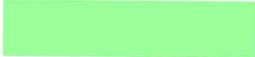


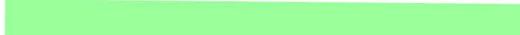
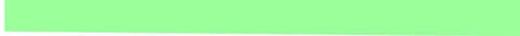


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **JUN 21 2013** OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

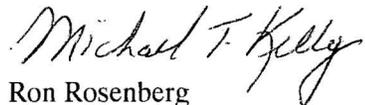
ON BEHALF OF PETITIONER:  


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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,

*for*   
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 acquisition, management and development firm, primarily engaged in retail trade and investments established in 2010. In order to employ the beneficiary in what it designates as a management analyst position,<sup>1</sup> 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 his determination that the petitioner had 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.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(1) of the 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:

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<sup>1</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was one certified for a job prospect for which the SOC (O\*NET/OES) would be Code 13-1111, the associated Occupational Classification would be "Management Analysts," and Level I (entry-level) would be the prevailing wage rate.

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

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

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

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

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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.

At the outset, the AAO will address some parts of the evidentiary record that bear upon the AAO’s analysis of this appeal.

At the outset, the AAO will address an aspect of the administrative information provided in this record of proceeding which tends to narrow the range of the particular business operations in which the petitioner was actually engaged at the time the petition was filed.

In the petitioner’s August 31, 2011 letter of support, the petitioner represented that it is an acquisition, management and development firm, primarily engaged in retail trade and investments, but on the Form I-129, the petitioner entered 447110 as the appropriate North American Industry Classification System (NAICS) code. This is a designation for gasoline stations with convenience stores (<http://www.naics.com/free-code-search/naicsdescription.php?code=447110>). Additionally, the petitioner’s Form 1120S U.S. Income Tax Return for an S Corporation indicates on Schedule B that the business activity is a convenience store with the product or service of groceries.

On the Form I-129, the petitioner reported that it had a gross annual income exceeding \$5 million, but the petitioner’s 1120S U.S. Income Tax Return for 2010 listed gross receipts or sales income of \$1,208,169. Other information on the Form I-129 is not congruent with information on the LCA regarding the beneficiary’s work location. On the Form I-129, the beneficiary’s work location is listed as [REDACTED] on the LCA the beneficiary’s work location is listed as [REDACTED]

Next, the AAO will analyze the opinion letter dated November 2, 2011, written by [REDACTED] a professor of Operations Management and Management Science at the [REDACTED]. In the letter, [REDACTED] states that the proffered position is a specialty occupation and, therefore, requires a bachelor's degree in business administration or a related field. In addition, [REDACTED] states that a bachelor's degree in business administration, or its equivalent, is considered an industry standard requirement for the proffered position.

First, it must be noted that, if the AAO accorded probative weight to [REDACTED] evaluation document (which is not the case), his conclusion that a degree in "business administration"<sup>2</sup> is a sufficient minimum requirement for entry into the proffered position would still be inadequate to

[REDACTED] also opines that an individual may also earn a degree in business management, or a related area, for entry into the proffered position.

establish that the proposed position qualifies as a specialty occupation. As will be discussed later at greater length, a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, but 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.

The AAO will now discuss why it finds that [REDACTED]'s evaluation does not merit any significant evidentiary weight.

[REDACTED] provided a summary of his education and experience and attached a copy of his curriculum vitae. He described his qualifications, including his educational credentials and professional experience, as well as provided a list of the publications he has written in different areas of business and technology. The AAO finds, however, that [REDACTED] letter and curriculum vitae, do not indicate that he has sufficient knowledge and experience to merit any deference as an expert, recognized authority, or person whose opinion is sufficiently informed and reliable in the area in which [REDACTED] offers his opinion, namely, the educational requirements for the particular type of position that is the subject of this appeal. [REDACTED] claims that he is qualified to comment on the position of management analyst because of the position he holds at the [REDACTED]

However, without further clarification, this person's position as a professor of Operations Management and Management Science at the University of Maryland, merits no deference without his establishing that he has a foundation of reliable, specialized knowledge in the particular matter in which he is opining. This [REDACTED] has not done.

In this regard, the AAO also notes [REDACTED] opinion letter and curriculum vitae do not cite specific instances in which his past opinions have been accepted or recognized as authoritative on the particular issue upon which he opines. Further, there is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for management analysts in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. Also, opinion letter contains no evidence that it was based on scholarly research conducted by [REDACTED], or anyone else, in the specific area upon which he is opining.

