

(b)(6)

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



U.S. Citizenship
and Immigration
Services

DATE: **APR 06 2015**

OFFICE: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

This is a non-precédent 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 (hereinafter "director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a three-employee "Design and Construction Company" established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Construction Manager" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation. On appeal, the petitioner submits additional evidence that it asserts will overcome the director's decision.

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

Upon review, we find that the evidence fails to establish that the proffered position is a specialty occupation. The appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

As noted above, the petitioner is a "Design and Construction Company" with three employees. In a letter dated March 26, 2014 submitted in support of the petition, the petitioner described itself as "a commercial and residential interior design and construction company." The petitioner stated that it has a "pressing need for a Construction Manager" because it seeks to expand its services in the national marketplace. The petitioner summarized the duties of the proffered position as follows:

In this position, [the beneficiary] will be primarily responsible for overseeing specialized contractors and other personnel, scheduling and coordinating all construction processes to ensure projects meet design specifications and that projects are completed on time and within budget. [The beneficiary] will work closely with architects, civil engineers, and other building specialists, set operational specifications, interpret and explain contracts and technical information, and formulate and analyze project requirements for the company. [The beneficiary] will also lead projects involving contract negotiation, architecture, design input, selecting, scheduling, and coordinating subcontractor activities, and perform day-to-day administration of the company's construction department.

The petitioner stated that the minimum educational requirement for the proffered position is a "Bachelor's degree or its equivalent combination of experience in Civil Engineering, Construction Engineering or a related field" due to the "advanced, specialized, and complex nature" of the duties. The petitioner asserted that the duties of the proffered position are "highly complicated," "extremely complex," and "require specialized knowledge in respect to construction, engineering and management that most individuals would not be able to understand."

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position corresponds to Standard Occupational Classification (SOC) code and occupation title 11-9021, Construction Managers, from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

In support of the petition, the petitioner submitted, *inter alia*, an additional letter dated March 24, 2014 attesting that the beneficiary possesses "a special mix of skills" and "knowledge of engineering and construction, business education, computer skills, and natural instinct for organization" that it will utilize to "completely revamp [its] business." Specifically, the petitioner attested that the beneficiary is "reorganizing [its] business from top-to-bottom" and "developing an overarching management system that tracks each construction item (like an engineering beam, a refrigerator, or a custom door knob) from design visualization, through engineering implementation, to client approval, ordering, delivery, installation, and finally to client payment for such."

The petitioner submitted the chapter on "Construction Managers" from the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)*.

The petitioner submitted evidence that the beneficiary has earned a U.S. Master of Business Administration degree from [REDACTED] and the foreign equivalent of a U.S. Master's degree in Civil Engineering from [REDACTED] Latvia. The petitioner also submitted the beneficiary's transcripts from [REDACTED]

The director determined the initial evidence was insufficient, and issued an RFE for additional evidence that the proffered position qualifies as a specialty occupation.

In response to the RFE, the petitioner submitted, *inter alia*, a letter dated June 28, 2014 further explaining the proffered position and its constituent duties. In this letter, the petitioner emphasized the "extremely complex" nature of the proffered position, stating that the beneficiary "will deal with every facet of the project: construction planning, architect, labor relations, cost evaluation, materials handling, blue print reading and more." The petitioner asserted that the beneficiary will be responsible for several construction projects, including the [REDACTED] project, [REDACTED] project, and [REDACTED] project. The petitioner further stated that in addition to project planning and construction management, the beneficiary will also "help the company implement and develop numerous project management software and applications" including [REDACTED]

