



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE **MAY 20 2013**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]

Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:

[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 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.

On the Form I-129 visa petition, the petitioner describes itself as a company, established in 2005, that manufactures home health and health care equipment. In order to employ the beneficiary in what it designates as an account and project manager position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. 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 that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

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 29, 2012, the petitioner indicates that it is seeking the beneficiary's services as an account and project manager on a full-time basis. In the May 27, 2012 letter of support, the petitioner states that the beneficiary will be responsible for the following duties:

- Responsible for managing customer accounts to meet both profit and revenue targets.
- Build long-term relationships in alignment with customer needs.
- Responsible for overall direction, coordination, implementation, execution, control and completion of specific projects consistent with company goals.
- Oversee fixturing design and implementation.
- Manage updating of Customer Requirement Sheets (CRS) in a timely manner.
- Define project scope, goals, and deliverables that support business goals.
- Prepare and submit budget proposals and recommend future budget changes as necessary.
- Develop and deliver progress reports, proposals, requirements documentation and presentations.
- Ensure that an Engineer Change Notice (ECN) or a Process and Material Control Change Notice (PMCCN) is used for documentation for change implantation that may be needed for additional First Article Samples for the next production run of parts.
- Proactively manage changes in project scope, identify potential crises and devise contingency plans.
- Coach, mentor, and motivate team members and influence them to take positive action and accountability for their assigned work.
- Develop business relationships vital to success of project.
- Communicate with customers on status of project.

In addition, the petitioner states, "The demands of this position requires a minimum of a Bachelor [sic] Degree in materials or engineering or related field and knowledge of project management techniques and tools." Notably, the petitioner also states that "[o]ur company could not entrust this position to anyone with less than a Bachelor [sic] Degree, *preferably* in materials or engineering, because of the variety of very technical products we manufacture (emphasis added)."¹ The petitioner failed to provide an explanation or address this variance.

With the Form I-129 petition, the petitioner submitted copies of the beneficiary's academic diplomas. Notably, one of the diplomas indicates that the beneficiary was awarded a degree on August 6, 2010, but it does not specify any particular discipline. The petitioner did not submit the beneficiary's transcripts. Additionally, the AAO observes that the petitioner did not provide an educational evaluation of the beneficiary's foreign education. The petitioner submitted a copy of the beneficiary's Master of Science diploma in Industrial Administration from [REDACTED] in Indiana awarded on December 17, 2011, and it appears that the petitioner is relying upon this degree for the instant case.

In addition, the petitioner 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, at a Level I (entry level) wage.

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on August 21, 2012. The petitioner was asked to submit documentation to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted. Notably, the director acknowledged that the petitioner had submitted a job description, but notified the petitioner that it was not persuasive in establishing that the proffered position is a specialty occupation. The director specifically requested that the petitioner provide a more detailed description of the work to be performed by the beneficiary for the entire period requested, including the specific job duties, the percentage of time to be spent on each duty, level of responsibility, etc.

On October 3, 2012, counsel responded to the director's RFE with a brief and additional evidence. Specifically, counsel submitted (1) an opinion letter from [REDACTED] (2) organizational charts; (3) job vacancy announcements; (4) documents described by counsel as emails between the beneficiary and various customers; and (5) a copy of the petitioner's presentation entitled "[The petitioner] at a Glance" and a promotional brochure.

In addition, counsel provided a job description from the petitioner, which included a revised description of the duties of the proffered position, along with the percentage of time that the beneficiary will spend performing each duty. Specifically, the job description indicated the following:

¹ Obviously, a *preference* for a degree in materials or engineering is not an indication of a *requirement* of a degree in one of these disciplines.

