duties as assigned.

The petitioner explained that it requires a candidate with a bachelor's degree to perform the duties of the proffered position, and that it prefers that the individual's degree be in marketing, education, or business administration.

II. Specialty Occupation

The AAO will now address its determination that the evidence in the record of proceeding fails to establish that the proffered position is a specialty occupation.

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires [(2)] the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely upon a proffered position's title. The specific duties of the position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally* *Defensor v. Meissner*, 201 F. 3d at 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

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

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

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.⁵ The AAO finds that the duties of the proffered position generally align with the Postsecondary Education Administrators occupational classification as it is discussed in the *Handbook*.⁶

⁵ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

⁶ The *Prevailing Wage Determination Policy Guidance* (available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf (last accessed Apr. 30, 2013)) issued by DOL states that "[t]he O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification" for determining the prevailing wage for the LCA.

As noted previously, the LCA submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 25-9099 and the associated Occupational Classification of "Education, Training, and Library Workers, All Other." However, the AAO does not agree with the petitioner that the duties of the proffered position fall within that particular occupational category. Instead, as discussed above, it appears as though the LCA should have been certified for the SOC (O*NET/OES) Code 11-9033 and the associated Occupational Classification of "Education Administrators, Postsecondary."

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

In relevant part, the *Handbook* summarizes the duties typically performed by postsecondary education administrators as follows:

Postsecondary education administrators who work in *admissions* decide whether potential students should be admitted to the school. They typically do the following:

- Determine how many students to admit to fill the available spaces
- Prepare promotional materials, such as brochures and videos, about the school
- Meet with prospective students to discuss the school and encourage them to apply
- Review applications to determine if each potential student should be admitted
- Analyze data about applicants and admitted students

Many admissions counselors are assigned a region of the country and travel to that region to speak to high school counselors and students.

In addition, they often work with the financial aid department, which helps students determine if they are able to afford tuition.

Postsecondary education administrators who work in the *registrar's office* maintain student and course records. They typically do the following:

- Schedule and register students for classes

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.*

DOL guidance specifies that when ascertaining the proper occupational classification, a determination should be made by "consider[ing] the particulars of the employer's job offer and compar[ing] the full description to the tasks, knowledge, and work activities generally associated with an O*NET-SOC occupation to insure the most relevant occupational code has been selected." *See Prevailing Wage Determination Policy Guidance.* In this case, the petitioner has provided no explanation of its apparently erroneous claim that the position's primary and essential tasks, knowledge, and work activities are those generally associated with the occupational category of "Education, Training, and Library Workers, All Other" as depicted by O*Net OnLine, rather than "Education Administrators, Postsecondary." As such, it has not established that this LCA actually corresponds to this petition.

- Ensure that students meet graduation requirements
- Plan commencement ceremonies
- Prepare transcripts and diplomas for students
- Produce data about students and classes

How registrars spend their time varies depending on the time of year. Before students register for classes, registrars must prepare schedules and course offerings. Then during registration and for the first few weeks of the semester, they help students sign up for, drop, and add courses. Toward the end of the semester, they plan graduation and ensure that students meet the requirements to graduate. Many of them need advanced computer skills to create and maintain databases.

Postsecondary education administrators who work in *student affairs* are responsible for a variety of nonacademic school functions, such as student athletics and activities. They typically do the following:

- Advise students on topics such as housing issues, personal problems, or academics
- Communicate with parents and families
- Create and maintain student records
- Create, support, and assess nonacademic programs for students
- Schedule programs and services, such as athletic events or recreational activities

Postsecondary education administrators in student affairs can specialize in student activities, housing and residential life, or multicultural affairs. In student activities, education administrators plan events and advise student clubs and organizations. In housing and residential life, education administrators assign students rooms and roommates, ensure that residential facilities are well maintained, and train student staff, such as residential advisers. Education administrators who specialize in multicultural affairs plan events to celebrate different cultures and diverse backgrounds. Sometimes, they manage multicultural centers on campus.

Other **postsecondary education administrators** are *provosts* or *academic deans*. Provosts, also sometimes called chief academic officers, help college presidents develop academic policies, participate in making faculty appointments and tenure

decisions, and manage budgets. Academic deans direct and coordinate the activities of the individual colleges or schools. For example, in a large university, there may be a dean who oversees the law school.

Education administrators have varying duties depending on the size of their college or university. Small schools often have smaller staffs who take on many different responsibilities, but larger schools may have different offices for each of these functions. For example, at a small college, the Office of Student Life may oversee student athletics and other activities, whereas a large university may have an Athletics Department.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Postsecondary Education Administrators," <http://www.bls.gov/ooh/management/postsecondary-education-administrators.htm#tab-2> (accessed Apr. 30, 2013).