Next, the AAO finds that even if [REDACTED] had established himself as a person whose opinion here would be helpful in resolving this appeal – and, again, this is not the case – the particular opinion that he provides in his letter would not merit any significant weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO reaches this determination based upon what the AAO finds to be a failure of the opinion letter to provide substantial facts and substantive analysis sufficient to support [REDACTED]'s opinion as well-founded and reliable.

For instance, [REDACTED] provides no documentary support (such as formal studies, statistical data; surveys, industry publications, or other authoritative work) for his ultimate conclusion regarding the education required for the position (e.g., Principles of Management, Business Strategy, Operations Management, Economics, Business Communications, Workplace Effectiveness, Managing Project Risks and Opportunities, Statistics, Marketing, and Finance). Likewise, [REDACTED] asserts a general

industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement.

Further, in his opinion letter the AAO finds no indication that [REDACTED] possesses any knowledge of the petitioner's proffered position beyond a generalized job description provided by the petitioner. The fact that he attributes a degree requirement to such a generalized treatment of the proffered position also undermines the credibility of his opinion. [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. For instance, there is no evidence that [REDACTED] has visited the petitioner's business or reviewed any of the types of matters that would engage the beneficiary in the course of his work for this petitioner. The AAO also finds it very telling, negatively, that [REDACTED] nowhere expresses an understanding that the petitioner appears to be chiefly engaged in a gasoline station and convenience store business. [REDACTED] provides general conclusory statements regarding management analyst positions, but he does not provide a substantive, analytical basis for his opinion and ultimate conclusions regarding the particular position that is the subject of this position.

Along those same lines, the AAO notes that there is no indication that the petitioner and counsel advised [REDACTED] that the petitioner characterized the proffered position as a low, entry-level position (by virtue of the Level I wage level on the submitted LCA). As will be discussed later in this decision, that wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the advisory opinion rendered by [REDACTED] is not probative evidence that the proffered position qualifies as a specialty occupation. The conclusions reached by [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. There is an inadequate factual foundation established to support the opinion and the AAO finds that the opinion is not in accord with other information in the record. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply 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 beneficiary, 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.

In its August 31, 2011 letter of support, the petitioner stated that the duties of the proffered position would include the following:

- (i) analyzing procedures to devise most efficient methods of accomplishing company goals;
- (ii) studying financial planning, organizational change and cost analysis of the organization;
- (iii) gathering and organizing information on problems or procedures including present operating procedures;
- (iv) designing systems and procedures for work simplifications and measurement studies, and prepare operations and procedures manuals to assist management in operating more efficiently and effectively;
- (v) analyzing data gathered, develop information and [propose] available solutions or alternate methods of proceedings to management;
- (vi) organizing and [documenting] findings of studies and recommend to the management on implementation of new systems, procedural changes, and company goals;
- (vii) interacting with other managers and executives to assure smooth functioning of newly implemented systems and procedures;
- (viii) preparing cost estimate reports to determine accurate and competitive pricing of products and services;
- (ix) producing and analyzing monthly budgets and activity reports;
- (x) reviewing market trends and competition in the insurance industry; and
- (xi) [P]reparing reports and graphic illustrations of findings.

Counsel asserted that the position requires a bachelor's degree in business administration or a related field.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on October 6, 2011. Within the RFE, the director requested specific documentation to establish that the proffered position qualifies for classification as a specialty occupation.

In response to the RFE's request for specific documentation relevant to the specialty occupation claim, counsel submitted a letter of reply signed by him and dated November 8, 2011, with enclosures that included, in part: (1) an RFE response letter from the petitioner dated November 7, 2011; (2) job vacancy advertisements; (3) documentation regarding the petitioner's business; (4) a summary report for management analysts from O\*NET; (5) brief job descriptions held by persons employed by the petitioner; (6) an organizational chart; and (7) an opinion as to the educational equivalency of the beneficiary's academic background and work experience, provided by [REDACTED], Associate Professor of Management Science at the [REDACTED].