Position Summary:

Responsible for managing customer accounts to meet both profit and revenue targets. Build long-term relationships in alignment with customer needs. This position is also responsible for the overall direction, coordination, implementation, execution, control and completion of specific projects ensuring consistency with company strategy, commitments and goals. (30%)

Tasks:

- Direct and manage project development from beginning to completion of project.
- **Head up and oversee fixturing design and implementation. (10%)**
- **Manage the update of Customer Requirement Sheets (CRS) in a timely manner. (5%)**
- **Define project scope, goals and deliverables that support business goals. (5%)**
- Draft and submit budget proposals and recommend subsequent budget changes where necessary. (As needed)
- **Develop and deliver progress reports, proposals, requirements documentation and presentations. (10%)**
- **Ensure that an Engineer Change Notice (ECN) or a Process and Material Control Change Notice (PMCCN) for is used for documentation for change implantation that may be needed for additional First Article Samples of for the next production run of parts. (10%)**
- **Proactively manage changes in project scope, identify potential crises and devise contingency plans. (10%)**
- **Coach, mentor, and motivate team members and influence them to take positive action and accountability for their assigned work. (10%)**
- **Build, develop, and grow business relationships vital to the success of the project. (5%)**
- **Communicate with customers on status of project. (5%)**

(The job duties in bold are identical to the job duties previously provided with the initial petition.) The AAO notes that the description of the proffered position provided in response to the RFE is in many respects identical to the job description submitted with the initial petition. Thus, the petitioner elected not to provide a "more detailed description of the work to be performed by the beneficiary" as requested by the director. No explanation was provided.

Further, the AAO observes that the job description provided in response to the RFE states the following:

Experience and Education

- Bachelor's Degree – preferably in materials or engineering

- Knowledge of project management techniques and tools.

Again, the AAO notes that a *preference* for a degree in materials or engineering is not an indication of a *requirement* of a degree in one of these disciplines.

The director reviewed the information provided by counsel to determine whether the petitioner had established eligibility for the benefit sought. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on October 17, 2012. The petitioner submitted an 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. 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."

The AAO reviewed the record in its entirety and will make some findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.²

Upon review of the record of proceeding, the AAO notes that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermines the petitioner's credibility with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

In the instant case, the petitioner has provided inconsistent information regarding the requirements of the proffered position. In the May 27, 2012 letter of support, the petitioner stated that a bachelor's degree in materials **or** engineering is required for the proffered position. Then, later in the same letter, the petitioner stated that the "company could not entrust this position to anyone with less than a Bachelor [sic] Degree, **preferably** in materials **or** engineering (emphasis added)." The petitioner reiterated this *preference* in the description provided in response to the RFE.

² The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Further, in the opinion letter from [REDACTED] provided by counsel in response to the director's RFE, Mr. [REDACTED] stated that the proffered position "requires the theoretical and practical application of an advanced highly specialized body of knowledge in the field of **Business Administration**, which requires the attainment of at least a Bachelor's degree or its equivalent as the minimum requirement for entry into the occupation (emphasis added)." In addition, in the October 1, 2012 brief, submitted in response to the RFE, counsel stated that "a bachelor's degree in **materials engineering** plus knowledge of project management techniques is required (emphasis added)" for the proffered position. No explanation for the variances was provided.

The petitioner claims that the company could not entrust this position to anyone with less than a bachelor's degree, **preferably** in materials or engineering. The AAO notes that 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. Obviously, a *preference* for a degree in materials or engineering is not an indication of a *requirement* of a degree in one of these disciplines. Thus, the petitioner's assertion is insufficient to establish the proffered position as qualifying as a specialty occupation.

Furthermore, even assuming *arguendo* that the petitioner required a bachelor's degree in materials or engineering for the proffered position, the statement is inadequate to establish that the proposed position qualifies as a specialty occupation. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Again, the petitioner states that a degree in materials or engineering is acceptable for the proffered position. The field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear

engineering, is closely related to the other fields, or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, fails to establish either (1) that all of the disciplines (including any and all engineering fields) are closely related fields, or (2) that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty*, or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. As explained above, 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 proposed position. USCIS has consistently stated that, 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.

