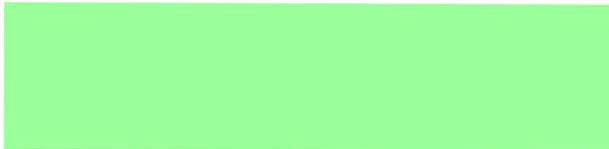
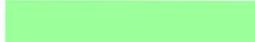


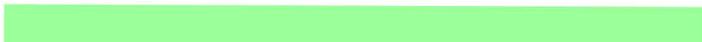


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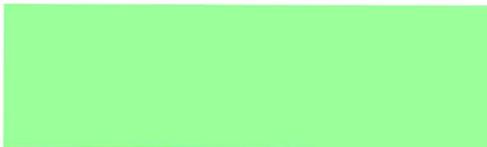


DATE: **SEP 08 2014** OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(15)(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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center. In the Form I-129 visa petition, the petitioner describes itself as an automotive parts wholesale export business established in 2004. In order to employ the beneficiary in what it designates as a systems analyst position, 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, 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 of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. Counsel submitted a brief and additional documents in support of this assertion.

The record of proceeding before us 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 denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, and supporting documentation. We reviewed the record in its entirety before issuing our decision.¹

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

We will also discuss two additional, independent grounds, not identified by the director's decision, that also preclude approval of this petition. Specifically, beyond the decision of the director, the petitioner failed to (1) establish that it would pay an adequate salary for the beneficiary's work, as required under the applicable statutory and regulatory provisions; and (2) submit a Labor Condition Application (LCA) that corresponds to the petition.

I. FACTUAL AND PROCEDURAL BACKGROUND

In this matter, the petitioner states in the Form I-129 petition that it seeks the beneficiary's services as a systems analyst to work on a full-time basis at an annual salary of \$38,334. In an addendum to the Form I-129 petition, the petitioner states that the proffered position involves the following duties:

- Perform periodic analysis of [the petitioner's] management and logistical operations and network infrastructure to maintain a baseline assessment of the effectiveness of these operations[,] from which adjustments and improvements to the infrastructure can be made.

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- Plan, develop and report to senior management and directors improvements and adjustments to be made in various departmental management practices performed at the company's headquarters and within its foreign affiliates in a continuing effort to provide uniformity and efficiency in the execution of shared business functions.
- Address specific problems with networked communications, logistical services management and reporting requirements and develop plans for resolving these problems.
- Establish a reporting regimen for personnel to follow as a means of alerting the senior managers to problems that have arisen or that may arise within any particular corporation operation.

The petitioner did not state the requirements for the proffered position, but indicates that the beneficiary is qualified to perform services in the position by virtue of his foreign education and his experience working for the petitioner's Venezuelan affiliate. The petitioner provided an evaluation of the beneficiary's credentials prepared by [REDACTED] which states that the beneficiary has attained the equivalent of a bachelor degree in systems engineering from a regionally accredited college or university in the United States. In addition, the petitioner submitted a copy of the beneficiary's foreign diploma.

The petitioner provided 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 "Management Analysts" - SOC (ONET/OES) code 13-1111, at a Level I (entry level) wage. The petitioner also provided flyers and brochures regarding the petitioner's products.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE. The director requested that the petitioner submit probative evidence to establish eligibility for the benefit sought, and outlined the evidence to be submitted.

The petitioner and counsel responded to the director's RFE with a letter from the petitioner, dated December 1, 2013, and additional evidence including corporate documents and documents regarding the petitioner's business operations. The petitioner also provided an opinion letter from [REDACTED] emeritus professor at [REDACTED]

The director reviewed the information provided in the initial H-1B petition and in response to the RFE. Although the petitioner and counsel claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish eligibility for the benefit sought and denied the petition. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition. In support of the appeal, counsel submitted a brief and additional evidence, including several job advertisements, a letter from the petitioner, and copies of previously submitted documents.

II. STANDARD OF PROOF

In light of counsel's references to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director 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.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

As footnoted above, we conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted

in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

III. SPECIALTY OCCUPATION LAW AND INTERPRETATION

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 at 387. To avoid this 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 at 147 (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.

