(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: MAR 13 2014 OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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,

Michael T. Kelly

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center ("the director"), denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), the petitioner states that it is a "Retail" business. The petitioner indicates that it was established in 2005, employs 3 personnel in the United States, and reported a gross annual income of $876,548 for the last fiscal year. It seeks to employ the beneficiary as a "Sales Manager" from October 1, 2012 until October 1, 2015. Accordingly, the petitioner endeavors 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 record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the denial decision; and (5) the Form I-290B, Notice of Appeal or Motion, and counsel's brief and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.[1]

The director denied the petition, determining that the record did not establish that the job offered qualifies as a specialty occupation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's grounds for denying this petition. For this reason the appeal will be dismissed and the petition will remain denied.

I. Facts and Procedural History

On the Form I-129, the petitioner identified the proffered position as a part-time "Sales Manager" who will work 25 hours per week. The petitioner listed its North American Industry Classification System (NAICS) Code on the Form I-129 H-1B Data Collection Supplement, Part A, Question 6, as 447110, "Gasoline Stations with Convenience Stores."[2] The petitioner also attested on the required Labor Condition Application (LCA) that the proffered position is a part-time position and that the occupational classification for the position is "Sales Managers," SOC (ONET/OES) Code 11-2022, at a Level I (entry-level) wage.[3] The LCA was certified on June 25, 2012, for a validity period from October 1, 2012 to October 1, 2015.

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

[2] U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "447110 Gasoline Stations with Convenience Stores," http://www.census.gov/cgi-bin/sssd/naics/naicsrch.

[3] *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.

In its July 20, 2012 letter in support of the petition, the petitioner stated that it is "an acquisition, management and development firm, primarily in the business of retail distribution of food, automotive, and household products." The petitioner indicated its need for a sales manager to "combat the work flow" and to "accomplish the goal of becoming a major participant in the industry." The petitioner described the beneficiary's specific duties as:

i. Training staff and conducting annual reviews;
ii. Supervising sales staff in selling merchandise to retail customers and general store management;
iii. Maintaining inventory listing and calculating shrinkage;
iv. Developing computerized procedures for inventory purchasing, quality control, and store sales reporting;
v. Responding to customer inquiries and complaints;
vi. Planning and implementing sales quotas, budgets, and forecasts by utilizing software applications, including proprietary POS system; and
vii. Sales and management reporting.

The petitioner noted: "[d]ue to the complex and demanding requirements of the position of a Sales Manager, only a person of exceptional ability and skills in technology is capable of qualifying as a Sales Manager for [the petitioner]." The petitioner stated that the minimum prerequisite for the proffered position is a bachelor's degree in sales management, technology, information systems, or a related field.

Upon review, the director found the evidence insufficient to establish eligibility for the benefit sought and issued an RFE.

In a response dated March 4, 2013, the petitioner provided a similar description of duties for the proffered position, adding an allocation of time spent on the duties and expanding upon the duties as follows:

> Training staff and conducting annual reviews. Supervising sales staff in selling merchandise to retail customers and general store management. 35%
>
> Manage sales department in a professional manner. You must make every effort to maximize both present and long term sales and gross profits. Keep face-to-face contact with sales people and you must stay current on financial data and inventory. Sales managers train, direct, and supervise their sales staff. They coordinate the operation of their sales department by establishing territories, goals, and quotas for their sales workers. Reviewing market analyses helps them to determine customer needs, sales volume potential, and pricing schedules that will meet company goals.
>
> Maintaining inventory listing and calculating shrinkage. Developing computerized security procedures for inventory purchasing, quality control. 20%

Keeping inventory management costs down is crucial to competitive advantage. Provide tighter control of stock levels. Set complex pricing rules based on individual customers, item variations, volume and more. Provides intelligent control over inventory replenishment, helping ensure that you have enough on hand to fill anticipated orders, but keep excess stock to a minimum. Average lead time, historical or seasonal-based sales demand, and number of days' supply to stock are used to dynamically set reorder point and preferred stock level for each item, on an ongoing basis. Measure for selling, buying, and costing each item across various sales channels, and retail stores.

Planning and implementing sales quotas, budgets, and forecasts by utilizing software applications, including proprietary POS system. 25%

Plan, organize, direct and control your sales staff to meet these objectives. Use these to help your salespeople maximize their potential. Sales Managers assign sales territories, or geographic regions to selling personnel. They also evaluate the performance of the sales workers. Sales managers represent their companies at trade association conventions and meetings to promote their products. Some monitor customer preferences and direct and supervise product research and development. They may also be in charge of recommending or approving budgets for product research and development.