Furthermore, while the petitioner has identified its proffered position as that of account and project manager, the description of the beneficiary's duties, as provided by the petitioner, lacks the specificity and detail necessary to support the petitioner's contention that the position is a specialty occupation. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. In the instant case, it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the AAO finds the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position. The job description fails to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will be "[c]ommunicate with customers on status of project." The petitioner also claims that in the proffered position, the beneficiary will "[b]uild, develop, and grow business relationships vital to the success of the project." The petitioner's statements do not detail the specific tasks involved in the performance of these duties. The petitioner fails to illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application. Additionally, the petitioner asserts that the beneficiary will "[c]oach, mentor, and motivate team members and influence them to take positive action and accountability for their assigned work." This statement fails to provide any particular details regarding the demands, level of responsibilities and requirements necessary for the performance of this duty. This is further illustrated by the petitioner's statement that the beneficiary will "[d]efine project scope, goals and deliverables that support business goals." The statement does not delineate the actual work the beneficiary will perform. Furthermore, the phrase could cover a range of activities, and without further information, does not provide any insights into the beneficiary's day-to-day work. Moreover, the petitioner states that the beneficiary will "[b]uild long-term relationships in alignment with customer needs," but fails to sufficiently define how this translates to specific duties and responsibilities. Furthermore, the petitioner claims the beneficiary will "[m]anage the update of Customer Requirement Sheets (CRS) in a timely manner." However, the petitioner does not provide any further information as to what this task entails. According to the petitioner, the beneficiary will "[d]evelop and deliver progress reports, proposals, requirements documentation and presentations." The statement fails to provide any specifics regarding the beneficiary's role and it does not provide any information as to the complexity of the job duty, the amount of supervision required, and the level of judgment and understanding required to perform the duty.

Upon review of the record of proceeding, the AAO finds that the overall responsibilities for the proffered position contain insufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their daily performance. Furthermore, although the petitioner submitted general documentation regarding its business operations, the petitioner did not provide sufficient documentation to establish and substantiate the actual job duties and responsibilities of the proffered position.

Moreover, based upon a review of the record of proceeding, the AAO finds that there are additional discrepancies and inconsistencies with regard to the proffered position that preclude the approval of the petition. For instance, there are discrepancies between what the petitioner claims about the occupational classification and level of responsibility inherent in the proffered position set against the contrary occupational classification and level of responsibility conveyed by the wage level indicated on the LCA submitted in support of the petition.

As previously discussed, the petitioner submitted an LCA in support of the petition that designated the proffered position to the corresponding occupational category of "Sales Managers" - SOC (ONET/OES) code 11-2022. The wage level for the proffered position in the LCA corresponds to a Level I (entry) position. The prevailing wage source is listed in the LCA as the OES (Occupational

Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.³ The LCA was certified on May 22, 2012, and signed by the petitioner on May 29, 2012. The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

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.⁴

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) position 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.⁵ The U.S. Department of Labor (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 wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees

³ The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Office of Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

⁴ For additional information regarding prevailing wage determinations, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

⁵ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

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.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

The AAO acknowledges that the petitioner and its counsel claim that the duties of the proffered position are complex, unique and/or specialized. For instance, in response to the director's RFE, counsel states that "[t]he Petitioner contends that the nature of its products, ultra-small surgical and medical devices and dental implants, is sufficiently complex, with technical engineering demands that the position of Account and Project Manager can only be performed by an individual with specialized knowledge." Moreover, counsel claims that the proffered position "is essentially an executive level sales and project management role, with technical duties and compensation typical for a professional in a specialized knowledge occupation." In addition, counsel further claims that "the offered position requires a bachelor's degree and specialized knowledge to perform the work." Counsel also states that the "highly skilled, technical nature of the precision manufacturing of complex medical devices requires specialized knowledge for the role of Account and Project Manager." According to counsel, the position is "highly technical and requires [a] scientific background to fully understand." Counsel asserts that the position requires "a technically sound employee, in addition to good communication and negotiation skills." Further, counsel repeatedly references the complex and highly technical nature of the petitioner's products, and claims that the position requires an individual with specialized knowledge.