IV. MATERIAL FINDINGS

The issue here is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, we will make some preliminary findings that are material to the determination of the merits of this appeal.

A. Requirements for the Proffered Position

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. The petitioner has not identified a minimum education requirement necessary to perform services in the proffered position.² Consequently, the petitioner has not demonstrated that the proffered position qualifies as a specialty occupation, and the appeal may be dismissed and the petition denied on this basis alone.

B. Description of the Duties of the Proffered Position

To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, 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."

Thus, a crucial aspect of this matter is whether the petitioner has adequately and consistently described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed 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. The petitioner has not done so here.

In the instant case, the duties of the proffered position, as described by the petitioner in support of the Form I-129 petition were stated in generic terms that failed to convey the actual tasks the

² We note that the opinion letter submitted in response to the RFE, and again on appeal, states that the proffered position requires a bachelor's degree or its equivalent in computer science, systems engineering, or a related field. However, the source of this requirement is unknown. As will be discussed below, the writer of the letter has not established a sufficient factual foundation upon which to reach a conclusion regarding the requirements of the proffered position.

beneficiary will perform on a day-to-day basis. Specifically, the petitioner stated that the beneficiary would:

- Perform periodic analysis of [the petitioner's] management and logistical operations and network infrastructure to maintain a baseline assessment of the effectiveness of these operations[,] from which adjustments and improvements to the infrastructure can be made.
- Plan, develop and report to senior management and directors improvements and adjustments to be made in various departmental management practices performed at the company's headquarters and within its foreign affiliates in a continuing effort to provide uniformity and efficiency in the execution of shared business functions.
- Address specific problems with networked communications, logistical services management and reporting requirements and develop plans for resolving these problems.
- Establish a reporting regimen for personnel to follow as a means of alerting the senior managers to problems that have arisen or that may arise within any particular corporation operation.

So generally stated, these duties do not convey the actual tasks that the beneficiary is expected to perform on a day-to-day basis such that USCIS may ascertain whether at least a bachelor's degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. In the RFE, the director requested that the petitioner provide additional evidence to "establish that the beneficiary will be employed with the duties that [the petitioner has] set forth." In response to the RFE, the petitioner provided a new list of duties of the proffered position that repeats the above quoted duties and adds the following additional duties:

- Complete configuration, installation and support of a new program, in equipment to the specifications necessities.
- Integrate and relate [the petitioner's] system with Venezuela businesses and clients systems, to keep a better record of inventory, transit status of all merchandise that [redacted] sells and customer's needs.
- To develop new modules to handle various markets that [redacted] manages inside the U.S. (Administration, Purchasing, Sales and Operations) and new product lines to Latin America and other countries around the world.
- Troubleshoot and resolve computer and new program related issues.
- Maintaining software applications, operating systems and regular maintenance.
- Managing changes in new program components to deliver services in accordance with establish[ed] objectives.
- Training staff and responding to inquiries from staff and administrators to provide technical assistance and support.
- Supervising the administration of system and servers related to network to ensure availability of services to authorized users.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new, additional duties to the job description. Significantly, in response to the RFE, the additional duties added by the petitioner relate exclusively to the petitioner's computer systems, calling into question the petitioner's characterization of the proffered position as pertaining to the occupational category of "Management Analysts" on the LCA.

On appeal, the petitioner provided yet another set of duties for the proffered position. In a letter dated February 4, 2014, the petitioner stated that the beneficiary will perform the following duties:

