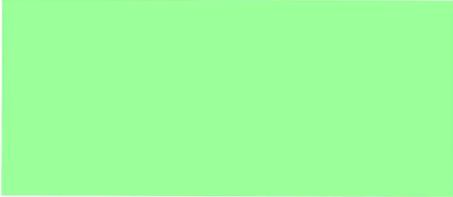
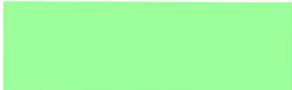


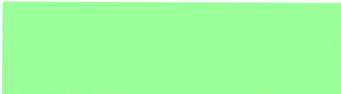
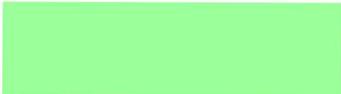


U.S. Citizenship  
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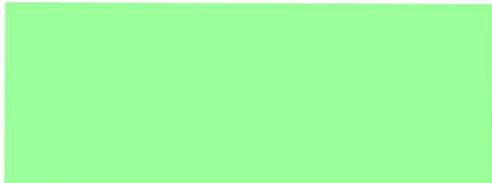


DATE: **JUN 18 2014** Office: CALIFORNIA SERVICE CENTER File: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 22, 2013. On the Form I-129 petition, the petitioner describes itself as a "marine data technology" company. In order to employ the beneficiary as a "Lead Operations and Data Manager," the petitioner seeks to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on November 20, 2013, 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, counsel asserts that the director's basis for denial was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

For the reasons that will be discussed below, we agree with the director's decision 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.

## I. THE LAW

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

Section 214(i)(1) of the 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 (5<sup>th</sup> Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as 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), 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.

## II. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner stated on the Form I-129 petition that it is a marine data technology company, and that it seeks the beneficiary's services in a position that it designates as a "Lead Operations and Data Manager " to work on a full-time basis with an annual salary of \$100,000. The petitioner was established in 2012 and has approximately 15 employees.

The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Managers, All Other" - SOC (ONET/OES) Code 11-9199, at a Level I (entry-level) wage.

The petitioner claimed, in a letter of support dated March 22, 2013, that the beneficiary would be responsible for managing its marine data integration activities globally, including overseeing the following:

- Legal and financial activities, including ensuring legality and regularity of all agreements entered into by [the petitioner].
- Negotiating the terms of agreements with partners.
- Financial management and management reporting.
- Data integration project planning.
- Actual day-to-day data integration product development activities.
- Negotiating with data owners the terms for importing their data to the [petitioner's] database.
- Inbound and outbound data licensing management.
- Personnel management, including hiring/firing and day-to-day management, of the marine data integration team which is distributed between the US and Europe.

In further support of eligibility, the petitioner submitted (1) various corporate documents, including its certificate of incorporation; (2) a company overview; and (3) a copy of the beneficiary's academic credentials and evaluation by the [REDACTED]

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 24, 2013. In the RFE, the director asked the petitioner to provide additional evidence to establish (1) that the proffered position qualifies as a specialty occupation; (2) that the beneficiary was qualified to perform the duties of a specialty occupation position; and (3) that the petitioner had sufficient in-house employment for the beneficiary. The director outlined the evidence to be submitted.

In response to the director's RFE, the petitioner submitted a letter and additional evidence. That letter included an additional description of the duties of the described position, which is restated below in relevant part:

- Ensuring the legality and regularity of all agreements entered into by [the petitioner]. Approximately 5% of the time.
- Negotiating the terms of agreements with business partners. Approximately 5% of the time.
- Negotiating with data owners the terms for importing their data to the [petitioner's] database. Approximately 30% of the time.
- Inbound and outbound data licensing management. This function requires a careful analysis of the scope of the applicable licensing agreements to ensure that all data use fits within the scope of the licenses. Approximately 20% of the time.

In addition, the petitioner stated:

Other key responsibilities of the position of Lead Operations and Data Manager include the following management-level business management activities (many of which also often have legal elements as well):

- Financial management and management reporting. Approximately 5% of the time.
- Personnel management, including hiring/firing and day-to-day management, of the marine data integration team which is distributed between the US and Europe. Approximately 5% of the time.
- Data integration project planning. Approximately 10% of the time.
- Day-to-day management of the data integration product development activities. Approximately 15% of the time.
- Other tasks related to daily operations. Approximately 5% of the time.