In addition, in response to the RFE, counsel submitted an organizational chart. The chart depicts the hierarchy of the petitioner's organization, including the position of Account and Project Manager. The proffered position reports to the inside sales manager, who reports to the general manager. Thus, when reviewing the placement of the proffered position, the AAO notes that there are two positions that are more senior than the account and project manager position. Moreover, it appears that two individuals report to the beneficiary, specifically, the quoting engineer position and customer service representative position.

On appeal, counsel states that the beneficiary "will serve in a highly technical position that is directly responsible for the design and manufacture of specialized medical devices and implants." According to the counsel, the proffered position "requires specific knowledge and thorough understanding of various technical and scientific processes." Counsel further claims that the beneficiary "will have primary responsibility regarding the technical design of ultra-complex surgical and medical devices as well as orthopedic, spine and dental implants." Moreover, counsel

continues by asserting that "the position is, in essence, in charge of the Company's design process and its customers and the primary contact on technical matters with customers." In the appeal, counsel reports that "[t]he position is essentially an executive level sales and project management role, with technical duties" and claims that the position "'is highly technical and requires [a] scientific background to fully understand." Counsel further asserts that "[t]he position is uniquely complex because it does not merely require sales, it requires the design of highly specialized products and the understanding of the complex manufacturing requirements to produce the products."

The AAO notes that this characterization of the position and the claimed duties, responsibilities and requirements conflict with the wage-rate element of the LCA, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. 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 and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he 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. As noted above, 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.

The AAO notes that a petitioner may distinguish its proffered position from others within the occupation through the proper wage level designation to indicate factors such as 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. That is, through the wage level, the petitioner is able to reflect the job requirements, experience, education, special skills/other requirements and supervisory duties.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The AAO notes that the prevailing wage of \$64,875 per year on the LCA corresponds to a Level I for the occupational category of "Sales Managers" for [REDACTED].⁶ The petitioner stated in the Form I-129 petition and LCA that the offered salary for the proffered position was \$70,000 per year. Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$97,365 per year for a Level II position,

⁶ For additional information regarding the prevailing wage for sales managers in [REDACTED] see the All Industries Database for 7/2011 - 6/2012 for Sales Managers at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=11-2022&area=42044&year=12&source=1> (last visited May 16, 2013).

\$129,834 per year for a Level III position, and \$162,323 per year for a Level IV position.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted. Thus, even if it were determined that the petitioner overcame the director's ground for denying the petition (which it has not), for this reason also the H-1B petition cannot be approved. It is considered an independent and alternative basis for denial.

The AAO finds that the claimed level of complexity, independent judgment and understanding is materially inconsistent with the LCA certification for a Level I entry-level position. Given that the LCA submitted in support of the petition is for a Level I wage, it must therefore be concluded that the LCA does not correspond to the petition.

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

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

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation . . . and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.*

(Italics added). The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties of the proffered position, that is, specifically, that corresponds to the level of work and responsibilities that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and

responsibilities in accordance with the requirements of the pertinent LCA regulations.

The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict, along with the discrepancies in the educational requirements, undermines the overall credibility of the petition. The petitioner failed to provide an explanation for the inconsistencies in the record with regard to wage level for the proffered position in the LCA submitted with the petition, or the educational requirements. The AAO finds that fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the petitioner actually intended to employ the beneficiary. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed 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. For efficiency's sake, the AAO hereby incorporates the above discussion and analysis into the record of proceeding regarding the beneficiary's proposed employment.

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 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.⁷ As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Sales Managers."

The AAO reviewed the chapter of the *Handbook* entitled "Sales Managers," including the sections regarding the typical duties and requirements for this occupational category.⁸ However, the *Handbook* does not indicate that "Sales Managers" 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 into the occupation.