1. Set up the whole computing environment by the actual server, enabling it to tolerate and adapt to the new software to be installed. This procedure is made through the configuration of services, security, and accesses.
2. Installation and set up of software itself. General variables, users, configuration of role of users are part of the steps to be done.
3. Configuration done to the software, to define data structures that each module will follow (Sales module, Purchase module, Administration module, and accounting module)
4. Feed the software with previous historic data to establish the record.
5. Re-engineering processes, making them more optimal while they work along with the new software to be installed.
6. Execute a detailed job throughout the modules. (E.g. statistics module amplification, purchase module amplification, re-structure of inventory and more)
7. Training given by [the beneficiary] to all users, since he is the developer, expert, and installer of the new software in [the petitioner's] Miami office.
8. Consolidation of all the information originated from the different affiliates of the company around the world, in just one information central ([the petitioner's] Miami [location]).
9. Develop a "Management consulting", which uses all the consolidation of the information done previously in order to generate purchase, sales, accounting and administrative reports.
10. Provide support to all the technological structure established in the Headquarter.
11. Foster the implementation of an optimal webpage that will be interrelated with the system, developing the e-commerce of the company and creating a relationship between system and information uploaded to the web.

The petitioner then proceeded to describe its "computing environment." We observe that on appeal, the petitioner no longer represents that any of the original duties comprise the proffered position. Rather, the position is now exclusively a position relating to the upgrading and maintenance of the petitioner's computer systems, and installation of specialized software. The management analyst aspects of the proffered position have disappeared from the petitioner's description.

Thus, upon review, it is not evident that the proposed duties as described, and the position that they comprise, merit recognition of the proffered position as qualifying as a specialty occupation. That is, to the extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the performance of the proffered position for the entire period requested. The varying job descriptions do not persuasively support the claim that the position's day-to-day job responsibilities and duties would require the theoretical and practical application of a particular educational level of highly specialized knowledge in a specific specialty directly related to those duties and responsibilities. As the petitioner has not consistently described the duties of the proffered position, we are unable to ascertain the specific tasks that will occupy the majority of the beneficiary's time. We are therefore unable to conclude that the proffered position requires the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

V. SPECIALTY OCCUPATION ANALYSIS

We now turn to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). As explained earlier in this decision, the petitioner has not established the nature of the proffered position and in what capacity the beneficiary will actually be employed within the context of the petitioner's business operations. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nevertheless, assuming, *arguendo*, that the petitioner had adequately and accurately described the duties of the proffered position, we will now discuss the proffered position 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.

USCIS recognizes the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations

that it addresses.³ As previously discussed, the petitioner asserts that the proffered position falls under the occupational category "Management Analysts." We reviewed the section of the *Handbook* regarding the occupational category "Management Analysts," including the section entitled "How to Become a Management Analyst," which describes the following preparation for the occupation:

Education

A bachelor's degree is the typical entry-level requirement for management analysts. However, some employers prefer to hire candidates who have a master's degree in business administration (MBA).

Few colleges and universities offer formal programs in management consulting. However, many fields of study provide a suitable education because of the range of areas that management analysts address. Common fields of study include business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English.

Analysts also routinely attend conferences to stay up to date on current developments in their field.

Licenses, Certifications, and Registrations

The [REDACTED] offers the Certified Management Consultant (CMC) designation to those who meet minimum levels of education and experience, submit client reviews, and pass an interview and exam covering the [REDACTED] Code of Ethics. Management consultants with a CMC designation must be recertified every 3 years. Management analysts are not required to get certification, but it may give jobseekers a competitive advantage.

Work Experience in a Related Occupation

Many analysts enter the occupation with several years of work experience. Organizations that specialize in certain fields typically try to hire candidates who have experience in those areas. Typical work backgrounds include management, human resources, and information technology.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Management Analysts, on the Internet at <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-4> (last visited August 12, 2014).

When reviewing the *Handbook*, it must be noted that the petitioner designated the proffered position

³ All of the references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational categories are hereby incorporated into the record of proceeding.

as a Level I (entry level) position on the LCA.⁴ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance."⁵ A Level I wage rate is described 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.

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.

Thus, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. Based upon the petitioner's designation of the proffered position as a Level I (entry) position, it does not appear that the beneficiary will be expected to serve in a senior or leadership role. As noted above, according to DOL guidance, a statement that the job offer is for a research fellow, worker in training or an internship is indicative that a Level I wage should be considered.

⁴ Wage levels should be determined only after selecting the most relevant 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.