The petitioner submitted an additional letter dated June 27, 2014 stating that the beneficiary will spend 20% of his time on duties such as: conducting research on clients' needs and maintaining up-to-date knowledge of industry trends and emerging techniques to help identify company/project development plans and strategies; conferring with clients to identify their needs and construction specifications; identifying project features; and making sure that all activities are in compliance with legal requirements, building safety codes, and other regulations. The beneficiary will spend 55% of his time on duties including planning, estimating, purchasing, supervising, project scheduling, and management. Specifically, the beneficiary will help to schedule and coordinate all construction processes (including site preparation, sewage systems, landscaping and road construction, building construction, and building systems) to ensure that projects meet design specifications, and are completed on time and within budget. The beneficiary will coordinate with architects, engineers, and other construction specialists. The beneficiary will also review "sophisticated and comprehensive reports" including soil reports, topographies, energy reports, structural drawings, service agreements, and proposed floor plans. In addition, the beneficiary will evaluate and help determine appropriate construction delivery systems and the most cost-effective plan and schedule for completing the project. The beneficiary will also prepare comprehensive, "extremely complex" documents, such as preliminary cost estimates, design fee estimates, painting costs, appliance schedules, project manuals, project agendas, bidding documents, construction schedules, building permit applications, budget analysis report, and construction contracts. Finally, the beneficiary will spend 25% of his time on supervising staff, implementing, testing, and maintaining the petitioner's operation systems and components, including: developing the company's financial and project management systems using cloud technology and BIM design workflows and construction cost estimating systems; overseeing the delivery and use of materials, tools, and equipment; and monitoring functioning of equipment.

The petitioner submitted two articles: (1) [REDACTED] *Different Types of Construction Management Techniques* (publication information and date unknown); and (2) [REDACTED] *Manageability of Complex Construction Engineering Projects: Dealing With Uncertainty* (Second International Symposium on Engineering Systems MIT) (2009).

The petitioner submitted a letter from [REDACTED] concluding that "[t]he job duties of Construction Manager are so complex and unique that they may not be performed by an individual who has not attained at least a baccalaureate level of education in Civil Engineering, Construction Management, or a closely related field or its equivalent."

The petitioner submitted a letter from [REDACTED] concluding that it considers a qualified candidate for a construction manager to possess a minimum of a bachelor's degree in construction management, civil engineering, architecture, or a related field. The letter further attests that "Construction Managers are required to have knowledge in engineering and construction management, such as planning, cost estimating, scheduling, project management, construction administration, as well as basic economics, accounting and management principles."

The petitioner submitted a letter from [REDACTED] stating that it puts "an emphasis on having a Bachelors degree in a field related to construction – Engineering, Construction Management or Architecture."

The petitioner submitted a letter from [REDACTED] concluding that "based on the overall complexity of the industry and growing need for better educated entry level employees we are now making a minimum requirement of a BA or BS degree in Construction Management."

The petitioner submitted several vacancy announcements, including its own vacancy announcement for the proffered position posted on Craigslist on June 30, 2014.

The petitioner submitted print-outs from the [REDACTED]

The petitioner submitted an opinion letter from [REDACTED] Associate Professor of Civil & Environmental Engineering at [REDACTED] dated May 30, 2014, concluding that "Construction Managers with the responsibilities such as those required of [the beneficiary] in small to medium sized companies typically require at least a baccalaureate degree in Civil Engineering, Structural Engineering, or Construction Management."

The petitioner submitted examples of work products utilized or created by the petitioner, such structural calculations, appliance schedules, budget analysis reports, cost proposals, work flow charts and construction schedules, construction contracts, geotechnical reports, topography reports, energy reports, and construction bids.

The petitioner submitted examples of documents developed by the beneficiary, such as spreadsheet pages, the JavaScript sample code for the spreadsheet pages, and Revit construction drawings. The petitioner also submitted documents concerning the three projects that the beneficiary will manage, which appear to consist of construction and renovations to single-family homes.

The director denied the petition, finding that the evidence fails to establish that the proffered position qualifies as a specialty occupation.