The subchapter of the *Handbook* entitled "How to Become a Sales Manager" states, in part, the following about this occupation:

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.

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 May 16, 2013).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the wage level of the proffered position as a Level I position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the

⁷ 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.

⁸ For additional information regarding the occupational category "Sales Managers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Sales Managers, on the Internet at <http://www.bls.gov/ooh/management/sales-managers.htm#tab-1> (last visited May 16, 2013).

occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he 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. DOL guidance indicates that a statement that the job offer is for a research fellow, a worker in training, or an internship may indicate that a Level I wage is appropriate.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupational category. Rather, the *Handbook* states that while most sales managers have a bachelor's degree (no specific specialty is stated), the educational requirements are less strict for job candidates who have significant experience as a sales representative.⁹ Notably, the *Handbook* does not state that such experience must be equivalent to a bachelor's degree in a specific specialty. The *Handbook* also reports that work experience is typically required for someone to become a sales manager. Furthermore, the *Handbook* indicates that the preferred duration of work experience varies, but employers usually seek candidates who have at least one to five years of experience.

The *Handbook* does not indicate that employers normally require a degree in a *specific specialty* for entry into the occupation. The *Handbook* reports that courses in business law, management, economics, accounting, finance, mathematics, marketing, and statistics are advantageous for sales manager positions. A statement that various courses are *advantageous* is obviously not an indication that such courses are *required*.

Moreover, in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a statement that it is advantageous to take courses in disparate fields, such as business law, management, economics, accounting, finance, mathematics, marketing, and statistics,

⁹ The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of sales managers have a bachelor's degree (no specific specialty), it could be said that "most" sales managers have such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement (of at least a bachelor's degree in a specific specialty, or its equivalent) for that occupation, much less for the particular position proffered by the petitioner. As previously noted, the petitioner designated the proffered position in the LCA as a low-level, entry position relative to others within the occupation. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

would not meet the statutory requirement that the degree be "in *the* specific specialty."¹⁰ Section 214(i)(1)(B) (emphasis added). The text suggests that a baccalaureate degree or higher may be a preference among employers of sales managers in some environments, but that some employers hire employees with less than a bachelor's degree. For employers requiring a degree, it appears that a degree in any field and/or in an unrelated field is acceptable. The narrative of the *Handbook* emphasizes the importance of work experience. The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

In response to the director's RFE, the AAO notes that counsel references the O*NET OnLine Summary Report for the occupational category "Sales Managers" to support the assertion that the proffered position qualifies as a specialty occupation. The AAO reviewed the O*NET OnLine Summary Report in its entirety. However, upon review of the Summary Report, the AAO finds that it is insufficient to establish that the position qualifies as a specialty occupation normally requiring at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation. The Summary Report for sales managers has a designation of Job Zone 4. This indicates that this occupation is grouped with occupations for which considerable preparation is necessary. It does not, however, demonstrate that a bachelor's degree in a *specific specialty* is required, and does not, therefore, demonstrate that a position so designated qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). The O*NET OnLine Help Center provides a discussion of the Job Zone 4 designation and explains that this zone signifies only that most, but not all of the occupations within it, require a bachelor's degree. See O*NET OnLine Help Center at <http://www.onetonline.org/help/online/zones>. Further, the Help Center discussion confirms that a designation of Job Zone 4 does not indicate any requirements for particular majors or academic concentrations. Therefore, despite counsel's assertion to the contrary, the O*NET OnLine Summary Report is not probative evidence that the proffered position qualifies as a specialty occupation.

Counsel also indicates that the occupational category "Sales Managers" has a Specialized Vocational Preparation (SVP) rating of "7 to 8." It must be noted that an SVP rating of "7 to 8" is not indicative of a specialty occupation. This is obvious upon reading Section II of the *Dictionary of Occupational Titles* (hereinafter the *DOT*) Appendix C, Components of the Definition Trailer, which addresses the SVP rating system.¹¹ The section reads:

II. SPECIFIC VOCATIONAL PREPARATION (SVP)

Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the

¹⁰ Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty.

