



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **JUN 26 2013** OFFICE: VERMONT SERVICE CENTER [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:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The director initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR), and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. Approval of the petition will remain revoked.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on May 20, 2010. In the Form I-129 visa petition and supporting documentation, the petitioner described itself as an oil and gas retailer company established in 1998. In order to employ the beneficiary in what it designated as a manager position, the petitioner sought 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 position was approved for what was designated as a manager position. However, thereafter an onsite visit was conducted at the beneficiary's work location, as specified in the petition. Upon subsequent review of the record of proceeding upon which approval of the petition was based, the director issued a NOIR, and ultimately revoked approval of the petition. Thereafter, counsel for the petitioner submitted an appeal.

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

U.S. Citizenship and Immigration Services (USCIS) is required to revoke on notice the approval of an H-1B petition when one of five grounds is found. Specifically, 8 C.F.R. § 214.2(h)(11)(iii)(A) states the following:

- (A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
 - (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
 - (2) The statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
 - (3) The petitioner violated terms and conditions of the approved petition; or
 - (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
 - (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

- (A) Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days

of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

As a preliminary matter, the AAO finds that the basis specified for the revocation action in the instant matter is a proper ground for such action. USCIS must be able to verify the information provided in the petition to further determine eligibility for an immigration benefit and/or compliance with applicable laws and authorities. To that end, agency verification methods may include but are not limited to review of public records and information; contact via written correspondence, the Internet, facsimile or other electronic transmission, or telephone; unannounced physical site inspections; and interviews. *See* 8 C.F.R. §§ 103, 204, 205, and 214, 8 U.S.C. §§ 1103, 1155, 1184 (2013). In the instant case, the petitioner's owner and the beneficiary were not at the business premises on when the site visit was conducted. The director notified the petitioner that the beneficiary's wages as stated in the petition could not be verified and that the record does not establish that the job offered is a specialty occupation. The petitioner was provided an opportunity to submit evidence in support of the petition. The director's statements in the NOIR were adequate to notify the petitioner of the intent to revoke the approval of the petition.

As will be evident in the discussion below, the AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner has failed to credibly establish its proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The documents submitted in response to the NOIR and on appeal fail to effectively rebut and overcome the basis for revocation. Accordingly, the appeal will be dismissed, and approval of the petition will remain revoked.

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics,

physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as 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 on a position's title. The specific duties of the proffered 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 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 the petition signed on May 12, 2010, the petitioner indicates that it is seeking the beneficiary's services as a manager on a full-time basis at the rate of pay of \$42,000 per year. In the May 11, 2010 letter of support, the petitioner describes the proposed duties of the beneficiary as follows:

Responsible for the overall operations of the store, including supervising other store employees, maximizing gross profits, optimizing inventory levels and standardizing operations. Duties in the professional position encompass overseeing all aspects of operations at the [REDACTED] (Virginia) locations. More, specifically, responsible for the following professional duties as required by [the petitioner's] Manager position:

- Hire, train, discipline and supervise [REDACTED] location employees;
- Control inventory through point of sale inventory management system and maintain appropriate inventory level;
- Coordinate orders and delivery with more than 100 vendors;
- Monitor inventory of perishable items;
- Monitor store profits/losses, cash and account receivables;
- Complete daily accounting paperwork and provide daily reports to corporate accounting;
- Oversee daily bank deposit procedures and ensure acceptable cash control is maintained;
- Prepare budgets and reports; [and]
- Prepare and post employee work schedules to reflect operating forecasts while keeping within budgeted figures[.]

The position mentioned above, is directly responsible for the management and smooth overall operation of the store. The position is responsible for the scheduling and overseen [sic] the work of two individuals including sales personnel.

In addition, the petitioner states that the proffered position "requires a theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree [in] a specific field or its equivalent as minimum for entry into the occupation." The AAO observes that the petitioner does not indicate that the minimum academic requirement for the proffered position is a bachelor's degree in a specific specialty, or its equivalent, that directly relates to the duties and requirements of the position.

With the Form I-129 petition, the petitioner submitted a copy of the beneficiary's foreign diploma and employment verification letters as well as a credential evaluation from [REDACTED]. The evaluation indicates that the beneficiary's foreign education and experience amount to the "equivalent to the degree, Bachelor of Business Administration in Accounting, for employment purposes, from an accredited educational institute in the United States."

