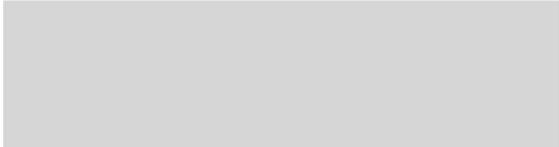


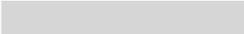


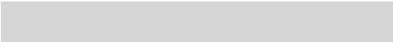
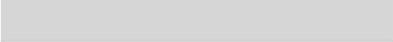
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUL 08 2015

PETITION RECEIPT #: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) 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 software development/consulting firm that was established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Management 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, concluding that the petitioner did not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The Director's decision hinged upon what the Director framed as a lack of documentary evidence to substantiate that the beneficiary would be employed in the project that the petitioner described as the basis for its need for a management analyst. On appeal, the petitioner asserts that the Director's ground for denial was erroneous and contends that it satisfied all evidentiary requirements.

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

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 appeal will be dismissed, and the petition will be denied.

I. LEGAL FRAMEWORK

The issue on appeal is whether the petitioner provided 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 it is offering employment to the beneficiary that meets the applicable statutory and regulatory requirements.¹

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

¹ We apply the "preponderance of evidence" standard of review as articulated in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). Accordingly, we have examined each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence. Also, we conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- (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 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.

II. ANALYSIS

According to petitioner, the beneficiary will be employed on an in-house project developing a particular software product for the petitioner, which is identified as "[REDACTED]". The petitioner's letter in reply to the RFE provided the following outline of the proposed duties, which we quote verbatim:

A detailed description of the duties:

- Translating business requirements into data requirements and documenting the process in our mapping documents;
- Translating data requirements into technical requirements and documents the same;
- Analyze problems and procedures of information flow, operations, procedures and requirements of businesses using Organizational Analysis;
- Observe unit functions, conduct work simplification studies, identify input/output requirements for the project;
- Optimize methods and systems for management policy formulation;

- Design, develop, modify and update the automated processes involved based on business use and bugs in optimum functioning of the project;
- Define data, systems and program functions to improve automated applications;
- Create program to assist management in planning, resource allocation, performance measurement and effective operation and prepare recommendations for implementation of new systems, procedures, and organizational changes;
- Study organizational change, communications, information flow, integrated production methods, inventory control, or cost analysis after implementation of application;
- Prepare operations and procedural manuals for the project;
- Develop, document and revise system design procedures, test procedures, and quality standards.

The only way to assure that the applicant/candidate for the position will be able to perform all of these duties is to require that the individual have at least a Bachelor's degree in Computer Science, Engineering, Business Administration or a closely related field.

A. Credibility of the Project

The Director determined that the petitioner had not submitted sufficient evidence to establish the credibility of the [REDACTED] application project as providing the management analyst work upon which the petitioner bases its specialty occupation claim. The Director summarized this conclusion in stating that "[t]he totality of the evidence does not demonstrate that you [i.e., the petitioner] will gainfully employ the beneficiary to work on an in-house project as a management analyst."

The pertinent part of the Director's decision further states:

You have submitted Internet content regarding the [REDACTED] product, which you indicate is the platform for the [REDACTED] product. A review of your internet website indicates that [REDACTED] to be your product; however, publicly available information indicates that [REDACTED] is shareware, which is available for free download, and that it was developed by [REDACTED]. The record does not demonstrate that you are in any way affiliated with this entity.

This information cast[s] doubt as to the veracity of your claim regarding the development of this product.

We observe that the evidence of record before the Director provided a sound factual basis for concern about the accuracy of the petitioner's claims. For example:

- The last page of Exhibit 7 presents [REDACTED] as the petitioner's own product. This document, with the "Products" section at its menu-bar highlighted, introduces three "Screenshots of [REDACTED]" as follows:

[REDACTED]

We are very happy to announce the release of our new product [REDACTED]. A component to make building [REDACTED]. [Click here to know more.](#)

Screenshots of [REDACTED]

The features that demonstrate that the petitioner was presenting [REDACTED] to USCIS as the petitioner's own product are the combination of (1) the document's identification of [REDACTED] as the product of the entity producing that page through the description of [REDACTED] as "our new product," (2) the Copyright tag at the bottom of the document, which reads: "Copyright © [the petitioner's name]. All rights reserved." The implication is that [REDACTED] is a proprietary product developed and owned by the petitioner, and that, as such, the petitioner would have unrestricted use of [REDACTED] as the platform upon which to build the [REDACTED] application.

