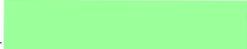


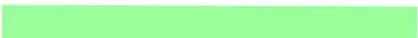
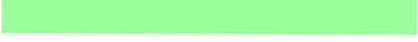
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U.S. Citizenship
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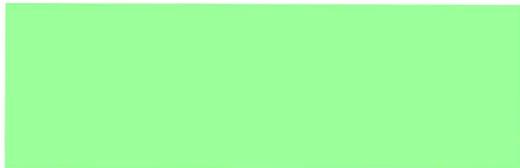


DATE: **MAR 05 2013** OFFICE: VERMONT SERVICE CENTER File: 

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:

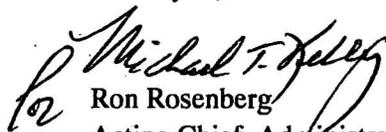


INSTRUCTIONS:

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

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

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a hotels' owner and operator established in 1997, with 30 employees. It seeks to employ the beneficiary in what it designates as a sales and finance manager position and 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 finding that (1) the petitioner failed to establish that the proffered position qualifies as a specialty occupation; and (2) the beneficiary's status expired prior to the submission of the petition.¹ On appeal, counsel for the petitioner contends that the director's findings were erroneous and submits a brief and additional evidence in support of this contention.

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

For the reasons that will be discussed below, the AAO agrees with the director's determination that the petitioner has not established the proffered position as a specialty occupation. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

¹ The director denied the extension of stay request on January 24, 2012, finding that the beneficiary's status expired prior to the submission of the H-1B petition. However, the AAO lacks jurisdiction over this matter. A request for an extension of stay in an H-1B submission is not a petition within the meaning of section 214(c)(1) of the Act, 8 U.S.C. § 1184(c)(1), and does not confer any of the appeal rights normally associated with a petition. The Form I-129 in this context is merely the vehicle by which information is collected to make a determination on the application for an extension of stay.

The regulations are clear on this matter. Under 8 C.F.R. § 214.1(c)(5), there is no appeal of a denial of an application for extension of stay. Specifically, the regulation at 8 C.F.R. § 214.1(c)(5) states the following:

Decision in Form I-129 or I-539 extension proceedings. Where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of the Service. **There is no appeal from the denial of an application for extension of stay filed on Form I-129 or I-539.**

[Emphasis added.] The AAO has no jurisdiction over the denial of the extension of stay request, as issues surrounding the beneficiary's maintenance of nonimmigrant status are within the sole discretion of the director.

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

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory

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

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

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a sales and finance manager to work on a full-time basis at a salary of \$48,500 per year. In its support letter, dated November 10, 2010, the petitioner provided the following description of the proffered position:

- Oversee overall sales and financial management of individual properties;
- Analyze and review company's past performance and forecast business activities and financial position in the areas of income, expenses, and earnings;
- Provide financial information to management for making sound business decisions related to management of existing properties and acquisition of future properties;
- Direct activities of finance department, devise and oversee unified accounting systems, and implement an audit and tracking system for financial records;
- Oversee preparation of federal, state, county[,], and city tax returns, taxes and licenses for group and individual properties;
- Provide daily management, penetration, and maintenance of existing

- relationship[s] for negotiated accounts;
- Generate group, meeting, and conference sales and booking goals in consultation with the Managing Partner;
- Create sales presentations to agents through unique and innovative promotions;
- Maintain contact with several hundred local businesses to promote sales in local areas; and
- Attend weekly sales meeting to discuss and promote sales initiatives.

In addition, the petitioner claims that it requires candidates for the proffered position to have "at minimum a baccalaureate degree or equivalent in business administration or finance." The petitioner further states that the beneficiary is qualified for the proffered position as "he has earned the equivalent of [a] Master in Business Administration, with [a] concentration in Finance." The petitioner submitted a copy of the beneficiary's credential evaluation by [REDACTED] dated August 27, 2007, that asserts (1) that the beneficiary's foreign academic qualifications alone are considered the equivalent of a U.S. bachelor of arts in sociology degree, and (2) that the beneficiary's foreign academic qualifications in combination with his professional work experience are considered the equivalent of a U.S. bachelor of business administration degree. The petitioner also submitted a copy of the beneficiary's credential evaluation by [REDACTED] dated May 5, 2008, that asserts that the beneficiary has the equivalent of a U.S. master of business administration degree, with a concentration in finance. It is noted that these credential evaluations are inconsistent in their determinations of the beneficiary's degree-equivalency, and as will also be later discussed, these evaluations and their ultimate conclusions have no probative value in that their experience-evaluation components were produced by persons not recognized as officials competent to evaluate training and/or experience pursuant to the pertinent USCIS regulations. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

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 "Sales Managers" – SOC (ONET/OES Code) 11-2022.00, at a Level I wage.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought and issued an RFE on March 15, 2011. The petitioner was asked to submit probative evidence to establish (1) that a specialty occupation position exists for the beneficiary; and (2) that the beneficiary was in valid non-immigrant status when the petition was filed. The director outlined the specific evidence to be submitted.