⁵ 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.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into a management analyst occupation. Rather, the *Handbook* states that many fields of study provide a suitable education for management analysts. The *Handbook's* narrative indicates that common fields of study include business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English. According to the *Handbook*, a range of programs can help people prepare for jobs in this occupation. The *Handbook* states that many analysts enter the occupation with several years of work experience, and that typical work backgrounds include management, human resources, and information technology. The *Handbook* does not conclude that normally the minimum requirement for entry into these positions is at least a bachelor's degree in a *specific specialty*, or its equivalent.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields (such as business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English) would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

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

Here, the *Handbook* indicates baccalaureate degrees in various fields are acceptable for entry into the occupation. In addition to recognizing degrees in disparate fields (i.e., business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English), the *Handbook* indicates that a common field of study for this occupation is business and that some employers prefer to hire candidates who have an advanced degree in business administration. A *preference* for a candidate with a master's degree in business administration is not an indication of a *requirement* for the same. Furthermore, we note that although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See

Royal Siam Corp. v. Chertoff, 484 F.3d 139, 147 (1st Cir. 2007).⁶ Therefore, the *Handbook's* recognition that a general, non-specialty degree in business is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not normally the minimum requirement for entry into this occupation.

In addition, the *Handbook* reports that management analysts are not required to get certification, but it may give jobseekers a competitive advantage. According to the *Handbook*, the [REDACTED] offers the Certified Management Consultant (CMC) designation to those who meet minimum levels of education and experience, submit client reviews, and pass an interview and exam covering the [REDACTED] Code of Ethics. There is no indication that the petitioner requires the beneficiary to have obtained the CMC designation or any other professional designation to serve in the proffered position.

In support of the assertion that the proffered position qualifies as a specialty occupation position, the petitioner provided a letter from [REDACTED], emeritus professor at [REDACTED] which will be discussed below. In this letter, Mr. [REDACTED] references the *Handbook's* section for the occupational category of "Computer Systems Analysts." The subchapter of the *Handbook* entitled "How to Become a Computer Systems Analyst" states the following about this occupational category:

A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming.

Education

Most computer systems analysts have a bachelor's degree in a computer-related field. Because these analysts also are heavily involved in the business side of a company, it may be helpful to take business courses or major in management information systems.

⁶ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

Some employers prefer applicants who have a master's degree in business administration (MBA) with a concentration in information systems. For more technically complex jobs, a master's degree in computer science may be more appropriate.

Although many computer systems analysts have technical degrees, such a degree is not always a requirement. Many analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.

Many systems analysts continue to take classes throughout their careers so that they can learn about new and innovative technologies and keep their skills competitive. Technological advances come so rapidly in the computer field that continual study is necessary to remain competitive.

Systems analysts must understand the business field they are working in. For example, a hospital may want an analyst with a background or coursework in health management, and an analyst working for a bank may need to understand finance.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Computer Systems Analysts, available on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited August 12, 2014).

When reviewing this subsection of the *Handbook*, we again note that the petitioner designated the proffered position as a Level I position on the LCA, indicating that the position is a comparatively low, entry-level position relative to others within the occupation.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for a computer systems analyst positions. The *Handbook* indicates that there is a spectrum of degrees acceptable for positions in this occupation, including general purpose degrees such as business and liberal arts.

The *Handbook* does not state that the experience gained by a candidate must be equivalent to at least a bachelor's degree in a specific specialty. While the *Handbook* indicates that a bachelor's degree in a computer or information science field is common, the *Handbook* does not report that such a degree is normally a minimum requirement for entry. The *Handbook* continues by stating that some firms hire analysts with business or liberal arts degrees who know how to write computer programs. According to the *Handbook*, many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere. The *Handbook* reports that many analysts have technical degrees but does not specify a degree level (e.g., associate's degree, baccalaureate) for these technical degrees. Moreover, the *Handbook* specifically states that such a degree is not always a requirement. Thus, the *Handbook* does not support the claim that a computer systems analyst position falls under an occupational group for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent.