¹¹ Section II of the *DOT*'s Appendix C, Components of the Definition Trailer, can be found on the Internet at the website http://www.occupationalinfo.org/appendxc_1.html#II.

facility needed for average performance in a specific job-worker situation.

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

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

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

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

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

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

Thus, an SVP rating of "7 to 8" does not indicate that at least a four-year bachelor's degree is required, or more importantly, that such a degree must be in a specific specialty closely related to the requirements of that occupation. Therefore, the *DOT* information regarding the occupation's SVP rating is also not probative of the proffered position being a specialty occupation.

Upon review of the record, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement 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 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 criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will review 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. Also, there are no submissions from professional associations or similar firms in the petitioner's industry attesting that a minimum of a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in positions parallel to the proffered position.

In response to the director's RFE, counsel submitted copies of job advertisements in support of the 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 such reliance on the job announcements is misplaced.

In the Form I-129 and supporting documents, the petitioner stated that it is a company, established in 2005, that manufactures home health and health care equipment. The petitioner further stated that it has 93 employees and a gross annual income of approximately \$14 million. The petitioner stated its net annual income as "N/A." The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 339114.¹² The AAO notes that this

¹² 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

NAICS code is designated for "Dental Equipment and Supplies Manufacturing." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This U.S. industry comprises establishments primarily engaged in manufacturing dental equipment and supplies used by dental laboratories and offices of dentists, such as dental chairs, dental instrument delivery systems, dental hand instruments, and dental impression material and dental cements.

U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 339114 – Dental Equipment and Supplies Manufacturing, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited May 16, 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, counsel submitted job postings for [REDACTED] and [REDACTED] for which little or no information regarding the employers is provided. Consequently, the record is devoid of sufficient information regarding the advertising employers to conduct a legitimate comparison of the organizations to the petitioner. Furthermore, the advertisements include positions with [REDACTED] (a company in the orthopedic industry, which distributes products in 90 countries and has 7,000 team members and sales of over \$2.5 billion), [REDACTED] (a member of Johnson & Johnson and "an innovative leader in cardiac electrophysiology"), [REDACTED] (a company in the medical technology industry), [REDACTED] (a company that designs, develops, manufactures, and markets medical instruments used in dermatology), and [REDACTED] ("a global leader in the development, manufacturing and marketing of

innovative medical products for the treatment and management of respiratory disorders, with a focus on sleep-disordered breathing"). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and/or not in the same industry, and the petitioner has not provided sufficient probative evidence to establish otherwise. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided sufficient information regarding which aspects or traits (if any) it shares with the advertising organizations.

Moreover, some of the advertisements do not appear to be for parallel positions. For example, the position with [REDACTED] is "a 9-12 month training position." There is no indication in the record of proceeding that the proffered position is a "training position." Furthermore, the position with [REDACTED] is for a "Sr. Devel Eng / Project Mgr - GDC." The position requires a degree in mechanical engineering and "[f]ive or more years [of] experience in product development for the medical device industry." The job posting with [REDACTED] for the position of "Director, Strategic Accounts – Southwest Field Based" requires a degree and "[t]en to fifteen years [of] experience in sales, marketing, sales management & national accounts." Counsel also submitted an advertisement for the position of "Senior Business Development Manager – Washington, D.C." with [REDACTED] which states a degree and "5-7+ years demonstrated track record of hands-on experience with a multi national company." Further, the position with [REDACTED] requires a degree and "3+ years' capital equipment and/or device sales experience (medical preferred) and 3+ years' experience calling on doctors or similar call point (dermatologists and/or plastic surgeons preferred)." Counsel also provided an advertisement from [REDACTED] which requires a degree and "5+ years [of] Medical sales management experience. As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) 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.