On April 29, 2011, counsel for the petitioner responded to the RFE and submitted the petitioner's response letter and additional evidence. In a letter in response to the RFE, dated April 28, 2011, counsel provided the same description of the duties of the proffered position that was submitted with the petition. Counsel also provided a breakdown of the percentage of time that the beneficiary would spend performing each of the duties, as follows:

Oversee overall sales and financial management of individual properties	49%
Analyze and review company's past performance and forecast business activities and financial position in the areas of income, expenses[,] and earnings	8%
Provide financial information to management for making sound business decisions related to management of existing properties and acquisition of future properties	3%
Direct activities of finance department, devise and oversee unified accounting systems[,] and implement an audit and tracking system for financial records	6%
Oversee preparation of federal, state, county, and city tax returns, taxes and licenses for group and individual properties	3%
Provide daily management, penetration[,] and maintenance of existing relationships for negotiated accounts	6%
Generate group, meeting, and conference sales and booking goals in consultation with the Managing [P]artner	8%
Create sales presentations to agents through unique and innovative promotions	4%
Maintain contact with several hundred local businesses to promote sales in local areas	3%
Attend weekly sales meeting to discuss and promote sales initiatives	10%

On January 24, 2012, the director denied the petition. 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 also determined that the beneficiary as not in valid non-immigrant status when the petition was filed.² Counsel for the petitioner submitted a timely appeal of the denial of the H-1B petition.

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. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

The AAO first turns to the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for 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

² As noted earlier, the AAO has no jurisdiction over the denial of the extension of stay request, as issues surrounding the beneficiary's maintenance of nonimmigrant status are within the sole discretion of the director. Thus, this matter will not be addressed herein.

specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*,³ on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The petitioner stated that the beneficiary would be employed in a sales and finance manager position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, 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.

As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Sales Managers." The director reviewed the petitioner's job description and found the proffered position to fall under the occupational category "Lodging Managers." The AAO reviewed the entries in the *Handbook* for both occupational categories and finds that the proffered position more closely comports with the Sales Managers occupational category. Accordingly, the director's characterization and assessment of the proffered position as belonging to the Lodging Managers occupational classification is withdrawn, and the AAO will analyze the proffered position as belonging to the Sales Managers occupational classification. However, the *Handbook* does not indicate that sales managers positions comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

The subchapter of the *Handbook* entitled "How to Become a Sales Manager" states the following about this occupational category:

Most sales managers have a bachelor's degree and work experience as a sales representative.

³ The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/ooh/>.

Education

Most sales managers have a bachelor's degree, although some have a master's degree. Educational requirements are less strict for job candidates who have significant experience as a sales representative. Courses in business law, management, economics, accounting, finance, mathematics, marketing, and statistics are advantageous.

Work Experience

Work experience is typically required for someone to become a sales manager. The preferred duration varies, but employers usually seek candidates who have at least 1 to 5 years of experience.

Sales managers typically enter the occupation from other sales and related occupations, such as sales representatives or purchasing agents. In small organizations, the number of sales manager positions is often limited, so advancement for sales workers usually comes slowly. In large organizations, promotion may occur more quickly.

Important Qualities

Analytical skills. Sales managers must collect and interpret complex data to target the most promising areas and determine the most effective sales strategies.

Communication skills. Sales managers need to work with people in other departments and with customers, so they must be able to communicate clearly.

Customer-service skills. When helping to make a sale, sales managers must listen and respond to the customer's needs.

Managerial skills. Sales managers must be able to evaluate how sales staff perform and develop ways for struggling members to improve.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Sales Managers, available on the Internet at <http://www.bls.gov/ooh/management/sales-managers.htm#tab-4> (last visited February 4, 2013).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the prevailing wage for the proffered position as wage for a Level I (entry level) position on the LCA.⁴ This designation is indicative of a comparatively low, entry-level position relative to

⁴ Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

others within the occupation.⁵ That is, in accordance with the relevant DOL explanatory information on wage levels, this Level I wage rate is only appropriate for a position in which the beneficiary is only required to have a basic understanding of the occupation and would be expected to perform routine tasks that require limited, if any, exercise of judgment. This wage rate also indicates that the beneficiary would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. In the instant case, this is further signified by the fact that the offered salary of \$48,500 per year to the beneficiary is approximately \$50,000 less than the 2010 median annual wage of \$98,530 for sales manager positions (as listed in the *Handbook*).