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "First-Line Supervisors/Managers of Retail Sales Workers" - SOC (ONET/OES Code) 41-1011.00, at a Level II wage.

The petition was approved for what the petitioner designated as a manager position. On February 7, 2010, an administrative site visit was conducted to verify the information within the petition. After reviewing the information in the record of proceeding and the site visit report, the director issued a notice of intent to revoke the approval of the petition. The NOIR contained a detailed statement regarding the information that USCIS had obtained and notified the petitioner that it was afforded an opportunity to provide evidence to overcome the stated grounds for revocation.

On June 1, 2012, the petitioner and counsel responded to the NOIR. Specifically, the petitioner and counsel submitted, in part: (1) the beneficiary's Forms W-2 and Federal Income Tax Returns for 2009, 2010, and 2011; (2) pay statements issued to the beneficiary for the periods ending February 12, 2012 March 11, 2012, April 8, 2012, and May 6, 2012; (3) the petitioner's 2011 Employer's Quarterly Federal Tax Return for quarters 1, 2, 3, and 4; (4) the petitioner's 2012 Employer's Quarterly Federal Tax Return for quarter 1; (5) the petitioner's Federal Income Tax Return for 2010; (6) a list of the petitioner's current and past employees, along with their job titles, job duties, and education; and (7) job vacancy announcements.

In addition, the petitioner provided a letter dated May 30, 2012. In the letter, the petitioner stated that "[t]he position offered to [the beneficiary] is a First-Line [sic] Supervisor or Manager position that requires a minimum of [a] Bachelor's degree in a specific field of study." The petitioner, however, does not specify the required field of study.

In addition, the petitioner expanded on the previously submitted job description as follows:

The position is responsible for the overall operations of the store, including supervising other store employees, maximizing gross profits, optimizing inventory levels and standardizing operations. Duties in the professional position encompass overseeing all aspects of operations at the [REDACTED] (Virginia) location. More, specifically, responsible for the following professional duties as required by [the petitioner's] Manager position:

- Hire, train, discipline and supervise Hillsboro location employees;
- Define and design systems and procedures for handling the receipt and transmittal of orders, warehouse communications, billing, cash receipts and analysis functions for retail customers[;]
- Conduct detailed sales & margin analysis of company's business[;]
- Create daily, weekly and monthly reports identifying Point of Sale (POS) and Market trends.
- Conduct price point, sku and products analysis[;]
- Develop reports / presentations outlining the state of the business, factors impacting the business, potential risks and opportunity areas[;]
- Review and analyze customer ad and promotional plan, report the impact on the business and calculate ROI[;]
- Control inventory through point of sale inventory management system and maintain appropriate inventory level;
- Coordinate orders and delivery with more than 100 vendors;
- Monitor store profits/losses, cash and account receivables;
- Prepare management and profitability reports for executives of the organization[;]
- Prepare budgets and reports;
- Oversee daily bank deposit procedures and ensure acceptable cash control is maintained; [and]
- Prepare and post employee work schedules to reflect operating forecasts while keeping within budgeted figures[.]

The director reviewed the information provided. 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 revoked the approval of the petition on September 18, 2012. Thereafter, counsel for the petitioner submitted an appeal. With the appeal, counsel submitted a brief and additional evidence.¹

¹ With regard to documentation submitted on appeal that was requested in the director's NOIR but not provided, the AAO notes that this evidence is outside the scope of the appeal. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in

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

Upon review of the duties of the proffered position submitted by the petitioner with the initial petition and in response to the NOIR, the AAO notes that the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

The AAO further notes that the petitioner's job descriptions for the proffered position is generalized and generic as the petitioner fails to convey either the substantive nature of the work that the beneficiary would actually perform, any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it, or the educational level of any such knowledge that may be necessary. The responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations. Furthermore, the petitioner did not provide sufficient documentation to substantiate the job duties and responsibilities of the proffered position.

Further, upon review of the record of proceeding, the AAO notes that in the May 11, 2010 letter of support, the petitioner stated that the proffered position "requires a theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree [in] a specific field or its equivalent as minimum for entry into the occupation." In addition, in the May 30, 2012 letter, submitted in response to the NOIR, the petitioner stated that "[t]he position offered to [the beneficiary] is a First-Line [sic] Supervisor or Manager position that requires a minimum of [a] Bachelor's degree in a specific field of study."² The degree requirement set by

response to the director's NOIR. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not and does not consider the sufficiency of such evidence submitted for the first time on appeal.