Responding to customer inquiries and complaints. Sales and management reporting. 20%

Sales worker supervisors ensure that customers receive satisfactory service and quality goods. They also answer customers' inquiries, deal with complaints, and sometimes handle purchasing, budgeting, and accounting. To perform sales reporting and analysis, sales manager must be able to see the most current sales information, including volume, accounts, and type of products sold, which requires data from multiple systems. However, due to a complex set of sales reporting tools, the existing reporting was time consuming and lacked accuracy.

The petitioner asserted that because these duties are specialized and complex, the knowledge required to perform them is usually associated with the attainment of at least a bachelor's degree in sales management, technology, information systems, or a related field. The petitioner noted further that "the above mentioned duties requires [*sic*] candidates to possess skills in the area of Business Administration, which requires attainment of at least a Bachelor's degree."

The petitioner emphasized that the beneficiary "will not only oversee the work of salespersons and customer service representatives, but also will be responsible for the overall sales operation of the retail locations." The petitioner repeated and paraphrased previously described duties, indicating:

> [The beneficiary] will also be responsible for interviewing, hiring, and training sales employees, as well as preparing work schedules and assigning workers to specific duties. [The petitioner] sells merchandise directly to customers; the Beneficiary is responsible for ensuring that customers receive satisfactory service and quality merchandise as well [as] answer customers' inquiries and handle complaints. Beneficiary will also supervise sales associates and employees who price and ticket the inventory. In addition, the Beneficiary establishes sales quotas, budgets for sales department, and sales forecasts. Furthermore, the Beneficiary will establish security procedures, review inventory and sales records, develop merchandising techniques, coordinate sales promotions, and promote sales and good public relations.

The petitioner indicated that as it is seeks to expand its business, it requires "a properly-trained individual to perform complex analyses of market trends, consumer preferences, competitor strengths and weaknesses, and economic conditions in order to determine viable areas for growth and appropriate methods for maximizing profitability." The petitioner asserted that it is standard for a company with gross annual revenues of $876,548 to hire a sales manager and require that individual to have a bachelor's degree. The petitioner then concluded that the industry standard for the proffered position is a "minimum of a Bachelor's Degree in Sales Management, Technology, Information Systems, or a related field, or similar preparation."

Counsel for the petitioner, on page five of a letter dated March 6, 2013, submitted in response to the director's RFE, asserted that the beneficiary's "responsibilities primarily include formulating policies for potential sales of products." Counsel claimed that the beneficiary (paraphrased and bullets added for clarity):

- Will spend the majority of time on gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution.
- Will analyze data on past sales to predict future sales.
- Will devise methods and procedures for obtaining the sales data, directing staffing, coordinating sales promotions and distribution, advising dealers and clients, analyzing sales data and recommending solutions for improvements.

The petitioner also provided over 20 advertisements posted on the Internet for positions ranging from sales manager to district or regional sales manager from a variety of organizations. The organizations included an optical company, a major department store, a fragrance retailer, major wireless companies, a warehouse discount retailer, a medical software company, a window/glass retailer, a lift truck retailer, a bakery, staffing companies, and an import/export company dealing in chemicals. The petitioner did not provide any advertisements from the operator of a convenience store/gas station. A majority of the advertisements indicated that a general bachelor's degree was preferred or in some instances required. Five of the advertisements requiring a bachelor's degree indicated that majors in marketing, sales, or business were preferred. One advertisement from an import/export company dealing in chemicals required the successful candidate to have a bachelor's degree in either chemistry or chemical engineering. The petitioner provided two newspaper advertisements for sales managers, one for a hotel/motel

and one for a retail company, in the Texas area. Neither of the newspaper advertisements identified a specific field of study or degree as required for the sales manager positions advertised.

The record also included the petitioner's 2011 tax returns, the petitioner's 2012 Quarterly Tax Returns, the petitioner's Articles of Incorporation, copies of the petitioner's 2012 bank statements, copies of the petitioner's business licenses, copies of the petitioner's invoices, an excerpt from the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) on the Sales Managers occupational group, and the Internet printout from the Department of Labor's Occupational Information Network (O*NET Online) on the Sales Managers occupational classification. [4]

Upon review, including the petitioner's response to the RFE, the director determined that the record did not establish that the proffered position is a specialty occupation.