The petitioner filed this appeal. On appeal, the petitioner asserted that the proffered position meets the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), i.e., 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 support of the appeal, the petitioner submitted, *inter alia*: an additional explanation of the duties of the proffered position as well as the specialized education required to perform them; a new letter from [REDACTED] dated August 26, 2014; and course descriptions from the [REDACTED]

II. SPECIALTY OCCUPATION

A. Law

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

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

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

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

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

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

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

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

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

B. Discussion of Criteria

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

We recognize the *Handbook*, which is also relied upon by the petitioner, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The *Handbook* states the following about the educational requirements of construction manager positions:

How to Become a Construction Manager

Large construction firms increasingly prefer candidates with both construction experience and a bachelor's degree in a construction-related field. However, some managers may qualify with a high school diploma and by working many years in a construction trade, although most will qualify primarily as self-employed general contractors.

Education

It is increasingly important for construction managers to have a bachelor's degree in construction science, construction management, architecture, or engineering. As construction processes become more complex, employers are placing greater emphasis on specialized education.

More than 100 colleges and universities offer accredited bachelor's degree programs in construction science, building science, or construction engineering. These programs include courses in project control and management, design, construction methods and materials, cost estimation, building codes and standards, and contract administration. Courses in mathematics and statistics are also relevant.

A number of 2-year colleges offer construction management or construction technology programs. An associate's degree combined with work experience is typical for managers who supervise smaller projects.

A few universities offer master's degree programs in construction management.

Those with a high school diploma and several years of relevant work experience may qualify to become a construction manager, although most will do so primarily as self-employed general contractors.

* * *

Work Experience

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online.

Practical construction experience is important when entering the occupation, because it reduces the need for initial on-the-job training. Internships, cooperative education programs, and previous work in the construction industry can provide that experience. Some construction managers become qualified solely through extensive construction experience, spending many years in carpentry, masonry, or other construction specialties.

Licenses, Certifications, and Registrations

Although not required, certification is becoming increasingly important for construction managers. Certification is valuable because it can demonstrate knowledge and experience.

Id. at <http://www.bls.gov/ooh/management/construction-managers.htm#tab-4> (last visited Mar. 25, 2015).

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). The *Handbook* states that "[l]arge construction firms increasingly prefer" candidates with a bachelor's degree in a construction-related field. However, a *preference* for a degree does not indicate a *requirement* for the same. Moreover, the petitioner, with three employees, cannot reasonably be considered a "large" construction firm. In addition, the *Handbook* clearly states that an associate's degree or a high school diploma, combined with work experience, is sufficient preparation for employment as a construction manager. In fact, the *Handbook* states that some construction managers become qualified solely through experience.

We highlight the *Handbook's* statement that "[a]n associate's degree combined with work experience is typical for managers who supervise smaller projects." *Id.* In the instant matter, the petitioner has not established that the proffered position does not fall under this category of positions that supervise "smaller projects," for which the "typical" educational requirement is an associate's degree. The petitioner has not established the relative size and scope of the projects to be managed by the beneficiary, each of which appear to be single-family residential construction and renovations, compared to other construction projects. In other words, the petitioner has not established that these projects are not considered "smaller projects" for which the *Handbook* states is typically managed by individuals with associate's degrees.

The *Handbook* further indicates that certification is becoming increasingly important for construction managers. The *Handbook* continues by stating that certification is valuable because it can demonstrate knowledge and experience. However, in the instant case, there is no indication that the petitioner requires its construction manager to have obtained any certifications, such as Certified Construction Manager (CCM), Associate Constructor (AC), or Certified Professional Constructor (CPC) certifications.

Thus, the *Handbook* does not support the claim that the occupational category is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific

specialty, or its equivalent. Even if it did, the record lacks sufficient evidence to support a finding that the particular position proffered here (an entry-level position in comparison to others within the occupation), would normally have such a minimum, specialty degree requirement or its equivalent.