The petitioner's REF-response letter restated the same eleven duties represented in the initial support letter dated August 31, 2011, and noted that the beneficiary would spend the majority of his time in preparing, reviewing, and evaluating operations, implementing cost management techniques, and advising management on decisions to contribute to the financial success of the petitioner. The petitioner also outlined the following expanded duties (verbatim) in the RFE response letter, with the percentage-of-time notations on each duty, as requested by the director:

***Analyze procedures to devise most efficient methods of accomplishing company goals.***  
(20%)

[The beneficiary] will have overall responsibility for analyzing and proposing ways to improve [the] organization's structure, efficiency, and provides of [the petitioner.] [The beneficiary's] responsibilities primarily include increasing service quality, workforce efficiency and to control costs. [The beneficiary] would be spending majority of his time in preparing, reviewing, and evaluating company operations, implementing cost management techniques, [the petitioner's] internal management operations to ensure integration on systems and operations, managing wide range of commercial contracts to ensure quality performance and recommending improvements that contribute to financial success of [the petitioner].

***Study financial planning, organizational change and cost analysis of the organization***  
(15%)

[The beneficiary] will be interacting with management regarding investigating and evaluating procedures and marketing products and making recommendations. [The beneficiary] will also be reporting to the Vice President on the management and operational progress of the company.

***Gather and organize information on problems or procedures including present operating procedures. Analyze data gathered, develop information and proposes available solutions or alternate methods of proceedings to management.*** (30%)

[The beneficiary] will gather and organize information on problems or procedures. Analyze data gathered and develop solutions or alternative methods of proceeding. Meet with personnel concerned to ensure successful functioning of newly implemented systems or procedures. Develop and implement records management program for filing, protection, and retrieval of records, and assure compliance with program. Review forms and reports and discuss with management and users about format, distribution, and purpose, and to identify problems and improvements. Interview personnel and conduct on-site observation to ascertain unit functions, work performed, and methods, equipment, and observation to ascertain unit functions, work performed, and methods, equipment, and personnel used. Document findings of study and prepare recommendations for implementations of new systems, procedures, or organizational changes.

***Organize and document findings of studies and recommend to the management on implementation of new systems, procedural changes, and company goals. (15%)***

[The beneficiary] will provide analysis on marketing problems based on the current marketing manager's recommendations keeping up with requirements and procedures to Upper Management and Marketing Manager. He will analyze [the petitioner's] in key performance areas as compare to industry standards.

***Organize and document findings of studies and recommend to the management on implementation of new systems, procedural changes, and company goals. (15%)***

[The beneficiary] will be responsible to update operational manuals for [the petitioner] in use of training employees and staff. He will ensure that proper training procedures are put into place for area managers and retail managers so they can be trained in minimizing wastage and shrinkage and reducing employee theft. He will be implementing procedures for area managers on monitoring and analyzing Point-of-Sales reports.

***Interact with other managers and executives to assure smooth functioning of newly implemented systems and procedures. (20%)***

[The beneficiary] will be working with area managers on operating each location efficiently and more effectively. He will also be advising area managers and retail managers on the requirements of the industry and how to implement these organizational requirements and policies. He will be interacting with each area managers to ensure compliance with company policies.

In addition, the petitioner stated that a bachelor's degree in business administration is the minimum requirement for entry into the position, and that such a degree provides decision-making, problem-solving, and analytical skills.

The AAO finds that, as evident in the above-quoted duty descriptions and their percentage-of-time notations adding up to 115%, the petitioner limited its descriptions of the position and its constituent duties to general functions that do not in themselves reveal the substantive nature of the actual work that would be involved. More importantly, the AAO finds that none of the position and duty descriptions submitted by the petitioner provide any information beyond generalized functions that the beneficiary would perform. The record of proceeding does not relate the position or the duties in any substantive details regarding specific substantive work that would be performed and regarding any applications of a body of highly specialized knowledge in any specialty that beneficiary would have to employ in order to perform such work. Additionally, the record does not establish a necessary correlation between such work and the necessity for the beneficiary to hold at least a bachelor's degree, or the equivalent, in a specific specialty closely related to the nature of the proffered position as it would actually be performed.