On appeal, counsel for the petitioner asserts, for the first time, that the petitioner "is seeking new opportunities to establish an internet business for a retail store." Counsel also claims that it is "typical for a retail management company with approximately $966,683 in gross annual revenues to hire someone in a professional position to perform specialized financial management duties."[5] Counsel contends that the copies of Internet job postings submitted in response to the director's RFE included several from retail businesses similar to the petitioner. Counsel paraphrases and repeats his response to the director's RFE and contends that the duties of the position and the nature of the petitioner's business require the services of a sales manager and that the industry standard requires a minimum of a bachelor's degree plus work experience.

II. Specialty Occupation

A. Law

The principle issue in this matter is whether the director correctly determined that the petitioner failed to establish that the proffered position is a specialty occupation.
To meet its burden of proof on this issue, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements. Section

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[4] The petitioner also included a July 31, 2009 opinion prepared by Dr. , an Associate Professor of Management Science at the Dr. letter discussed the sales manager position for the company that previously employed the beneficiary and Dr. offered his opinion on the nature of that position as well as on the beneficiary's qualifications. As the letter does not address the current proffered position it has no probative value in this matter.

[5] Although the petitioner's 2012 Internal Revenue Service (IRS) Form 1120S shows the petitioner had gross receipts and sales of $966,683, counsel also references previously submitting a job description for an accountant and further uses the name of a different beneficiary to indicate that the individual is qualified to perform the duties of an accountant. Accordingly, it is not clear from counsel's brief on appeal that the new assertions pertain to the petitioner and/or the beneficiary in this matter.

214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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, supra*. To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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

B. Analysis

Preliminarily, we observe that the petitioner has identified itself with the NAICS Code on the Form I-129 as a gasoline station with a convenience store. The petitioner also indicated that it employs three personnel. Thus, it appears that the petitioner operates one gasoline/convenience store in Texas.[6] In the petitioner's July 20, 2012 letter in support of the petition, the

[6] Although the petitioner references "retail operations," the record does not include evidence establishing that the petitioner operates more than one gas station/convenience store in one location. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Counsel's assertion on appeal that the petitioner "is seeking new opportunities to establish an internet business for a retail store," is not supported in the record. Moreover, the petitioner must establish eligibility at the time of filing the

petitioner claimed that it is an "acquisition, management and development firm, primarily in the business of retail distribution of food, automotive, and household products." The petitioner does not clarify this material discrepancy regarding the nature of its business. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In addition, the petitioner's initially described the beneficiary's proposed duties as training staff and conducting annual reviews, supervising sales staff, and general store management. In response to the director's RFE, the petitioner noted that the beneficiary would spend 35 percent of his time managing the sales department, keeping face-to-face with the sales people, establishing territories, goals, and quotas for the sales market, as well as reviewing market analyses. The petitioner also references the beneficiary's responsibility for overseeing the work of salespersons and customer service representatives. However, the petitioner does not provide an organizational chart or any probative evidence establishing that it has a sales department, sales people, or customer service representatives. Moreover, the petitioner does not explain why it is necessary for the individual in the proffered position to establish territories, goals, and quotas for a three-employee retail gasoline station/convenience store. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The record is further confused when counsel for the petitioner responds to the director's RFE with additional and different duties for the beneficiary. Counsel asserted that the beneficiary's "responsibilities primarily include formulating policies for potential sales of products" and then adds duties that appear to correspond more closely with a marketing position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

A critical analysis of the nature of the petitioner's business as presented in the record and its stated number of employees undermines the petitioner's claim that the proffered part-time position comports with the Sales Managers occupation as described in the *Handbook*. Rather, the totality of the evidence of record – considered and together and weighed for consistency and credibility – does not establish that the beneficiary would engage in more than the day-to-day functions of a sales clerk or cashier. Although the petitioner does not include information regarding the number of hours its business will remain open, it is not entirely credible that a gasoline station/convenience store open for even a minimum number of hours could operate with only three employees without the participation of the beneficiary primarily performing non-managerial cashier, clerk, and stocking duties.

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nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Finally, the petitioner initially claims that the minimum requirement for the proffered position is a bachelor's degree in sales management, technology, information systems, or a related field. The petitioner, however, does not correlate the specific duties described to one or more of the disparate fields of sales management, technology, information systems, or a related field. The petitioner also later indicates that the duties require candidates only to possess skills in the area of business administration which requires at least a bachelor's degree. Accordingly, it is not possible to conclude from the petitioner's varying statements regarding the requirements necessary to perform the duties of the position: (1) the specific degree it requires for the beneficiary to perform the duties of its claimed sales manager position; and (2) how the disparate degrees referenced as a minimum prerequisite correlate to the duties it described. 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. *Matter of Ho*, 19 I&N Dec. at 591 (BIA 1988).