We will now address the two opinion letters from [REDACTED] attesting to the typical minimum educational requirements of construction managers in small to medium sized companies such as the petitioner. We reviewed the opinion letters in their entirety. However, as discussed below, the letters from [REDACTED] are not persuasive to establish the proffered position qualifies as a specialty occupation. For instance, in his May 30, 2014 letter, [REDACTED] concludes that "Construction Managers with the responsibilities such as those required of [the beneficiary] in small to medium sized companies typically require at least a baccalaureate degree in Civil Engineering, Structural Engineering, or Construction Management." He then states that "[t]hese requirements are evident when reviewing job placement advertisements for similar positions posted by similar construction business entities, and from my conversations with employers looking to hire [REDACTED] students." However, [REDACTED] does not sufficiently explain the factual foundation for his conclusions, such as what job advertisements he reviewed, and the particular characteristics of the prospective employers and the advertised positions. Merely attesting that they were for "similar positions posted by similar construction business entities," without more, is insufficient to establish a reliable factual foundation for his assertions.

We also note that [REDACTED] first stated in his May 30, 2014 that construction manager positions such as the proffered position require at least a bachelor's degree in "civil engineering, structural engineering, or construction management." He then stated in his August 26, 2014 letter that the duties of the proffered position require someone with a bachelor's degree in "civil engineering or its equivalent." [REDACTED] did not explain the change in educational requirements for the same position.

[REDACTED] provided a short bullet point list of the job duties in his second letter. There is no indication that [REDACTED] possesses any knowledge of the petitioner's proffered position beyond this brief description. He does not discuss the duties of the proffered position in any substantive detail. Further, while he provided a brief description of the petitioner's business ("specializes in residential and commercial interior design and construction services") in his first letter, he does not demonstrate or assert in-depth knowledge of the specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. For instance, there is no evidence that [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.

[REDACTED] asserts a general industry educational standard for construction manager positions without referencing any supporting authority or any empirical basis for the pronouncement. Likewise, he does not provide a substantive, analytical basis for his opinion and ultimate conclusion. His opinion does not relate his conclusion to specific, concrete aspects of the petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the

particular position here at issue. Accordingly, the very fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion.

In the opinion letters, [REDACTED] does not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for such positions (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements.

Furthermore, there is no indication that the petitioner and counsel advised [REDACTED] that the petitioner characterized the proffered position as a low, entry-level construction manager position, for a beginning employee who has only a basic understanding of the occupation (as indicated by the wage-level on the LCA) relative to other positions within the occupational category. It appears that [REDACTED] would have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

In summary, and for each and all of the reasons discussed above, we conclude that the opinion letters rendered by [REDACTED] are not probative evidence to establish that the proffered position qualifies as a specialty occupation. The conclusions reached by [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. There is an inadequate factual foundation established to support the opinion and we find that the opinion is not in accord with other information in the record. As such, neither [REDACTED] findings nor his ultimate conclusions are worthy of any deference, and his opinion letter is not probative evidence towards satisfying any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are 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 discount the advisory opinion letters as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, we hereby incorporate the above discussion and analysis regarding the opinion letters into each of the bases in this decision for dismissing the appeal.

In the instant case, the duties and requirements of the position as described in the record of proceeding do not indicate that this particular position proffered by the petitioner 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 find that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner.

In determining whether there is 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 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As discussed above, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other reliable and authoritative sources, indicates that there is a standard, minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent.

The petitioner submitted print-outs from professional associations in the construction and civil engineering industries. However, these print-outs do not support the assertion that a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry. For instance, the [REDACTED] website states that "[t]he membership of the [REDACTED] like the field of construction management, is richly interdisciplinary, drawing membership from such disciplines as architecture, engineering, management, [and] technology, to name a few." In addition, while the [REDACTED] allows membership for students "in a CM-related degree program," it does not specify that these students must be in a program leading up to a bachelor's degree or above.² Nor does the [REDACTED] limit its membership to students or former students in a CM-related degree program; in fact, it specifically provides membership for "organizations, corporations, or individuals utilizing (not providing) CM services."

The petitioner submitted letters from three firms in the industry attesting that they recruit only degreed individuals. However, the letters do not demonstrate that any of the companies are similar organizations to the petitioner. The record of proceeding lacks sufficient information to conduct any meaningfully substantive comparisons of the business operations of those companies to the petitioner. The petitioner failed to provide any supplemental information to establish that the organizations are similar to the petitioner. Thus, from the onset, this prong of the regulations has not been established.