Also, the AAO notes, it is unable to discern other than a speculative projection in the petitioner's saying that the beneficiary will be working with area managers at different locations, because neither counsel nor the petitioner describe the petitioner has having multiple locations, nor does the record contain a context for the role of area managers. As noted earlier, however, the Form I-129 lists one work location, but the LCA lists another, and the record of proceeding does not resolve the discrepancies about the petitioner's locations. Accordingly, the AAO finds that the representations regarding the petitioner's locations as they fit into the petitioner's business model are imprecise. Additionally, the AAO notes that the organizational chart submitted by the petitioner does not reflect multiple locations.

Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on November 25, 2011.

On appeal, counsel for the petitioner contends that the director erroneously determined that the proffered position is not a specialty occupation, and submits that the petition qualifies as a specialty occupation and meets more than one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel maintains also that the Service erred in denying the petition based on the size and scope of the petitioner's business.

To supplement the appeal brief, counsel resubmitted much of the same supporting materials that had accompanied the RFE response.

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. It should be understood that the AAO hereby incorporates into its upcoming analysis of each criterion the comments, analysis, and findings that have already been presented in this decision.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), 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.<sup>3</sup>

The AAO agrees with the petitioner that the duties of the proffered position generally align with those of management analysts as outlined in the *Handbook*. The *Handbook's* discussion of the duties and educational requirements of management analysts, includes, in pertinent part, the following:

### **What Management Analysts Do**

Management analysts, often called management consultants, propose ways to improve an organization's efficiency. They advise managers on how to make organizations more profitable through reduced costs and increased revenues.

### **Duties**

Management analysts typically do the following:

- Gather and organize information about the problem to be solved or the procedure to be improved
- Interview personnel and conduct on-site observations to determine the methods, equipment, and personnel that will be needed
- Analyze financial and other data, including revenue, expenditure, and employment reports, including, sometimes, building and using sophisticated mathematical models
- Develop solutions or alternative practices
- Recommend new systems, procedures, or organizational changes
- Make recommendations to management through presentations or written reports
- Confer with managers to ensure that the changes are working

Although some management analysts work for the organization that they are analyzing, most work as consultants on a contractual basis.

Whether they are self-employed or part of a large consulting company, the work of a management analyst may vary from project to project. Some projects require a team

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<sup>3</sup> 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.

of consultants, each specializing in one area. In other projects, consultants work independently with the client organization's managers.

Management analysts often specialize in certain areas, such as inventory management or reorganizing corporate structures to eliminate duplicate and nonessential jobs. Some consultants specialize in a specific industry, such as healthcare or telecommunications. In government, management analysts usually specialize by type of agency.

Organizations hire consultants to develop strategies for entering and remaining competitive in the electronic marketplace.

Management analysts who work on contract may write proposals and bid for jobs. Typically, an organization that needs the help of a management analyst solicits proposals from a number of consultants and consulting companies that specialize in the needed work. Those who want the work must then submit a proposal by the deadline that explains how they will do the work, who will do the work, why they are the best consultants to do the work, what the schedule will be, and how much it will cost. The organization that needs the consultants then selects the proposal that best meets its needs and budget.

U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., at <http://www.bls.gov/ooh/Business-and-Financial/Management-analysts.htm#tab-2> (last visited June 20, 2013).

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

### **How to Become a Management Analyst**

Most management analysts have at least a bachelor's degree. The Certified Management Consultant (CMC) designation may improve job prospects.

### **Education**

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

Few colleges and universities offer formal programs in management consulting. However, many fields of study provide a suitable education because of the range of areas that management analysts address. Common fields of study include business,

management, accounting, marketing, economics, statistics, computer and information science, and engineering.

Analysts also routinely attend conferences to stay up to date on current developments in their field.

U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., at <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-4>. (last visited June 20, 2013).

These statements from the *Handbook* do not indicate that the Management Analysts occupational group is one for which the normal minimum entry is at least a bachelor's degree, or the equivalent, in a specific specialty. Instead, the *Handbook* finds that these positions generally impose no specific degree requirement in a particular major or academic concentration on individuals seeking employment. The *Handbook* also indicates that individuals with bachelor's degrees in a variety of fields may enter the occupation of management analyst, including those with such disparate majors as business or engineering. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as business and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty."<sup>4</sup> Section 214(i)(1)(b) (emphasis added).

Now, as mentioned earlier in this decision, the petitioner's claim that a degree in "business administration" is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

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

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<sup>4</sup> 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.

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 139, 147 (1st Cir. 2007).