As the record does not present a consistent version of the nature of the petitioner's business, the proposed duties of the position, or the required degree to perform the duties of the proffered position, the petitioner has not established that the proffered position is a specialty occupation.

Nevertheless, as will now be discussed, even if the petitioner had presented a consistent and realistic version of its claimed position sufficient to establish that it belongs within the Sales Managers occupational classification, the evidence of record still would not establish the proffered position as a specialty occupation.

To make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position that is the subject of the petition.

The AAO recognizes the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[7] The AAO reviewed the information in the *Handbook* regarding the occupational category "Sales Managers," which naturally enough appears in the chapter entitled "Sales Managers." The *Handbook* reports:

> Sales managers direct organizations' sales teams. They set sales goals, analyze data, and develop training programs for organizations' sales representatives.
>
> Sales managers typically do the following:

[7] The AAO's references to the *Handbook* are to the 2014-2015 edition, which may be accessed at the Internet site http://www.bls.gov/OCO/.

- Resolve customer complaints regarding sales and service
- Prepare budgets and approve expenditures
- Monitor customer preferences to determine the focus of sales efforts
- Analyze sales statistics
- Project sales and determine the profitability of products and services
- Determine discount rates or special pricing plans
- Develop plans to acquire new customers or clients, through direct sales techniques, cold calling, and business-to-business marketing visits
- Assign sales territories and set sales quotas
- Plan and coordinate training programs for sales staff

Sales managers' responsibilities vary with the size of the organization they work for. However, most sales managers direct the distribution of goods and services by assigning sales territories, setting sales goals, and establishing training programs for the organization's sales representatives.

Some sales managers recruit, hire, and train new members of the sales staff.

See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Sales Managers," at http://www.bls.gov/ooh/management/sales-managers.htm#tab-2 (last visited Jan. 29, 2014).

While the *Handbook* indicates that "most sales managers have a bachelor's degree," the *Handbook* does not state that the degree must be in a specific discipline. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Sales Managers," at http://www.bls.gov/ooh/management/sales-managers.htm#tab-4 (last visited Jan. 29, 2014).

To satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the petitioner must demonstrate that a baccalaureate or higher degree in a *specific discipline* is normally the minimum requirement for entry into the particular position. 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 only a general bachelor's degree or a bachelor's 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). Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).[8] In

[8] 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

this matter, the petitioner's acknowledgment that a bachelor's degree in business administration is the minimum requirement to enter the proffered position is tantamount to an admission that the position here proffered is not a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

Additionally, as the *Handbook* reports that "most" - not all - sales managers hold a bachelor's degree, it does not support a finding that the proffered position's inclusion within the Sales Managers occupational category would in itself be sufficient to establish the position as one for which even a bachelor's degree, let alone a bachelor's degree in a specific specialty, would normally be a minimum requirement for entry.

Where, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies this criterion by a preponderance of the evidence standard, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Again, 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. In this case, the *Handbook* does not support the proposition that the proffered position satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), and the record of proceeding does not contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category would be sufficient in and of itself to establish that a bachelor's or higher degree in a specific specialty or its equivalent "is normally the minimum requirement for entry into [this] particular position."

In conclusion, as the evidence in the record of proceeding does not establish 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 this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This prong requires a petitioner to establish that a requirement

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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 analysis in connection with a conceptually similar provision). This is as it should be: elsewise, 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.

for a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava,* 712 F. Supp. at 1102). As already discussed, the *Handbook* does not report an industry-wide requirement for at least a bachelor's degree in a specific specialty for the proffered position. The record of proceeding does not contain any evidence from the industry's professional association to indicate that a degree in a specific discipline is a minimum entry requirement. The petitioner also did not submit any letters or affidavits from firms or individuals in the industry.

However, the record of proceeding contains several job announcements, which we shall now address.

Regarding the advertisements submitted, we observe that for the petitioner to establish that the organizations advertising for sales managers are similar to its organization, it must demonstrate that it 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).