² We again refer to the *Handbook's* statement that "[a] number of 2-year colleges offer construction management or construction technology programs." *Id.* at <http://www.bls.gov/ooh/management/construction-managers.htm#tab-4> (last visited Mar. 25, 2015).

More specifically, for the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and an 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). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Furthermore, we find that none of the letters sufficiently explain the factual basis for their conclusions. Thus, for these reasons, they are not entitled to probative weight.

The petitioner submitted copies of job advertisements in support of the assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, upon review of the evidence, we find that the petitioner's reliance on the job announcements is misplaced. For instance, the petitioner has not established that it and the advertising organizations are similar and in the same industry.³ Without such evidence, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner and in the petitioner's industry. It is not sufficient for the petitioner to claim that the organizations are similar and in the same industry without providing a legitimate basis for such assertions. In addition, some of the advertising employers provided brief and/or vague job descriptions for the advertised positions. Thus, these advertisements do not contain sufficient information regarding the day-to-day duties, complexity of the job duties, supervisory duties (if any), independent judgment required, or the amount of supervision received within the context of the advertising employers' business operations to make a legitimate comparison of the advertised positions to the proffered position.

Moreover, many of the advertisements do not appear to be for parallel positions, as several of the postings required several years of experience.⁴ As previously discussed, the petitioner designated the proffered position on the LCA as a Level I, entry-level position. In addition, the petitioner did not provide any independent evidence of how representative the job advertisements are of the advertising employers' recruiting history for the type of jobs advertised. Contrary to the purpose for

³ To illustrate, [redacted] describes itself as providing a wide range of services including "healthcare housekeeping, management in laundry processing, patient transportation, business facilities management and clinical engineering." [redacted] describes itself as operating in approximately thirty countries and having over 6,000 employees, with revenues of approximately \$1.6 billion worldwide.

⁴ To illustrate, [redacted] all require fifteen or more years of related experience.

which the advertisements were submitted, some of the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, the job posting for [REDACTED] indicates that a bachelor's degree and/or 1-3 years of experience in construction management is required. The [REDACTED] job posting only states a requirement of a bachelor's degree and does not mention that it must be in a specific specialty. Also, the [REDACTED] posting states that a bachelor's degree in business or a related field is required. The petitioner has not demonstrated that business is a field related to civil engineering or construction management. As the advertisements are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

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

Overall, the evidence of record does not establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner. The petitioner has not, therefore, satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The evidence of record also does not 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."

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including information regarding the proffered position and evidence regarding its business operations. As previously discussed, the evidence of record does not establish that the proffered position is so complex or unique such that it falls outside the category of positions supervising "smaller projects" which are typically held by individuals with associate's degrees or less. In other words, the record lacks sufficiently evidence to distinguish the proffered position as unique from or more complex than other closely related positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. We hereby reiterate our earlier discussion on the matter.

Throughout the record of proceeding, the petitioner characterizes the duties of the proffered position in such terms as "advanced," "specialized," "complex" and "highly complicated." According to the petitioner, the job duties "are highly complicated and require specialized knowledge in respect to construction, engineering and management that most individuals would not be able to understand," and "the position demands an extremely complex combination of engineering and management skills." The petitioner further indicated that the beneficiary will "develop an overarching management system that tracks each construction item (like an engineering beam, a refrigerator, or a

custom door knob) from design visualization, through engineering implementation, to client approval, ordering, delivery, installation, and finally to client payment for such," which requires "significant knowledge in programming and computer science." The petitioner further asserts that the "job duty of the beneficiary is more sophisticated than a general construction manager, because the beneficiary will have to ensure that various reports are correct and appropriate in various ongoing phases for the review of the owner and outside engineers as needed."