After the Director's decision was issued, counsel's quotes the petitioner as stating, in part, that it had purchased "a more advanced version of [the] [REDACTED] application." According to counsel, the petitioner's representations include the following statements:

[REDACTED] is an independent entity by itself and [the petitioner] does not have any ownership or partnership or any subsidiary relationship with [REDACTED]. But [the petitioner], to develop its own software application product called "[REDACTED]", uses [REDACTED] software as a platform (or a base) on which to build that application.

* * *

[T]his advanced version also has an array of API's (Application Programming Interfaces) provided solely for [the] developer community and other companies (such as the petitioner) that not only wants to enhance and/or the advanced features set, but also use this as a base platform to build and develop their own product(s) on, as a 'value added' software product offering. [We] are one such company that is using this [REDACTED] product as a base to build its '[REDACTED]' application on.

The submissions on appeal include copies of three printouts from [REDACTED] reflecting that the petitioner issued three checks to [REDACTED] as follows: (1) for \$625.00, on September 23, 2010; (2) for \$1,680, on January 7, 2011; and (3) for \$840.00, on February 4, 2011. While these documents indicate that the petitioner has made three payments to [REDACTED], the printouts only list those amounts as "product fees." The record does not include any communication from [REDACTED] that supports the petitioner's assertion that the advanced version that it purchased authorized the petitioner to use [REDACTED] as a platform for developing its own time-planning application for it to market and sell as its own product. 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)).

Importantly, the "[REDACTED] License Agreement" (hereinafter "the License Agreement"), submitted as part of Exhibit 9 of the RFE reply, suggests that [REDACTED] has not authorized such use of any [REDACTED] version. The terms of the License Agreement provides, *inter alia*:

- Subparagraph (a) at part 2, "Ownership," reports that "Licensee acquires no title, right, or interest in the SOFTWARE other than the rights granted herein."
- The statement, repeated with regard to each license described, that [REDACTED] is granting "a non-transferable" license.
- The second paragraph of part 4, "Restrictions on Use and Transfer," which states:

You may not a) use any part of the Software or Modifications or Your knowledge of the Software (or any information that you may learn as a result of your use of the Software) to create a product with the same or substantially the same functionality as the Software; b) transfer, rent, lease, or sublicense the Software or Modifications, or any portions thereof; c) change or remove the copyright notice from any of the files included in the Software Modifications.

UNDER NO CIRCUMSTANCES MAY YOU USE THE SOFTWARE (OR WITHOUT LIMITATION) AS THE BASIS FOR OR IN CONNECTION WITH A PRODUCT THAT CONTAINS THE SAME, OR SUBSTANTIALLY THE SAME, FUNCTIONALITY AS THE SOFTWARE.

- The bold-faced statement at part 5 "Intellectual Property Rights" that "You may not copy the Licensed Software, or decompile, disassemble, reverse engineer, or create a derivative work based upon the Licensed Software, or authorize anyone else to do so."

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1).

B. Application of the Criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)

As will be discussed, even if the petitioner had established the credibility of the project presented as the basis of the petition – which is not the case – the application of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence of record would not support approval of this petition.

A baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position

The issue presented by the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) is whether the evidence in the record of proceeding has established that the particular position that is the subject of the petition is one for which the minimum requirement for entry is normally a baccalaureate or higher degree in a specific specialty, or its equivalent.

We recognize the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.² The *Handbook* states the following with regard to the educational requirements necessary for entrance into positions within this occupational category:

Most management analysts have at least a bachelor's degree. The Certified Management Consultant (CMC) designation may improve job prospects.

² All of our references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The occupational category designated by a petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. However, to satisfy the first criterion, the burden of proof remains on the petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement or its equivalent for entry. That is, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title or designated occupational category. 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 beneficiary, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F.3d 384.

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 Institute of Management Consultants USA (IMC USA) 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 IMC USA's 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 June 24, 2015).