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, some of the postings state that a bachelor's degree is required, but they do not provide any further specification. These include the following advertisements:

[REDACTED] (for the positions [REDACTED] Trauma Sales Manager - Virginia, [REDACTED] Omaha, Patient Care, and Project Manager – Government Accounts); [REDACTED] and [REDACTED]

¹³ Thus, they do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required.¹⁴

¹³ The posting for [REDACTED] lists the qualifications for the advertised position as "[a] minimum of a related Bachelors [sic] Degree is required, Masters [sic] Degree preferred. Degree is Biomedical Engineering, Nursing or related degree preferred." As previously noted, a *preference* is not an indication of a *requirement* for a degree in a particular discipline.

¹⁴ Furthermore, many of the advertisements state that a range of disparate fields are acceptable. Again, since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields would not meet the statutory

Notably, in response to the RFE, counsel provided a list of the job postings and claimed that the proffered position qualifies as a specialty occupation under this criterion of the regulations. In support of this assertion, counsel claimed that the job postings state that a bachelor's degree (no specific specialty) is required. The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the position. See 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

The AAO reviewed the advertisements submitted in support of the petition.¹⁵ However, as discussed, 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 for parallel positions in organizations similar to the petitioner.

It must be noted that even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty (or its equivalent) is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.

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

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

requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

¹⁵ 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.

(b)(6)

In support of the proffered position qualifying as a specialty occupation, the petitioner provided a letter from ██████████ in response to the RFE. The letter is dated September 20, 2012. In the letter, Mr. ██████████ states that the proffered position is a specialty occupation and, therefore, "requires the theoretical and practical application of an advanced highly specialized body of knowledge in the field of Business Administration, which requires the attainment of at least a Bachelor's degree or its equivalent as the minimum requirement for entry into the occupation." In addition, Mr. ██████████ states that a bachelor's degree in business administration is considered an industry standard requirement (stating that companies "require prospective candidates to have a strong foundation in the field of Business Administration which can only be obtained through a Bachelor's degree or progressively responsible experience in the field of Business Administration"). Notably, Mr. ██████████'s assertion differs from the petitioner's stated requirements for the proffered position.¹⁶

Even if established by the evidence of record, which it is not, Mr. ██████████'s statement is inadequate to establish that the proffered position qualifies as a specialty occupation. As previously stated, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). In addition to demonstrating that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 147.¹⁷

¹⁶ In the instant case, the petitioner has provided inconsistent information regarding the requirements of the proffered position. In the May 27, 2012 letter of support, the petitioner stated that a bachelor's degree in materials or engineering is required for the proffered position. Then, later in the same letter, the petitioner stated that the "company could not entrust this position to anyone with less than a Bachelor [sic] Degree, preferably in materials or engineering (emphasis added)." The petitioner reiterated this *preference* in the description provided in response to the RFE.

¹⁷ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. See, e.g., *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; cf. *Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited

Furthermore, the AAO notes that Mr. [REDACTED] provided a summary of his education and experience and attached a copy of his curriculum vitae. He described his qualifications, including his educational credentials, professional experience, information regarding his research interests, as well as provided a list of the publications he has written. Based upon a complete review of Mr. [REDACTED]'s letter and curriculum vitae, the AAO notes that, while Mr. [REDACTED] may be a recognized authority on various topics, he has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. Mr. [REDACTED] claims that he is qualified to comment on the position of sales manager because of the positions he holds at various universities and colleges, as well as his professional experience and academic training. However, without further clarification, it is unclear how his education, training, skills or experience would translate to expertise or specialized knowledge regarding the current hiring practices of manufacturers of home health and health care equipment in the dental equipment and supplies manufacturing industry (as designated by the petitioner in the Form I-129 and with the NAICS code) similar to the petitioner for sales manager positions (or parallel positions).