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

Although a bachelor's degree may be acceptable for some entry-level positions, a master's or higher degree is often required. Employers often require candidates for some positions, particularly for registrars and academic deans, to have some experience. . . .

Educational requirements vary for different positions. For entry-level positions, a bachelor's degree may be sufficient. Degrees can be in a variety of disciplines, such as social work, accounting, or marketing.

For higher level positions, a master's degree or doctorate is generally required. Provosts and deans often must have a Ph.D. Some provosts and deans begin their career as professors and later move into administration. These administrators have doctorates in the field in which they taught, such as English or chemistry. Other provosts and deans have a Ph.D. in higher education or a related field.

Id. at <http://www.bls.gov/ooh/management/postsecondary-education-administrators.htm#tab-4>.

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 philosophy 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.⁷ Section 214(i)(1)(b) of the Act (emphasis added).

Here, although the *Handbook* indicates that a bachelor's or higher degree is required, it also indicates that baccalaureate degrees in various fields are acceptable for entry into the occupation and, while the *Handbook* notes "social work, accounting, or marketing" as examples of the "variety of disciplines" in which degrees would be acceptable, the *Handbook* expresses no specific limitation as to the range of disciplines from which degrees would be acceptable.⁸ Accordingly, as the *Handbook* indicates that working as a postsecondary education administrator 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.

Thus, from the *Handbook's* information it follows that a position's inclusion within the Postsecondary Education Administrator's occupational classification is not in itself sufficient to establish a position as one which requires for entry at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner's statements made on the "Position Description and Requirements" strengthen further the AAO's determination that a bachelor's degree, or the equivalent, *in a specific specialty* is not required to perform the duties of the proffered position. As noted above, the petitioner stated that it requires an individual with a bachelor's degree to perform the duties of the proffered position, and that it prefers that the degree be in marketing, education, or business administration.

First, an employer "preference" for a bachelor's degree in a specific specialty does not equate to a normal hiring practice. While the petitioner may prefer an individual with a bachelor's degree from one of those three majors, a preference for such a degree does not translate into a normal hiring requirement, and indicates that a bachelor's degree from any field would be acceptable.

Second, the disciplines of marketing, education, and business administration do not constitute a specific specialty. To the contrary, as explained above, these are three disparate fields of study, and a requirement (which, in this case, does not exist; again, the petitioner states only a preference for a

⁷ 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.

⁸ On appeal, counsel asserts that the director "effectively concludes that a non-degree holder would have the background and insight" to perform the duties of the proffered position, and that "it also is illogical to expect that the [beneficiary] would be able to successfully recruit and enroll students in a degree program, when himself does not have one." Counsel, however, has misread the director's decision. The director did not state that the petitioner failed to demonstrate that the proffered position requires a bachelor's degree. The director found that the petitioner failed to demonstrate that the proffered position requires a bachelor's degree, or the equivalent, *in a specific specialty*.

bachelor's degree in one of these three fields) for a bachelor's degree, or the equivalent, in one of these three fields of study does not meet the statutory requirement that the degree be "in *the* specific specialty."⁹

Third, the petitioner indicates that an individual with a bachelor's degree, or the equivalent, in business administration could perform the duties of the proffered position. However, such a requirement is inadequate to establish that a 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). In addition to proving that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

Thus, for all three of these reasons, the petitioner's assertions made on the "Position Description and Requirements" document strengthens further the AAO's determination that a bachelor's degree *in a specific specialty*, or the equivalent, is not required to perform the duties of the proffered position.

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

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

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to

⁹ Again, 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).

the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Nor does the petitioner submit any other evidence 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.

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary would perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty. The duties which collectively constitute the position are similar to those outlined in the *Handbook* as normally performed by postsecondary education administrators who work in admissions and in student affairs, and the petitioner's description of them does not establish that they surpass or exceed the duties performed by such postsecondary education administrators in terms of complexity or uniqueness. Rather, the AAO finds, that the petitioner has not distinguished either the proposed duties, or the position that they comprise, from generic postsecondary-education-administration work, which, the *Handbook* indicates, may normally require a person with at least a bachelor's degree, or the equivalent, but without additionally requiring that the degree be in a specific specialty.

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

The AAO finds further that, even outside the context of the *Handbook*, the petitioner has simply not established relative complexity or uniqueness as attributes of the proffered position, let alone as being so elevated as to require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty. To the contrary, and as indicated above, the record indicates that an individual with a degree from a wide spectrum of unrelated specialties could perform the duties of the proffered position.