Next, the AAO notes that, as part of the RFE response, counsel submitted the job description of Management Analyst taken from O\*NET. Although counsel did not contextualize this evidence, the AAO presumes counsel submitted it to support the proposition that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

However, review of the O\*NET reveals that it does not state a requirement for a bachelor's degree. Rather, it assigns the management analyst occupation a Job Zone "Four" rating, which groups the occupation as one of which "most," but not all, "require a four-year bachelor's degree."<sup>5</sup> Further, the O\*NET does not indicate that four-year bachelor's degrees required by Job Zone Four occupations must be in a specific specialty closely related to the requirements of that occupation. See the U.S. Department of Labor's Occupational Information Network (O\*NET) section on management analysts on the Internet at <http://www.onetonline.org/link/summary/13-1111.00>

On appeal, counsel maintains, mistakenly, that information within the *DOT* supports the proposition that a management analyst position is one that requires at least a bachelor's degree, or the equivalent, in a specific specialty. The AAO looks to the *DOT*, and observes that it states the occupational category for management analysts fit within the specific vocational preparation level (SVP) designation of "7." The SVP is the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. See U.S. Department of Labor, Bureau of Labor

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<sup>5</sup> For instance, the first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of management analyst positions require at least a bachelor's degree in business administration or a closely related field, it could be said that "most" management analyst positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

Statistics, *Dictionary of Occupational Titles Index*, at <http://www.occupationalinfo.org/16/161167010.html>. The *DOT* explains the analysis and designation of SVP levels in relation to a given occupation as follows:

Specific Vocational Preparation... may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

1. Vocational education (high school, commercial or shop training, technical school, art school, and that part of college training which is organized around a specific vocational objective)
2. Apprenticeship training (for apprenticeable jobs only)
3. In-plant training (organized classroom study provided by an employer)
4. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker)
5. Essential experience in other jobs (serving in less responsible jobs, which lead to the higher-grade job, or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years

Note: The levels of this scale are mutually exclusive and do not overlap.

U.S. Department of Labor, Bureau of Labor Statistics, *Dictionary of Occupational Titles Index*, at <http://www.occupationalinfo.org/16/161167010.html>.

Although counsel insists that the *DOT* supports its view that the proffered position is a specialty occupation, the AAO disagrees, and finds that the *DOT* indicates otherwise. Based on the foregoing

chart, job classifications with a designation of SVP level 7, such as management analysts, are those that require, at a minimum, the passage of over two years of preparation. The two years of preparation may occur in one of five circumstances, ranging from vocational training to on-the-job training. Here, at issue is whether the *DOT* states that a bachelor's degree requirement is a threshold for entry into management analyst occupations. An SVP rating of 7 does not indicate that at least a four-year bachelor's degree is required, or more importantly, that such a degree must be in a specific specialty closely related to the requirements of that occupation. Therefore, the *DOT* information is not probative of the proffered position satisfying the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Counsel asserts a broad contention within the RFE response and on appeal that the Service has recognized accounting-related managerial occupations as specialty occupations, and may even do so if an occupation may be found to be a profession or specialty occupation in transition. In support of this proposition, counsel cites *Matter of Caron International*, 19 I&N Dec. 791 (Comm.1988), *Arctic Catering, Inc. v. Thornburgh*, 769 F.Supp. 1167 (D. Colo. 1991), *Augat, Inc. v. Tabor*, 719 F. Supp. 1158 (D.Mass. 1989), as well as six unpublished AAO decisions.

Neither *Arctic Catering, Inc. v. Thornburgh*, 769 F.Supp. 1167 nor *Augat, Inc. v. Tabor*, 719 F. Supp. 1158 are relevant to the issues now before the AAO, which arises from the director's decision denying a visa petition for classifying the intended beneficiary as an H-1B temporary worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). *Arctic Catering, Inc. v. Thornburgh* and *Augat v. Tabor* addressed denials of petitions for immigrant visas, and whether the beneficiaries are members of the professions under sections 101(a)(32) and 203(a)(3) of the Act, 8 U.S.C.A. §§ 1101(a)(32) and 1153(a)(3), as those sections existed read at the time when the third preference petition was filed.<sup>6</sup>