However, we must question the stated requirements for the proffered position, as well as the level of complexity, independent judgment and understanding that are actually needed for the proffered position as the LCA is certified for a Level I entry-level position.⁵ This characterization of the position and the claimed duties, responsibilities and requirements as described in the record of proceeding conflict with the wage-rate element of the LCA selected by the petitioner, which is indicative of a comparatively low, entry-level position relative to others within the same occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that this is for beginning level employees who have only a basic understanding of the occupation.

Without further evidence, it is not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. As observed above, for example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."⁶

⁵ The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL 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.

⁶ Notably, if the proffered position had been designated at a higher level, the prevailing wage at that time would have been \$94,682 per year for a Level II position, \$114,504 per year for a Level III position, and \$134,326 per year for a Level IV position.

The petitioner indicates that the beneficiary "possesses a unique combination of education, skills and expertise combined with professional accomplishment, which makes him ideal for this temporary position." The petitioner also states that the beneficiary's "special mix of skills" will be used to "completely revamp [the petitioner's] business" and that the beneficiary will "reorganiz[e] [the petitioner's] business from top-to-bottom." The petitioner states that such work would not be possible "without his guidance." However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent).

Here, the petitioner did not substantiate the record to demonstrate how the proffered position is so complex or unique relative to other construction 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; therefore, it cannot be concluded that the evidence satisfies the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We will next address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which may be satisfied if the petitioner demonstrates that it normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position.⁷

As evidence under this criterion, the petitioner submitted its own vacancy announcement for the proffered position posted on [REDACTED] on June 30, 2014. Notably, this announcement was posted after the filing date of the instant petition. The petitioner did not establish how this single announcement is representative of its hiring and recruiting history for the proffered position. Moreover, the petitioner indicates that the proffered position is a newly created position. While a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, it is unclear how an employer that has never previously recruited and hired for the position would be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it "normally" requires at least a bachelor's degree in a specific specialty or its equivalent for the position. Thus, the evidence fails to satisfy the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

⁷ While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in a 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, we will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them 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. As previously discussed, the evidence of record does not establish that the proffered position is so specialized or complex such that it falls outside the category of positions supervising "smaller projects" which are typically held by individuals with associate's degrees. In fact, the petitioner's descriptions of the duties of the proffered position generally mirror the typical duties of construction managers as described in the *Handbook*.

For example, the petitioner stated that the beneficiary will spend 55% of his time on duties including planning, estimating, purchasing, supervising, project scheduling, and management. This is consistent with the *Handbook's* description that construction managers "plan, coordinate, budget, and supervise construction projects from development to completion." *Id.* at <http://www.bls.gov/ooh/management/construction-managers.htm#tab-1> (last visited Mar. 25, 2015). The petitioner also asserted that the beneficiary will oversee specialized contractors and personnel, and coordinate with architects, engineers, and other construction specialists. This too is consistent with the *Handbook*, which states that construction managers "oversee specialized contractors and other personnel," "work closely with other building specialists, such as architects, civil engineers, and a variety of trade workers . . . in everything from structural steel and painting to landscaping, paving roads, and excavating sites." *Id.* at <http://www.bls.gov/ooh/management/construction-managers.htm#tab-2> (last visited Mar. 25, 2015). The petitioner repeatedly emphasizes that the beneficiary "will deal with every facet of the project." This aspect of the proffered position's duties is also consistent with the *Handbook's* description of the occupational classification at large, i.e., that "most managers oversee construction projects from start to finish," which includes the planning, coordination, budgeting, and supervision of construction projects from development to completion. *Id.* at <http://www.bls.gov/ooh/management/construction-managers.htm#tab-2> (last visited Mar. 25, 2015). Overall, the evidence of record is insufficient to distinguish the proffered position from one of the positions involving "smaller projects" which the *Handbook* states are typically managed by individuals with associate's degrees.