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

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. The record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* § 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 at 387. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proposed position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The record contains no evidence regarding any prior individuals employed by the petitioner in this position. Although the fact that a proffered position is a newly-created one is not in itself generally a basis for precluding a position from recognition as a specialty occupation, certainly an employer that has never recruited and hired for the position cannot satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

As the evidence in the record of proceeding does not establish a history of recruiting and hiring only individuals with a bachelor's degree, or the equivalent, in a specific specialty for the proffered position, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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

The AAO also finds that the record of proceeding contains no evidence that establishes the nature of the proposed duties as being so specialized and complex. Rather, to the extent that they are described in the record, the AAO finds that the petitioner has not distinguished the proposed duties from generic postsecondary-education-administration duties, which, the *Handbook* indicates, may normally require a person with at least a bachelor's degree, or the equivalent, but do not additionally require that the degree be in a specific specialty.

Further, there is the countervailing weight of the wage-level of the LCA. Both on its own terms and also in comparison with the two higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level II is indicative of duties of, at best, only a moderate degree of complexity requiring the exercise of only a limited degree of judgment by the beneficiary.

The aforementioned *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level II wage rates:

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

The above descriptive summary indicates that this wage-level is appropriate for only “moderately complex tasks that require limited judgment.”

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

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

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

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

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

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

By virtue of this submission the petitioner effectively attested that the proffered position requires that the beneficiary exercise only a “limited” degree of professional judgment, that the job duties proposed for him are merely “moderately complex,” and that, as clear by comparison with DOL’s instructive comments about the next higher level (Level III), the proffered position did not even

involve “a sound understanding of the occupation” (the level of complexity noted for the next higher wage-level, Level III).

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

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

III. Beneficiary’s Qualifications to Perform the Duties of a Specialty Occupation

Finally, as noted at the outset of this discussion, the AAO also finds, beyond the decision of the director, that the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation. Thus, even if the petitioner had overcome the director’s ground for denying the petition, which it did not, the petition still could not be approved because the petitioner has not demonstrated the beneficiary’s qualifications to perform the duties of a specialty occupation.

The statutory and regulatory framework that the AAO must apply in its consideration of the evidence of the beneficiary’s qualification to serve in a specialty occupation follows below.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (I) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In addition, 8 C.F.R. § 214.2(h)(4)(v)(A) states the following:

General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The record contains evidence indicating that the beneficiary earned a master's degree in business administration from the *Instituto Tecnológico y de Estudios Superiores de Monterrey*, in Mexico. The record, however, does not contain evidence equating this degree to one awarded by an accredited institution of higher education located in the United States.

As the beneficiary did not earn a baccalaureate or higher degree from an accredited college or university in the United States, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(1). As he does not possess a foreign degree that has been determined to be equivalent to a baccalaureate or higher degree from an accredited college or university in the United States, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), either. As the petitioner has not demonstrated that the beneficiary holds an unrestricted state license, registration or certification to perform the duties of a specialty occupation, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(3), either. Accordingly, 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) remains as the

only avenue for the petitioner to demonstrate the beneficiary's qualifications to perform the duties of the proffered position.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) requires a demonstration that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) is determined by at least one of the following:

- (1) An evaluation from an official who has 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;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;¹⁰
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

As the record does not contain an evaluation of the beneficiary's work experience performed by an official who has 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, the beneficiary does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

No evidence has been submitted to establish, nor does the petitioner assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires submission of the results of recognized

¹⁰ The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI).

Nor does the beneficiary qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). As was the case under 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(1) and (2), the beneficiary is unqualified under this criterion because he did not earn a baccalaureate or higher degree from an accredited college or university in the United States and does not possess a foreign degree that has been determined to be equivalent to a baccalaureate or higher degree from an accredited college or university in the United States.

No evidence has been submitted to establish, nor does the petitioner assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that the beneficiary submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) states the following with regard to USCIS analyzing an alien's qualifications:

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;¹¹
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign

¹¹ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. See 8 C.F.R. § 214.2(h)(4)(ii).

country; or

- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Although the record contains some information regarding the beneficiary's work history, it does not establish that this work experience included the theoretical and practical application of specialized knowledge required by the proffered position; that it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the field; and that the beneficiary achieved recognition of her expertise in the field as evidenced by at least one of the five types of documentation delineated in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i)-(v).

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i)-(v) and therefore does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). As such, the petitioner has failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation. Accordingly, the petition must also be denied on this basis. Thus, even if it were determined that the petitioner had overcome the director's ground for denying this petition (which it has not), the petition could still not be approved.

IV. Conclusion

As set forth above, the AAO agrees with the director's finding that the petitioner has failed to demonstrate that the proffered position is a specialty occupation. Beyond the decision of the director, the petitioner has also failed to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (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.