The *Handbook's* does not report that a baccalaureate or higher degree, in a specific specialty, or its equivalent is normally the minimum requirement for entry into the proffered position. The above-quoted passage of the *Handbook* reports that most sales managers have bachelor's degrees, while some have master's degrees. The *Handbook* notes that educational requirements are less stringent for candidates with significant sales experience. The *Handbook* states that courses in business law, management, economics, accounting, finance, mathematics, marketing, and statistics are advantageous. Accordingly, as the *Handbook* indicates that working as a sales manager does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other 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.

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.

⁵ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

Id.

Where, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the 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 supports a favorable finding with regard to this criterion. 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." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Upon review of the totality of the evidence in the entire record of proceeding, the AAO concludes that the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition 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 has not satisfied the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This first alternative prong 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).

Furthermore, in order for the petitioner to establish that another organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, letters submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and another organization share the same general characteristics, 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) may be considered. It is not sufficient for the petitioner to claim that the organizations are similar and in the same industry without providing a corroborating factual basis

for such an assertion. 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. 190).

The record of proceeding is devoid of any documentation to satisfy the first alternative prong of this criterion.

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).

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.

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as a distinguishing aspect of the proffered position. In this regard, the AAO finds that the proffered position is described in terms of duties that are presented exclusively in generalized, functional terms (such as, for instance, "Oversee[ing] sales and financial management" of properties; Analyz[ing] and review[ing] . . . past performance"; and "Direct[ing] activities of [the] finance department"), terms which, the AAO finds, do not relate substantive aspects of the actual work that would be involved. The AAO finds that – as just illustrated – the generalized terms in which the proffered position and its constituent duties are described do not convey whatever level of complexity or uniqueness may reside in the position as it would actually be performed. The record, then, lacks sufficiently detailed information that might distinguish the proffered position as so complex or unique that it could only be performed by a person with at least a bachelor's degree in a specific specialty.

The AAO also observes that the petitioner failed to demonstrate how the proposed duties as described in the record of proceeding would require the theoretical and practical application of a body of highly specialized knowledge such that only a person with at least a bachelor's or higher degree, or its equivalent, in a specific specialty could perform them. In this regard, the AAO also notes that, while the petitioner provided copies of six pages of the beneficiary's "statement of marks" from the universities that the beneficiary allegedly attended in India, four of these pages only list subject code numbers instead of the names of the subjects/courses, making it impossible, without explanatory documentation (which was not provided), to determine what courses were studied.⁶ While such courses (whatever they may be) may be beneficial in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses culminating in a baccalaureate (or higher) degree in a

⁶ The AAO further finds the two credential evaluations inherently unreliable in light of their foreign-education evaluation components' reliance upon the sparse information listed in the copies of the beneficiary's "statement of marks."

specific specialty, or its equivalent, would be required to perform the duties of the particular position here proffered.

In addition to the lack of evidence of the relative complexity or uniqueness required to satisfy this criterion, the AAO finds that the Level I wage-rate designation in the LCA submitted by the petitioner weighs against a favorable finding under this criterion. The AAO here incorporates by reference and reiterates its earlier discussion that the LCA specifies a Level I (entry level) wage level. This designation 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 explanatory information 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 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.

Further, the record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

Consequently, as the evidence of record fails to demonstrate that the proffered position possesses the relative level of complexity or uniqueness required to satisfy this criterion, the petitioner has not 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 the equivalent, for the position.

Of course, the AAO will necessarily review and consider whatever evidence the petitioner may have submitted with regard to its history of recruiting and hiring for the proffered position and with regard to the educational credentials of the persons who have held the proffered position in the past.

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 the performance requirements of the position.

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").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner stated in the Form I-129 petition that it has 30 employees and that it was established in 1997. In the letter dated April 28, 2011 and submitted in response to the RFE, counsel for the petitioner claims that "[i]t is standard practice for this petition [sic] to require a Bachelor's degree as the minimum requirement for sales positions." Counsel provided a table listing the persons that it claims are "present employees in this position and their educational credentials," as follows:

Name	Position	Degree	Field of Study
[REDACTED]	Director of Sales	BA	University of South Carolina,

			Bachelor of Science ⁷
	Group Sales Manager	BA	Point Park University, Bachelor of Arts

It is noted that the “field of study” column of the table does not list the field of study. Rather, for each individual, it only lists the name of the university that each individual allegedly attended and the degree-level allegedly acquired.

Counsel also provided a copy of these two individuals’ business cards and Form W-2 Wage and Tax Statements for 2010, as evidence that these individuals were employed by the petitioner. However, there is no documentary evidence in the record, either in response to the RFE or prior to the director’s decision, establishing (a) such individuals’ educational credentials; (b) that the duties of their positions are analogous to those of the proffered position; and (c) that these individuals are presently employed by the petitioner. 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).