As previously mentioned, in response to the RFE, the petitioner provided an opinion letter, dated December 3, 2013, from [REDACTED] emeritus professor at [REDACTED]. In the letter, Mr. [REDACTED] states that his opinion is based on a job description received from the petitioner, and "information regarding the company" provided by the petitioner. Later in the letter, Mr. [REDACTED] cites job duties from the petitioner's letter submitted in response to the RFE. Mr. [REDACTED] indicates that he is qualified to offer an opinion on the requirements for the proffered position due to his 20 years of experience on curriculum committees and nine years of experience in software consulting and research engineering.⁷ Mr. [REDACTED] attributes a need for knowledge attained in specific courses to the generally described duties provided by the petitioner. For example, regarding a duty described by the petitioner as "Perform periodic analysis of [the petitioner's] management and logistical operations and network infrastructure to maintain a baseline assessment of the effectiveness of these operations from which adjustments and improvements to the infrastructure can be made," Mr. [REDACTED] states that knowledge from a class entitled "Systems Analysis & Design" is required. However, as this duty is so generally worded, it is not apparent how Mr. [REDACTED] is aware of the specific tasks required by the petitioner to perform this duty. Mr. [REDACTED] concludes that the position described by the petitioner requires "a Bachelor's degree or its equivalent in Computer Science, Systems Engineering, or a related field as a minimum educational requirement."

On appeal, counsel provides an additional letter from Mr. [REDACTED] dated February 11, 2014. Mr. [REDACTED] states that this letter is intended to replace his prior letter, as the petitioner had since provided additional evidence. Mr. [REDACTED] states that he has reviewed documents regarding the beneficiary's foreign education, the beneficiary's resume, and the petitioner's prior job description, and the petitioner's letter dated February 4, 2014.⁸ Mr. [REDACTED] now states that he has also examined the petitioner's website. Mr. [REDACTED] cites the new description of the proffered position, as described by the petitioner in its February 4, 2014 letter. In his new letter, Mr. [REDACTED] claims that the "stated minimum education requirement for the Systems Analyst position at [the petitioner] is a Bachelor's degree or its equivalent in Computer Science, Systems Engineering, or a related field," and again concludes that such a degree is required to perform the duties of the proffered position. However, the source of this "stated" requirement is unknown. As previously discussed, we have reviewed the record in its entirety and do not find that the petitioner has stated any minimum requirements for the proffered position.

Upon review of the opinion letters, there is no indication that Mr. [REDACTED] possesses any knowledge of the petitioner's proffered position and its business operations beyond that which was provided in the petitioner's letters and the information available on the petitioner's website. There is no evidence that Mr. [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. He does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or

⁷ Mr. [REDACTED] did not provide a copy of his curriculum vitae. The relevancy of Mr. [REDACTED] experience to the proffered position has not been established.

⁸ Mr. [REDACTED] does not specify which letter prior letter he consulted, nor did he provide a copy. We note that the petitioner has provided three distinct descriptions of the proffered position.

how the duties of the position would actually be performed in the context of the petitioner's business enterprise.

Furthermore, it does not appear that Mr. [REDACTED] is fully informed of the petitioner's representations regarding the nature of the proffered position. Notably, as previously discussed, Mr. [REDACTED] cites the section of the *Handbook* relevant to the occupational category of "Computer Systems Analysts." It appears that Mr. [REDACTED] is not aware that the petitioner characterized the position on the LCA as pertaining to the occupational category of "Management Analysts." It is also not apparent that Mr. [REDACTED] is aware of the petitioner's designation of the proffered position as a Level I (entry) position in the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the proffered position will entail limited, if any, exercise of judgment. Without this information, the petitioner has not demonstrated that Mr. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position.

We may, in our discretion, use an advisory opinion or statement submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of our discretion, we decline to regard the advisory opinion letters as probative evidence of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, we hereby incorporate the above discussion regarding the opinion letters into our analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we will review the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (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 a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

In the Form I-129, the petitioner stated that it is an exporter of wholesale auto parts established in 2004, and has 15 employees. The petitioner stated its gross annual income as approximately \$1.1 million and its net annual income as approximately \$72,000. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 423110. According to the U.S. Census Bureau, NAICS is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited August 12, 2014). The NAICS code specified by the petitioner is designated for "Automotive and other Motor Vehicle Merchant Wholesalers," and is defined by the U.S. Department of Commerce, Census Bureau as follows:

This industry comprises establishments primarily engaged in the merchant wholesale distribution of new and used passenger automobiles, trucks, trailers, and other motor vehicles, such as motorcycles, motor homes, and snowmobiles.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 423110 – Automobile and Other Motor Vehicle Merchant Wholesalers, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited August 12, 2014).