In *Matter of Caron International, Inc.*, 19 I&N Dec. 791, the petitioner – which was a manufacturer and dyer of hand knitting and industrial yarns – filed a petition to classify the beneficiary as a nonimmigrant of distinguished merit and ability, pursuant to section 101(a)(15)(H)(i) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i) (1982), so that it might employ that person as its vice-president of manufacturing. By the time that the instant petition was filed, the particular statute and regulations that were the focus of *Matter of Caron*, had long been replaced and superseded by the distinctly different statute and regulations for H-1B specialty occupation petitions, under which the present petition was filed. The AAO notes, in particular, that, as is clear from their plain wording, neither section 101(a)(15)(H)(i)(b) of the Act (which creates the H-1B specialty-occupation classification), nor section 214(i)(1) of the Act (which defines the term "specialty occupation"), nor the regulation at 8 C.F.R. § 214.2(h)(4)(ii) (which incorporates the statutory definition into the H-1B specialty occupation regulations), nor any of the other H-1B regulations, at 8 C.F.R. § 214.2(h), adopted inclusion in the professions as a standard for establishing a position as a specialty occupation. Accordingly, *Matter of Caron International's* comments regarding the possibility of employers

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<sup>6</sup> The AAO notes that the current, primary, and fundamental difference between qualifying as a profession and qualifying as a specialty occupation is that specialty occupations requires a U.S. bachelor's or higher degree, or its equivalent, to be in a specific specialty.

establishing certain occupations as professions if they are shown to be “in transition from professional to nonprofessional” have no bearing upon or relevancy to this appeal.

Next, with regard to the multiple unpublished cases cited by counsel, the AAO notes that counsel furnishes no evidence and makes no assertion that the facts in these decisions are analogous to the instant petition.<sup>7</sup> Regardless, even if the facts of those cases were analogous to those in this matter, they are unpublished decisions and, as such, not binding on the AAO. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

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 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

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<sup>7</sup> The AAO observes that five of the seven unpublished decisions were decided prior to 1991, and thus they predate the H-1B specialty occupation statutes and regulations in effect at this time, which mandate a baccalaureate or higher degree, or its equivalent “in the specific specialty.” § 214(i)(1) of the Act; *see also* 8 C.F.R. § 214.2(h)(4)(ii).

specialty or its equivalent for entry into those positions. Moreover, the AAO acknowledges that the record of proceeding contains an opinion letter from [REDACTED]. However, as previously discussed, the AAO finds that the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

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 32 advertisements.

Preliminarily, the AAO observes that the director correctly determined that the petitioner must demonstrate that its organization is similar to the organizations whose advertisements were submitted. The petitioner may not establish that an organization is similar unless the petitioner establishes that similar characteristics are shared with the advertising organizations, such as number the nature or type of organization and the scope of its operations, to list a few relevant factors. Moreover, contrary to counsel's assertion, the AAO notes that it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position.

For several reasons, the AAO finds that these advertisements are not probative evidence towards satisfying this present criterion.

Not all of the advertisements specify a bachelor's or higher degree in a specific specialty as a minimum hiring requirement.

Moreover, the petitioner has not supplemented the record with any persuasive documentary evidence as to how these advertisements correlate with the course of the advertising firms' actual hiring practices. Also, there is no evidence as the extent to which the advertisements even correlate with the firm's history and spectrum of advertising practices and content for the type of position advertised. Further, the petitioner has not established how representative the advertisements are even of management analyst advertisements, let alone advertisements for management analyst positions shown to be parallel to the one proffered in this petition.<sup>8</sup>

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<sup>8</sup> Further, 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 thirty-two job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

Further, with the regulation in mind, the petitioner would need to show that the advertising entities are acquisition, management and development organizations, primarily engaged in retail trade and investments. This is not case in this record of proceeding. Notably, the advertisements are from a wide array of industries, including retail, hospitality, and web technology.

As a result, the petitioner has not established that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Finally, the AAO finds that [redacted] assertion that various business entities similar to the petitioner, with at least eight employees and \$5 million in annual revenues, regularly hire individuals with a Bachelor's degree in business management, business administration, or a related area for management analyst positions and similar professional positions neither is persuasive nor probative with regard to establishing that a degree in a specific specialty is commonly required in the petitioner's industry in parallel positions in organizations similar to the petitioner. (The AAO hereby incorporates into this decision its earlier discussion and findings with regard to its analysis of [redacted] opinion letter as not meriting any significant or probative weight.) As previously stated, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.<sup>9</sup> *Matter of Soffici*, 22 I&N Dec. at 165. Again, the AAO may, in its discretion, use as an advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791.