² As previously mentioned, 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 the instant case, the petitioner provides no further information regarding "the specific field of study." The petitioner fails to identify a specific specialty.

the statutory and regulatory framework of the H-1B program is not just a college degree, but a baccalaureate (or higher degree) in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Thus, the petitioner's assertion that a general-purpose college degree is acceptable is tantamount to an admission that the proffered position is not in fact a specialty occupation.

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 make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³ As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "First-Line Supervisors/Managers of Retail Sales Workers."

The AAO reviewed the *Handbook* regarding the occupational category "First-Line Supervisors of Retail Sales Workers." However, the *Handbook* simply describes this category as "[d]irectly supervis[ing] and coordinat[ing] activities of retail sales workers in an establishment or a department. Duties also may include management functions, such as purchasing, budgeting, accounting, and personnel work." The *Handbook* does not provide a detailed narrative account nor does it provide summary data for the occupational category "First-Line Supervisors of Retail Sales Workers." More specifically, the *Handbook* does not provide the typical duties and responsibilities

Notably, counsel claims that the proffered position is a specialty occupation because a bachelor's degree is required. Contrary to counsel's assertion, to demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree *in a specialized field of study*, or its equivalent.

³ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

for this category. Moreover, the *Handbook* does not provide any information regarding the academic and/or professional requirements for these positions.

The AAO notes there are occupational categories which are not covered in detail by the *Handbook*, as well as occupations for which the *Handbook* does not provide any information. The *Handbook* states the following about these occupations:

Data for Occupations Not Covered in Detail

Employment for the hundreds of occupations covered in detail in the *Handbook* accounts for more than 121 million, or 85 percent of all, jobs in the economy. [The *Handbook*] presents summary data on 162 additional occupations for which employment projections are prepared but detailed occupational information is not developed. These occupations account for about 11 percent of all jobs. For each occupation, the Occupational Information Network (O*NET) code, the occupational definition, 2010 employment, the May 2010 median annual wage, the projected employment change and growth rate from 2010 to 2020, and education and training categories are presented. For guidelines on interpreting the descriptions of projected employment change, refer to the section titled "Occupational Information Included in the OOH."

Approximately 5 percent of all employment is not covered either in the detailed occupational profiles or in the summary data given here. The 5 percent includes categories such as "all other managers," for which little meaningful information could be developed.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Data for Occupations Not Covered in Detail, on the Internet at <http://www.bls.gov/ooH/About/Data-for-Occupations-Not-Covered-in-Detail.htm> (last visited June 17, 2013).

Thus, the narrative of the *Handbook* indicates that there are over 160 occupations for which only brief summaries are presented. (That is, detailed occupational profiles for these 160+ occupations are not developed.) The *Handbook* continues by stating that approximately five percent of all employment is not covered either in the detailed occupational profiles or in the summary data. The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed.

Accordingly, in certain instances, the *Handbook* is not determinative. When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise qualifies as a specialty occupation under this criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that indicates whether the position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider all of the evidence presented to determine whether a beneficiary qualifies to perform in a specialty

occupation. Upon review of the record, the petitioner has failed to do so in the instant case. That is, the petitioner has failed to submit probative evidence that normally the minimum requirement for positions falling under the occupational category "First-Line Supervisors of Retail Sales Workers" is at least a bachelor's degree in a specific specialty, or its equivalent.

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

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

In response to the director's NOIR, the petitioner and counsel submitted copies of job advertisements in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, upon review of the documents, the AAO finds that the petitioner and counsel's reliance on the job advertisements is misplaced.

In the Form I-129 and supporting documents, the petitioner stated that it is an oil and gas retailer company established in 1998, with six employees. The petitioner further stated that its gross annual income is \$5,167,208.00. The petitioner did not indicate its net annual income. The petitioner designated its business operations under the North American Industry Classification System

(NAICS) code 447110.⁴ The AAO notes that this NAICS code is designated for "Gasoline Stations with Convenience Stores." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments engaged in retailing automotive fuels (e.g., diesel fuel, gasohol, gasoline) in combination with convenience store or food mart items. These establishments can either be in a convenience store (i.e., food mart) setting or a gasoline station setting. These establishments may also provide automotive repair services.

U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 447110 – Gasoline Stations with Convenience Stores, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited June 17, 2013).

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). Notably, it is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

Notably, the petitioner and counsel did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documentation, the petitioner fails 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.