On appeal the petitioner states that the "job duty of the beneficiary is more sophisticated than a general construction manager, because the beneficiary will have to ensure that various reports are correct and appropriate in various ongoing phases for the review of the owner and outside engineers as needed." The petitioner also asserted that the beneficiary will review "sophisticated and comprehensive reports" such as topography, energy, and structural reports. The petitioner did not sufficiently explain and document, however, why these reports and other work documents utilized or created by the petitioner are more "sophisticated and comprehensive" than those usually relied upon by other construction managers. Again, we note the *Handbook's* statement that construction managers typically work with specialists in architecture, civil engineering, landscaping, paving roads, and excavating sites. *Id.* As such, and without more explanation from the petitioner, we

cannot find that reports such as the topography, energy, and structural reports the petitioner submitted are not common to the industry.⁸

While the petitioner implies that *all* "[c]onstruction is an extremely complex endeavor," the petitioner has not provided documentary evidence to corroborate such an implication. 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 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Here, it is important to note that the *Handbook* describes construction managers as coordinating and supervising "a wide variety of projects, including the building of all types of public, residential, commercial, and industrial structures, as well as roads, memorials, and bridges." *Id.* at <http://www.bls.gov/ooh/management/construction-managers.htm#tab-2> (last visited Mar. 25, 2015). Similarly, the article *Different Types of Construction Management Techniques* lists the major types of construction as: (1) Residential Housing Construction; (2) Institutional and Commercial Building Construction; (3) Specialized Industrial Construction; and (4) Infrastructure and Heavy Construction." The *Handbook* and the above article do not, however, discuss the relative complexity of single-family residential construction projects such as those the beneficiary will manage, as compared to construction on public, commercial, industrial, and infrastructural structures. We observe that the article *Manageability of Complex Construction Engineering Projects: Dealing With Uncertainty* discusses the construction of an underground tunnel and a three-story underground structure with a two-story underground car park as examples of "[c]omplex construction engineering projects." This article does not discuss residential housing construction as among the examples of "[c]omplex construction engineering projects."

Another aspect of the proffered position that the petitioner asserts requires specialized knowledge is the beneficiary's duties to implement, test, and maintain the company's operation systems and components, including developing financial management, project management, and construction cost estimating systems using numerous project management software applications and cloud technology. The petitioner states that these duties require specialized knowledge in computer science, computer graphics, construction, engineering, and management. However, the petitioner has not sufficiently explained and documented how the required body of knowledge represents an established curriculum leading to a baccalaureate or higher degree in Civil Engineering, Construction Engineering, or a related field. For example, the petitioner has not submitted evidence establishing that a bachelor's degree in Civil Engineering would necessarily include courses in

⁸ The petitioner makes two references to the "earthquake and land-sliding hazards south of [redacted] [that] require specialized civil engineering knowledge on all projects." However, the petitioner does not further explain how this factor distinguishes the associated reports as more sophisticated than other reports routinely utilized in the industry.

computer science and management.⁹ As such, these are conclusory statements that have no probative value. 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.

Finally, we 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 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. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence and explanation, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." The petitioner has submitted inadequate probative evidence to satisfy the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons above, the evidence of record fails to satisfy 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 for classification as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

III. CONCLUSION

⁹ While the beneficiary's transcripts from [REDACTED] reflect that he took two computer science classes, the petitioner has not submitted evidence establishing that these courses are representative of a typical curriculum leading to a baccalaureate or higher degree in Civil Engineering. The *Handbook* states that bachelor's degree programs in construction science, building science, or construction engineering "include courses in project control and management, design, construction methods and materials, cost estimation, building codes and standards, and contract administration. Courses in mathematics and statistics are also relevant." However, there is no indication that computer science courses are typically required in such a program. *Id.* at <http://www.bls.gov/ooh/management/construction-managers.htm#tab-4> (last visited Mar. 25, 2015). We note that the beneficiary took one course in management (Sociology of Management) as an elective.

We further observe that the letter from [REDACTED] states that "Construction Managers are required to have knowledge in . . . basic economics, accounting and management principles." The petitioner has also not established that a typical curriculum leading to a baccalaureate or higher degree in Civil Engineering would necessarily include courses in basic economics and accounting.

The evidence of record fails to establish that the proffered position qualifies as a specialty occupation. 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.