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

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."

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As such, even if the job announcements supported the finding that the position of management analyst in an acquisition, management and development organization that is primarily engaged in retail trade and investments 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 statistics-based 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.

<sup>9</sup> The petitioner made the same unsupported assertion in the RFE response letter dated November 7, 2011.

While petitioner and counsel do not expressly state that the proffered position is so complex or unique, any such claim would not be substantiated by the evidence residing in this record of proceeding. 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 only by a person with at least a bachelor's degree, or the equivalent, in a specific specialty could perform it.

Aside from and in addition to the lack of supportive evidence, the AAO also notes that the LCA's Level I wage rate weighs affirmatively against the position's satisfying this criterion, as a Level I (entry level) wage is appropriate for positions for which the petitioner expects the beneficiary to have a basic understanding of the occupation. That is, in accordance with the relevant DOL explanation on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

By way of comparison, the AAO notes that a position classified at a Level IV (fully competent) position is designated by the DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." Thus, the wage level designated by the petitioner in the LCA for the proffered position is not consistent with suggested claims that the position would entail any particularly complex or unique duties or that the position itself would be so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty.

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

The 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 with regard to 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.<sup>10</sup> In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

While a petitioner may believe and 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 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* section 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 actual performance requirements of the position necessitate a petitioner's history of requiring a particular degree in its recruiting and hiring for the position. *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 the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the 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 petitioner stated in the Form I-129 petition that it has eight employees and that it was established in 2010. While the petitioner claims, in the July 8, 2011 RFE response letter and in a separate, untitled, and undated document describing the petitioner's other positions, that it had

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<sup>10</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner indicated by the aforementioned LCA wage-level that its proffered position is a comparatively low, entry-level position relative to others within the occupation.

previously hired two degreed individuals for positions other than the one here proffered<sup>11</sup>, the AAO finds that this information does not demonstrate that it normally requires a degree or its equivalent for the position. Further, although the petitioner submitted educational documentation from foreign universities for these individuals, the documentation is not accompanied by educational evaluations establishing the degrees as equivalent to bachelors or higher degrees awarded by accredited U.S. institutions of higher learning. As previously noted, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Thus, the record of proceeding does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

Of more import, however, is the fact that, as a company that had only started in 2010, it is not likely that the petitioner would have accumulated a sufficient record of recruiting and hiring practices to establish the history required to satisfy this criterion.

As the petitioner has not demonstrated that it normally requires a degree or its equivalent for the position it has failed to satisfy 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 a specific specialty.

The AAO finds that relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position's duties, so as to distinguish the position from others, that the *Handbook* indicates as existing the occupational group, whose specific duties are not of such a complex and specialized nature as to require the application of knowledge usually associated with at least a bachelor's degree in a specific specialty.

Additionally, both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level I is indicative of duties of relatively low complexity.

Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted

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<sup>11</sup> Counsel asserts in the RFE response letter that these individuals are assisting with the management analyst duties, but the untitled and undated document describing the petitioner's positions shows that the two degreed individuals are the Vice President/General Manager and the Accountant. There is no evidence to support an assertion that these individuals held the particular position that is the subject of this petition.

for the next higher wage-level, Level II). The AAO also finds that, separate and apart from the petitioner's submission of an LCA with a wage-level I designation, the petitioner has also failed to provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The AAO has noted that counsel asserts on appeal - without any substantive support - that the incumbent in the proffered position would utilize theories and principles of a body of highly specialized knowledge imparted in the following courses: business and marketing fundamentals, statistics, business finance, financial accounting, brand management, managerial policy organizational behavior, project management, financial management, and cost accounting. Counsel also claims that the beneficiary has taken these courses, but these courses do not appear on the beneficiary's transcript within the record of proceeding. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Again, the AAO acknowledges that the record of proceeding contains an opinion letter from Dr. [REDACTED]. However, as previously discussed, the AAO finds that the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

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.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a 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. However, it behooves the AAO to note that the evaluation submitted to establish the beneficiary's qualifications is, in fact, ineffective to do so under the pertinent USCIS regulations.

Specifically, while the claimed degree-equivalency was based in part on experience, there is no evidence that the evaluator 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 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)(I). 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.

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.