The AAO notes that on appeal, counsel for the petitioner submitted a copy of what appears to be a photo of [redacted] diploma for the bachelor of science degree from the University of South Carolina. On appeal, counsel also stated that [redacted] was no longer employed by the petitioner. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). With regard to this aspect of the record of proceeding, the appeal will be adjudicated based on the record of proceeding before the director. In any event, even if that late-submitted documentation were considered, the evidence of record would still fail to establish a sufficient recruiting and hiring history to satisfy this criterion.

⁷ The AAO notes that in the “Degree” column of this table for [redacted] it states “BA,” which is a commonly used abbreviation for “bachelor of arts,” whereas in the “field of study” column of this table it states that [redacted] degree is a “Bachelor of Science.”

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

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.

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

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 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.

Upon review of the record of the proceeding, the AAO finds that the petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. However, upon review of the record, there is insufficient evidence to establish that the duties of the sales and finance manager position require 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 AAO notes that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, 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 their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

Into this analysis the AAO here incorporates this decision's earlier discussion and findings with regard to the record's lack of substantive specifics with regard to the proffered position's constituent duties.

The AAO here also incorporates into this analysis its earlier comments and findings with regard to the implication of the Level I wage-rate designation (the lowest of four possible wage-levels) in the LCA. The proffered position's Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Sales Managers" and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, the DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation."

The petitioner has submitted insufficient 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 knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A); and, therefore, it cannot be

found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

In light of the fact that the evidence of does not establish the proffered position as a specialty occupation, the AAO need not examine the evidence regarding the beneficiary's qualifications. This is because the issue of the beneficiary's qualifications to serve in a specialty occupation position is not relevant when the petitioner has failed to establish that the proffered position is a specialty occupation position. However, in this particular instance, it behooves the AAO to go beyond the decision of the director in order to identify, for the petitioner's benefit, some material defects in the evidence that would preclude a finding that the beneficiary is qualified to serve in any specialty occupation position pursuant to the pertinent beneficiary-qualification regulations at 8 C.F.R. § 214.2(h)(4)(iii)(C) and (D).

The crux of the matter is that the petitioner and its counsel relied upon two beneficiary-credential evaluations that fail to comport with the particular regulatory requirements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) and 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

First, the experience-equivalency component of each of the two evaluations clearly fails the unequivocal standard at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) that evaluations of training and/or experience be produced by an official who has authority to grant college level credit, for training and/or work experience in the specific specialty, at an accredited U.S. college or university, which has a program for granting such credit in the specialty. As such, the petition could not be approved even if the petitioner had established the proffered position as a specialty occupation.

The first evaluation dated May 5, 2008, was produced by Washington Evaluation Services (WES) and styled a "Credentials Analysis/Evaluation Report." By its own terms, this document's ultimate conclusion – that the beneficiary has attained the U.S. equivalent of a Master's degree in Business Administration with a concentration in Finance – is based, in material part, on the author's evaluation of the beneficiary's work experience. However, the record of proceeding contains no documentation establishing the evaluator as a properly authorized official within the meaning of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The same holds true with regard to the experience-equivalency component of the second credential-evaluation document, dated August 27, 2007 and produced by Morningside Evaluations and Consulting (MEC).

Next, the AAO observes that the MEC evaluator misstated the so-called "three-for-one test" at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) as "the equivalency ratio mandated by the Bureau of United States and Citizenship Services of three years of work experience as one-year of college training." There is no such mandate for a simple 3-to-1 straight chronological equivalency ratio whereby three years of experience in a particular specialty categorically merits recognition as equivalent to one year of college course-work in that specialty. Rather, as is clearly evident in the regulation, to qualify for credit, the petitioner must have "clearly demonstrated" that the claimed years of experience satisfy the stringent, unambiguous, and multi-level standards specified at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). The MEC evaluation neither articulates nor correctly summarizes those joint and multiple standards; and the MEC evaluation also is not supported by documentation adequate to meet those standards.

Likewise, the WES evaluation fails to articulate, reflect, or apply a correct understanding of the stringent, multi-level thresholds that must be reached to merit USCIS recognition of five years of experience in a specialty as equivalent to a Master's Degree. Additionally, the WES evaluation also is not supported by sufficient documentary evidence to satisfy those multiple requirements specified at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

For emphasis and instructional purposes, the AAO here excerpts from 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) the following regulatory language that applies to establishing the duration and substantive level and quality of training and/or experience and also the professional recognition that are required for USCIS to recognize years of training and/or experience as equivalent to academic achievement for beneficiary-qualification purposes.

This regulation allows for USCIS recognition of educational equivalency attained by training and/or experience *only* when USCIS finds that the following multi-tiered requirements have been satisfied:

[I]t must be clearly demonstrated [1] that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; [2] that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and [3] that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation⁸;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

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

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.