As observed above, the petitioner states on the Form I-129, that it is a "Retail" business, employs three (3) persons in the United States, and reported a gross annual income of $876,548 for the last fiscal year. In addition, the petitioner listed its NAICS Code on the Form I-129 H-1B Data Collection Supplement, Part A, Question 6, as 447110, "Gasoline Stations with Convenience Stores." As noted above, the advertisers on the job postings submitted did not include any gas stations with convenience stores. In addition, the petitioner did not present any evidence establishing that any of advertising organizations in retail are similar to the petitioner in type, scope of operations, or level of revenue or staffing.

Moreover, the petitioner 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. Additionally, upon review of the job postings, the AAO finds that they do not establish that requiring 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.

It must be noted that even if all of the job postings had shown that they specified at least a bachelor's degree in a specific specialty for the advertised positions and that those advertisements were placed by organizations similar to the petitioner and in its industry and for

positions parallel to the one that is the subject of this petition, the evidence of record does not demonstrate what statistically valid inferences, if any, can be drawn from these few 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). Further, 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 content of the job announcements had satisfied the requisite foundational elements for consideration under this alternative prong (i.e., that (1) the advertising organizations were in the petitioner's industry, (2) those organizations were similar to the petitioner, (3) they routinely required a bachelor's or higher degree in a specific specialty or its equivalent for the positions advertised, and (4) those advertised positions are parallel to the one proffered in this petition – none of which is the case here) still such a limited number of advertisements that appear to have been consciously selected would not be sufficient to satisfy this prong. That is, the advertisements do not establish that, in the words of this alternative prong, "[t]he degree requirement is common to the industry in parallel positions among similar organizations."

Thus, based upon a complete review of the record, the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and (2) located in organizations 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 petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

The petitioner in this matter fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of its sales manager. For example, the petitioner emphasized the complexity of the duties of the proffered position, however, the implicit claim that the beneficiary must operate at an advanced level is undermined by the Level I classification of the proffered position. A review of the beneficiary's Level I salary strongly suggests that the proffered position is actually a support role in a retail business. If the proffered position is a higher-level position, requiring the performance of unique and specialized duties, such a position would be classified as a Level III or IV position, requiring a significantly higher prevailing wage.

The evidence of record does not establish that this position is significantly different from other sales manager positions which do that require at most a general bachelor's degree to perform the attendant responsibilities. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than positions in the same occupational category

or other closely related positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Consequently, as the petitioner fails to demonstrate how the proffered position of sales manager analyst is so complex or unique relative to other sales manager positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

Turning to the third criterion, the AAO observes that the petitioner has not stated that it previously employed anyone to perform the duties of the proffered position. The record does not identify any other employees that held the position, or contain evidence of their degrees, duties, and wages paid. Accordingly, the petitioner's recruiting and hiring history is insufficient to establish this element.

We also observe that while a petitioner may believe or otherwise assert that a proffered position requires a degree in a specific specialty, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and 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").

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties as described do not show that they are more specialized and complex than a sales manager position that is not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. In addition to the lack of sufficient specificity to distinguish the proffered position from other sales manager positions for which a bachelor's or higher degree in a specific specialty, or its equivalent, is not required to perform their duties, the petitioner has designated the proffered position as a Level I position on the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation.[9]

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[9] *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.

Moreover, the Level I wage rate indicates that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that he will receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy. *See* DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. Both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, by the submission of an LCA certified for a wage-level I, the petitioner effectively attests that the proposed duties are of relatively low complexity as compared to others within the same occupational category. This fact is materially inconsistent with the level of complexity required by this criterion.

The *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

> **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 [emphasis in original].

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. The *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

> **Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

Id.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that the

Level II wage-rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

> **Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.
>
> Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker . . . .

Id.

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

> **Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Id.

By virtue of the petitioner's LCA submission at the lowest possible wage-level, the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex

tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

For these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(4)*.

Additionally, given that a typical sales manager position does not require at least a bachelor's degree in a specific specialty, or the equivalent, for entry into the occupation, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* contain such a requirement.

The current record does not establish that the petitioner has satisfied the statutory requirement for a specialty occupation found at section 214(i)(l) of the Act and further has failed to satisfy any of the additional, supplemental requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to conclude that it requires a baccalaureate or higher degree in a specific specialty or its equivalent. As observed above, absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent. Thus, we do not reach the question of the beneficiary's qualifications and whether his coursework in obtaining his degree qualifies him to perform the duties of the position because the record does not establish that the proffered position is a specialty occupation. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *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.