On appeal, the petitioner provided three job announcements. However, this documentation does not establish the proffered position qualifies as specialty occupation. As a preliminary matter, we note that 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.

We also make the following observations regarding these job announcements:

- Systems Analyst at [REDACTED] Group: This advertising organization is a staffing company with offices throughout the United States. It therefore appears that the organization is not in the petitioner's industry. It advertises for a placement with an unnamed "Cutting Edge Electronics Company" described as a manufacturer of electronics, components, and semiconductors. The petitioner is an exporter of wholesale auto parts. The advertisement contains a one-sentence description of the advertised position. The description is insufficient to establish that the advertised position is parallel to the proffered position. Further, the position requires three to five years of experience in addition to a bachelor's degree. As the proffered position is a Level I (entry-level) position, it appears that

the advertised position is a more senior position than the proffered position, and thus cannot be found to be parallel to the proffered position.

- Systems Integration Analyst at [REDACTED] The advertised position requires two years of development experience in addition to a bachelor's degree. As the proffered position is a Level I (entry-level) position (an appropriate designation for an internship or a worker-in-training), it appears that the advertised position is a more senior position than the proffered position, and thus cannot be found to be parallel to the proffered position.
- Senior Systems Analyst at [REDACTED] The advertising organization is a staffing company seeking an individual to place at an unnamed "client" in [REDACTED] PA. As no information is provided regarding the "client," the organization cannot be found to be similar to the petitioner, nor can we confirm that the organization is in the petitioner's industry. We also note that this position is more senior than the proffered position and thus not parallel. We note that the salary range for the advertised position is \$100,000 - \$120,000. This is more than twice the salary offered for the proffered position. Further, a bachelor's degree in a specific specialty is not required for the advertised position. Notably, the advertising company will accept "any combination of experience and education that provides the skills and abilities necessary to perform the job."

In his letter dated February 11, 2014, Mr. [REDACTED] cites the above described job postings and asserts that "it is the general practice for companies of the size and nature of [the petitioner] to hire a Systems Analyst into such a position with a minimum of a Bachelor's degree in Computer Science, Systems Engineering, or a related field." However, the job advertisements provided are not sufficient to establish eligibility under this criterion of the regulation. For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics (for example, the nature or type of organization, the particular scope of operations, and the level of revenue and staffing). Without such information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. It is not sufficient for the petitioner or the writer of the opinion letter to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion. Neither the petitioner nor Mr. [REDACTED] have specified what characteristics they believe the petitioner shares with these organizations. As previously noted, without further information, the petitioner has not established that the advertisements are for similar organizations. Additionally, all of the advertisements appear to be for dissimilar positions. Further, contrary to the purpose for which they were submitted, the advertisements do not all require a bachelor's degree in a specific specialty (or its equivalent as defined by USCIS).

In addition to these observations, the petitioner fails to establish the relevancy of the provided examples to the issue here.⁹ That is, the petitioner has not demonstrated what statistically valid

⁹ As the documentation does not establish that the petitioner has met this prong of the regulations, further

inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹⁰

Thus, based upon a complete review of the record of proceeding, the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is (1) common to the petitioner's industry (2) in parallel positions (3) among organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted an organizational chart, various corporate and tax documents, a financial statement, flyers regarding its products, and descriptions of its other positions.

However, a review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position 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. Furthermore, the petitioner has not established why a few related courses or industry experience alone is insufficient preparation for the proffered position. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related

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.

¹⁰ The petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these few job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

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

courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.¹¹

The petitioner has indicated that the beneficiary's educational background will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner fails to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. 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*

¹¹ This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. More specifically, the LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

Upon review of DOL's instructive comments, we observe that the petitioner did not designate the proffered position as involving "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II) when compared to other positions within the same occupation. *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.