For instance, the advertisements include positions with Sprint Nextel ("a leading provider of wireless solutions serving almost 49 million consumers, businesses and government users"); Trader Joe's (a grocery store); and Belk (a company in the "Fashion – Apparel – Textile, Merchandising, Retail" industry). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. Consequently, no legitimate comparison of the organizations to the petitioner

⁴ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited June 17, 2013).

may be made, as the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations. Again, the petitioner must demonstrate the degree requirement is **common to the industry** in parallel position **among similar organizations** (emphasis added).

Moreover, some of the advertisements do not appear to be for parallel positions. More specifically, counsel submitted a posting by Sprint Nextel, which requires a degree and "two years [of] related work experience or six years [of] related work." Counsel also provided a posting by Trader Joe's, which requires a degree, plus "2+ years of current retail, restaurant or hospitality experience" and "1+ years of current experience at the management or supervisory level." As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level II position. The advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Additionally, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, all of the postings state that a bachelor's degree is required, but they do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the position. Although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. The evidence does not establish that the proffered position qualifies as a specialty occupation under this criterion of the regulations.⁵

⁵ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of manager for companies that are similar to the petitioner and in the same industry requires a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor

With the appeal brief, counsel submitted letters from [REDACTED] in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations.

The letters lack sufficient information regarding the organizations to conduct a meaningfully substantive comparison of each of the business operations to the petitioner. Notably, the petitioner failed to provide any supplemental information to establish that the organizations are similar to the petitioner. Thus, from the onset, this prong of the regulations has not been established by the writers.

Furthermore, the writers failed to provide any specific job duties and day-to-day responsibilities for their manager positions. There is no information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, there is insufficient information regarding the duties and responsibilities of these positions to determine whether they are the same or parallel to the proffered position. Moreover, the AAO observes that the writers did not provide any documentary evidence to corroborate that they currently or in the past employed individuals in parallel positions to the proffered position, nor did they provide any documentation to substantiate their claimed academic requirements. Thus, they have failed to submit any probative evidence of their recruitment and hiring practices.

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

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

To begin with and as discussed previously, the petitioner itself does not require a baccalaureate or higher degree in a specific specialty, or its equivalent. In addition, the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. Furthermore, the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

In the instant case, the record of proceeding contains information regarding the petitioner's business operations, including copies of its bank statements; tax returns for 2008, 2009, 2010 and 2011; quarterlies for 2011 (all four quarters) and 2012 (quarter 1); a list of its employees; and invoices. The AAO acknowledges that the petitioner and its counsel may believe that the duties of the proffered position are complex or unique. However, the petitioner failed to demonstrate how the

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.

duties of the position as described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or in some cases even essential, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The AAO must note that the petitioner designated the proffered position as a Level II position (out of four possible wage-levels) on the LCA.⁶ This designation is only appropriate for positions for which the petitioner expects the beneficiary to have a good understanding of the occupation to perform moderately complex tasks that require limited judgment relative to others within the occupation. Thus, the wage level designated by the petitioner in the LCA is not consistent with claims that the position would entail any particularly complex or unique duties. It appears that such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."⁷

⁶ Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level II wage rate is described by DOL as follows:

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.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

⁷ For additional information on Level IV wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background and experience in the industry will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not sufficiently explain or clarify which of the beneficiary's actual duties, if any, would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Consequently, as the petitioner fails to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

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

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition

of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

In response to the director's NOIR, the petitioner and counsel provided a list of the petitioner's employees, along with their job titles, job duties and education. Notably, [REDACTED] also in the position of manager, only has two years of college.

The AAO notes that the petitioner stated in the Form I-129 petition that it has six employees and that it was established in 1998 (approximately 12 years prior to the H-1B submission). The petitioner did not provide the total number of people it has employed to serve in the proffered position. The petitioner also did not submit any information regarding employees who currently or previously held the position. The record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

Upon review of the record, the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The petitioner and its counsel assert that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. However, the AAO again notes that the petitioner itself does not require a baccalaureate or higher degree *in a specific specialty*, or its equivalent.

In the instant case, the relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent. There is a lack of evidence substantiating the assertions.

Moreover, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level II position (out of four possible wage-levels). Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent)

position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. Accordingly, the director correctly found that the petitioner failed to overcome this ground of the NOIR. Therefore, the director properly revoked the approval of the petition, and the appeal must be dismissed.

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. Approval of the petition remains revoked.