The petitioner also provided (1) additional corporate information taken from the petitioner's website; (2) an organizational chart; (3) letters documenting the beneficiary's prior work experience; (4) evaluation of the beneficiary's education and experience; (5) a copy of the

petitioner's business plan; (6) a copy of the beneficiary's employment agreement with the petitioner; (7) copies of contracts between the petitioner and clients; (8) photos of the petitioner's office space; (9) a copy of the petitioner's services agreement for its business location; (10) copies of bank statements and payrolls documents; and (11) copies of invoices.

The director denied the petition on November 20, 2013, concluding that the petitioner had not established that the proffered position qualifies as a specialty occupation.

On appeal, counsel for the petitioner asserts that the director's denial was erroneous, and submits a brief and additional evidence. Counsel contends that the director misapplied the facts, and contends that, contrary to the director's findings, the proffered position is actually akin to that of a top executive as described by the U.S. Department of Labor's *Occupational Outlook Handbook*. (*Handbook*). In addition to the appeal brief, counsel submits (1) excerpts from the *Handbook* addressing the occupations of "administrative services manager" and "top executives;" (2) material from the FLC Online Wage Library; and (3) copies of job vacancy announcements for positions the petitioner contends are parallel to the proffered position.

### III. ANALYSIS

We reviewed the record of proceeding in its entirety. To make our determination whether the proffered position qualifies as a specialty occupation, we turn to the supplemental, additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As a preliminary matter, the petitioner's claim that a "Bachelor's level education" is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, 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) ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility.") Thus, while 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 (1st Cir. 2007).

Accordingly, the petitioner's assertion that its minimum requirement for the proffered position is only a bachelor's degree, without further requiring that that degree be in any specific specialty, is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

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

The petitioner stated that the beneficiary would be employed in a position to which it assigned the job title of "Lead Operations and Data Manager." However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the evidence in the record of proceeding establishes that performance of the particular proffered position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation, as required by the Act.

As previously discussed, the petitioner asserted in the LCA that the proffered position falls within the occupational category "Managers, All Others." The director concluded that, based on the duties as described in the record, the proffered position was akin to that of an Administrative Services Manager, and denied the petition on the basis that this occupation did not require at least a bachelor's degree in a specific specialty. On appeal, counsel for the petitioner contends that the director's categorization of the position in this category was erroneous, and claimed that the proper classification of the proffered position is that of a Top Executive.

We reviewed the information in the *Handbook* regarding both occupational categories, and concur with counsel's contention on appeal that the proffered position is in fact properly classified under the heading of Top Executives. The director's findings to the contrary are hereby withdrawn.<sup>1</sup>

Nevertheless, the inclusion of the proffered position in this occupational category does not support a conclusion that this occupation normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation.

More specifically, the subchapter of the *Handbook* entitled "How to Become a Top Executive " states the following about this occupational category:

Many top executives have a bachelor's or master's degree in business administration or in an area related to their field of work. Top executives in the public sector often have a degree in business administration, public administration, law, or the liberal arts. Top executives of large corporations often have a master of business administration (MBA). College presidents and school superintendents typically have a doctoral degree in the field in which they originally taught or in education administration.

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<sup>1</sup> The director's erroneous finding was harmless, since we conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, "Top Executives," <http://www.bls.gov/ooh/management/top-executives.htm#tab-4> (accessed June 5, 2014).

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 this occupation. Although the *Handbook* states that most financial analysts typically need a bachelor's degree to enter the occupation, the *Handbook* does not indicate that such a degree must be *in a specific specialty*.<sup>2</sup> Rather, the narrative of the *Handbook* reports that "top executives in the public sector often have a degree in business administration, public administration, law, or the liberal arts."

Moreover, the *Handbook* also indicates that top executives often have degrees in business administration. To prove 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. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

Thus, for the reasons discussed above, the *Handbook* does not support a claim that "Top Executives" 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.

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. The

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<sup>2</sup> For instance, the first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of financial analyst positions require at least a bachelor's degree, it could be said that "most" financial analyst positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act.

regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

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

Next, we find that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (*D. Minn.* 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D. N.Y. 1989)).

As previously 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 for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter.

The petitioner designated its business operations under the corresponding North American Industry Classification System (NAICS) code 488330 designated for "Navigational Services to Shipping" on the LCA.<sup>3</sup> The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

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<sup>3</sup> According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last accessed June 5, 2014).

This industry comprises establishments primarily engaged in providing navigational services to shipping. Marine salvage establishments are included in this industry.