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

The petitioner does not state that it has ever employed anyone in the proffered position. Thus, upon review of the record, the petitioner has not provided probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position.¹² Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The petitioner and counsel claim that the nature of the specific duties of the position in the context of its business operations is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We reviewed all of the evidence in the record, including the organizational chart, the tax and corporate documents, the financial statement, the descriptions of the petitioner's other positions, and the flyers regarding the petitioner's products. We carefully considered the petitioner's statements regarding the proffered position. We also reviewed the letters written by Mr. [REDACTED] and here incorporate our earlier analysis regarding these letters. However, upon review of the evidence, the record does not support the assertion that the proffered position satisfies this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, we also reiterate our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four

¹² We note that the petitioner has made claims regarding the education attained by its other employees. The petitioner did not provide evidence to support its claims. However, even if such evidence had been provided, we observe that evidence regarding the petitioner's hiring history with respect to positions other than the proffered position is not relevant to the issue of whether the petitioner normally requires a bachelor's degree in a specific specialty or its equivalent for the proffered position.

assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. We also again note that the petitioner has not stated that a bachelor's degree in a specific specialty or its equivalent is required to perform the duties of the proffered position.

The petitioner has not established that the nature of the specific 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. We, therefore, conclude that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has not established 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.

VI. ISSUES BEYOND THE DIRECTOR'S DECISION

Upon review of the record of proceeding, we find that there are additional issues not identified in the director's decision that preclude approval of this petition. Specifically, beyond the decision of the director, we find that the petitioner (1) failed to submit an LCA that corresponds to the petition; and (2) failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the applicable statutory and regulatory provisions. Thus, the petition cannot be approved for these reasons as well. They are considered independent and alternative bases for denial of the petition.

Based on the petitioner's representations, the petitioner did not submit a certified LCA that properly corresponds to the petition. As previously stated, the petitioner submitted an LCA in support of the instant petition designating the proffered position under the occupational classification "Management Analysts" SOC (ONET/OES Code) 13-1111. However, the petitioner has characterized the duties of the proffered position as pertaining to multiple occupational categories. Notably, the petitioner submitted a letter in support of the petition from Mr. [REDACTED] which characterizes the proffered position as pertaining to the occupational category of "Computer Systems Analysts." We observe that the petitioner's final description of the proffered position provided on appeal eliminated the initial management analyst duties in favor of duties that appear to correspond more closely to a computer systems analyst.

When the duties of a proffered position involve more than one occupational category, DOL provides clear guidance for selecting the most relevant O*NET code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification If the

employer's job opportunity has worker requirements described in a combination of O*NET occupations, the [determiner] should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the [determiner] shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

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.

Thus, according to DOL guidance, if the petitioner believed its position was described as a combination of occupations, the petitioner should have chosen the relevant occupational code for the highest paying occupation. The petitioner provided an LCA with a prevailing wage of \$38,334 per year for a Level I position in the relevant geographic area. Notably, this prevailing wage is significantly lower than the prevailing wage for "Computer Systems Analysts." Specifically, a search of the Foreign Labor Certification Data Center Online Wage Library lists the prevailing wage for a Level I "Computer Systems Analyst" SOC (ONET/OES Code) 41-9031 as \$55,162 per year.¹³ On the Form I-129, the petitioner indicated that it would pay the beneficiary a full-time annual salary of \$38,334, which is insufficient for a position involving computer system analyst duties that requires a prevailing wage of \$55,162 per year.

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

Moreover, the petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational category in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act. Therefore, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed

¹³ For additional information regarding the prevailing wage for Computer Systems Analysts in [redacted] County [redacted], FL), see the All Industries Database for 7/2012 - 6/2013 at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatabase.com/OesQuickResults.asp> [redacted] last visited August 12, 2014).

for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

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

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

Therefore, for these reasons, even if it were determined that the petitioner overcame the director's basis for denial of the petition (which it has not), the petition could not be approved.

VII. CONCLUSION AND ORDER

An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 145 (noting that we conduct appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

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.