Mr. [REDACTED]'s opinion letter and curriculum vitae do not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for *sales managers* (or parallel positions) *in the petitioner's industry for similar organizations*, and no indication of recognition by professional organizations that he is an authority on those specific requirements. The opinion letter contains no evidence that it was based on scholarly research conducted by Mr. [REDACTED] in the specific area upon which he is opining. In reaching this determination, Mr. [REDACTED] provides no documentary support for his ultimate conclusion regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies). Mr. [REDACTED] asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement. His statements are not supported by copies or citations of the research material used.¹⁸

Upon review of the opinion letter, there is no indication that Mr. [REDACTED] possesses any knowledge of the petitioner's proffered position beyond the job description. The fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. Mr. [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of

analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

¹⁸ The AAO notes that the term 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 include how the conclusions were reached, as well as the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

the petitioner's business enterprise. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. There is no evidence that Mr. [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Mr. [REDACTED] provides general conclusory statements regarding sales manager positions, but he does not provide a substantive, analytical basis for his opinion and ultimate conclusions.

Also, while Mr. [REDACTED] claims that the duties of the proffered position are complex, unique and/or specialized, it must be noted that there is no indication that the petitioner and counsel advised Mr. [REDACTED] that the petitioner submitted an LCA certified for a Level I position, thereby characterizing the proffered position as a low, entry-level sales manager position, for an employee who has only a basic understanding of the occupation. As previously discussed, this designation indicates that the beneficiary would be expected to perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised and his work closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. It appears that Mr. [REDACTED] would have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that Mr. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the advisory opinion rendered by Mr. [REDACTED] is not probative evidence to establish the proffered position qualifies as a specialty occupation. The conclusions reached by Mr. [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. There is an inadequate factual foundation established to support the opinion and the AAO finds that the opinion is not in accord with other information in the record.

The AAO may, in its discretion, use as advisory opinions or 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. 1988). As a reasonable exercise of its discretion, and for the reasons discussed above, the AAO finds the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding Mr. Jelen's opinion letter into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

In the instant case, the record of proceeding contains information regarding the proffered position and the petitioner's business operations, including job descriptions; printouts from the petitioner's website; a slide show presentation; a letter from Mr. [REDACTED] a promotional brochure; emails between the beneficiary and the petitioner's clients; and an organizational chart. 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 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, 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. Again, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, the wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; his work will be closely supervised and monitored; he will receive specific instructions on required tasks and expected results; and his work will be reviewed for accuracy.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as 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. 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."¹⁹

Therefore, the evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information to the effect that a bachelor's degree in a specific specialty, or its equivalent, is not normally required for entry into sales manager positions. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than similar 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

¹⁹ For additional information on Level IV wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

and experience 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 and counsel do not sufficiently explain or clarify which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this prong of the criterion at 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 its 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").

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 the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the 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 93 employees and was established in 2005 (approximately seven years prior to the filing of the H-1B petition). However, upon review of the record, the petitioner did not provide any documentary evidence regarding current or past recruitment efforts for this position. Furthermore, the petitioner 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 probative 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.

In support of the H-1B petition, the petitioner provided information regarding the proffered position and the petitioner's business operations, including printouts from the petitioner's website; a presentation; a promotional brochure; emails between the beneficiary and the petitioner's clients; job descriptions; and an organizational chart. However, upon review of the record of the proceeding, the AAO finds that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. That is, the petitioner has not presented the proposed duties with sufficient specificity and substantive content to establish relative specialization and complexity as distinguishing characteristics of the duties of the proffered position, let alone that they are at a level that would require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, also, 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 requiring attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

In this regard, 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 low, entry-level position relative to others within the occupational category of "Sales Managers." The petitioner

designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." 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."

Again, the AAO acknowledges that the petitioner submitted an opinion letter from Mr. [REDACTED]. However, as discussed in detail, the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

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. The appeal will be dismissed and the petition denied for this reason.

A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner has failed to establish that the proffered position requires a baccalaureate or higher degree in a specific specialty, or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

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 (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

(b)(6)

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of the Act. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.