U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 488330 – All Other Chemical Product and Preparation Manufacturing on the Internet at <http://www.census.gov/epcd/ec97/def/32599.HTM> (last accessed June 5, 2014).

The petitioner must establish that similar organizations in fact routinely require specialty-degreed individuals in parallel positions. 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, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner.

Although specifically requested by the director, the petitioner provided no evidence to satisfy this prong of the second criterion prior to adjudication. On appeal, however, the petitioner submits for the first time a number of job advertisements to satisfy this criterion. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, we need not and will not consider the sufficiency of the evidence submitted for the first time on appeal.

It should be noted, however, that even if we were to consider this evidence, the petitioner did not provide any independent evidence of how representative the job advertisements are of the particular advertising employers' recruiting history for the types of jobs advertised. As the advertisements are only solicitations for hire, they are not evidence of the employer's actual hiring practices. Upon review of the documents, we find that they do not establish that a requirement for a bachelor's degree, in a specific specialty, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position.

For instance, the advertisements include positions with an international contracts research organization, a consumer packaged goods manufacturer, a security and surveillance company, and an IT services company. Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. Even if these advertisements had been properly before us for review, 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 any information regarding which aspects or traits (if any) it shares with the advertising organizations.

Moreover, most of the advertisements do not appear to be for parallel positions. For instance, one position is titled "Software Licensing Compliance Analyst" and another is titled "Negotiator." For these postings, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Finally, contrary to the purpose for which the advertisements were submitted, some of the postings do not establish that at least a bachelor's degree in a specific specialty, or the equivalent, is required for the positions. For example, some of the postings state that a bachelor's degree is required, but they do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required. We here reiterate 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 specialty occupation claimed in the petition. Moreover, we observe that some of the advertisements indicate that a bachelor's degree in business or business administration is acceptable. 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 support the assertion that a position is a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558.

We reviewed all of the submitted advertisements. As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. The evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.<sup>4</sup>

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).

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<sup>4</sup> USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. at 376. As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995).

We 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.

At the outset, the proffered position and its duties are presented in terms of generalized functions that are not described in sufficient detail to establish either whatever substantive work their actual performance would entail or the nature and educational or education-equivalency level of knowledge in any specific specialty that such work would require. As reflected in those discussions, we find that the evidence of record does not establish relative complexity or uniqueness as distinguishing features of the proffered position, let alone as aspects that would establish the position as requiring the service of a person with at least bachelor's degree, or the equivalent, in a specific specialty.

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. Specifically, the petitioner failed to demonstrate how the proffered position's duties as described require the theoretical and practical application of a body of highly specialized knowledge such that a person who has attained a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them.

In addition to this decisive evidentiary deficiency, we also find that the content of LCA submitted into the record weighs against a favorable finding here. The LCA indicates a wage level based upon the occupational classification "Managers, All Others" at a Level I (entry) wage.<sup>5</sup> This wage-level designation is appropriate for positions for which the petitioner expects

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<sup>5</sup> 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.

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

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at: [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

the beneficiary to only have a basic understanding of the occupation.<sup>6</sup> That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment, that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. 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. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."<sup>7</sup> Thus, the wage level designated by the petitioner in the LCA for the proffered position is not consistent with claims that the position would entail any particularly complex or unique duties or that the position itself would be so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty.

In other words, the record lacks sufficiently detailed information to distinguish the proffered position as so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We turn next to the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position.

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

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<sup>6</sup> The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

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

<sup>7</sup> For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

past.

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

While a petitioner may believe and 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").

Moreover, to satisfy this criterion, the record must establish 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 or its equivalent as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. To interpret the regulation 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 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 submits no evidence in support of the contention that it has routinely employed only specialty-degreed individuals in the proffered position. Since the petitioner has not provided evidence to establish that it normally requires at least a bachelor's degree in a specific

specialty, or its equivalent, for the proffered position, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

Upon review of the entire record of the proceeding, we find that the petitioner has not provided sufficient evidence to satisfy this criterion of the regulations.

We again refer the petitioner to our earlier discussions with regard to the generalized and relatively abstract information provided about the nature of the proposed duties. As there reflected, the evidence of record simply does not provide sufficient details about the nature of the proposed duties to establish the level of specialization and complexity required to satisfy this particular criterion.

By the same token, 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 positions in the Top Executives occupational category whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

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

As the evidence of record has not established that the nature of the duties of the proffered position is 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 petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

We therefore conclude that 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.

## V. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration

benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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