The *Handbook* reports that management analysts are not required to obtain certification, but that it may give jobseekers a competitive advantage. According to the *Handbook*, the Institute of Management Consultants USA (IMC USA) 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 IMC USA's Code of Ethics. We note that 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.

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.

Also, the *Handbook* states that a degree in business is acceptable.³ Although a general-purpose bachelor's degree, such as a degree in business, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.⁴ Therefore, the *Handbook's* recognition that a general, non-specialty degree in business is

³ Further, the petitioner reports that a degree in business administration is acceptable for the proffered position.

⁴ 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

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.

Also, when reviewing the *Handbook*, we take into account that in the Labor Condition Application (LCA), the petitioner stated that the position corresponds to a Level I (entry level) position in comparison to other positions within the same occupational category.⁵ This designation is appropriate for a comparatively low, entry-level position relative to others within the occupation.⁶ 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

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.

Id.

⁵ The petitioner's designation of this position as a Level I, entry-level position appears to indicate that the position is not particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

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

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

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

judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. DOL guidance indicates that a Level I designation should be considered for positions in which the employee will serve as a research fellow, worker in training, or an intern.

The documents submitted on appeal include the Occupational Information Network (O*NET) Online's Summary Report for the Management Analysts occupational group. The petitioner's letter on appeal refers to the O*NET's assignments of a Specific Vocational Range (SVP) of "from 7 to less than 8" ($7.0 < 8.0$) and a Job Zone of "Four."

O*NET Online provides general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. An SVP rating of 7 does not indicate that at least a four-year bachelor's degree is required for an occupational category that has been assigned such a rating or, more importantly, that such a degree must be in a specific specialty closely related to the occupation. Rather, the SVP rating simply indicates that the occupation requires between 2+ years and 4 years of training. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a particular position would require. Further, the petitioner's statement that "[t]he knowledge needed for such occupations are in the areas of Database Administration, Mathematics, Engineering, Business Administration and Design" is a conclusion drawn by the petitioner, which does not appear in the O*NET OnLine Summary Report.

Moreover, O*NET OnLine assigns this occupation a Job Zone "Four" rating, which groups it among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, O*NET OnLine does not indicate that the degree must be in a specific specialty directly related to the occupation.

The *Handbook* and O*NET Summary Report do 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 (which it does not), the record lacks sufficient evidence to support a finding that the particular position proffered here would normally have such a minimum, specialty degree requirement or its equivalent – as the petitioner has indicated that a range of fields of study are acceptable (i.e., computer science, engineering, business administration). 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)(I).

*The requirement of a baccalaureate or higher degree in a specific specialty,
or its equivalent, is common to the industry in parallel
positions among similar organizations*

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 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 already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source), reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Further, there is no evidence of a professional association for the industry making a degree a minimum entry requirement, and the record does not contain letters or affidavits from firms or individuals in the industry attesting that such firms "routinely employ and recruit only degreed individuals."

The provided several job vacancy advertisements which are presented as printouts of "other Management Analyst positions from www.monster.com where the employers are looking for applicants with a Bachelor's Degree in Business Administration or a closely related field." The petitioner submitted this documentation in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, as will be discussed, the petitioner's reliance on the job announcements is misplaced.

More specifically, in the Form I-129, the petitioner stated that it is a software development/consulting company with 46 employees. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541511.⁷ This NAICS code is designated for "Custom Computer Programming Services." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This U.S. industry comprises establishments primarily engaged in writing, modifying, testing, and supporting software to meet the needs of a particular customer.

U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 541511 - Custom Computer Programming Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed June 24, 2015).

⁷ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and, each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last viewed June 24, 2015).

When determining whether the petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). 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.⁸ 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

We note that not all of the job postings appear to be from organizations similar to the petitioner and in the same industry. The postings include the following: (1) a luxury transportation company; (2) a staffing company on behalf of a client in the travel, transportation and tourism industries; (3) a provider of contractor support services to the [REDACTED] (4) a provider of project management and administrative support for a government infrastructure engineering office; and (5) a \$40 billion aerospace company with 131,000+ employees in 100 countries around the world. Without more, it does not appear that the advertised positions are located in organizations that are similar to the petitioner and in the same industry.

In addition, some of the advertisements do not appear to be for parallel positions. For example, the posting from [REDACTED] states that the position is responsible for providing contract management for the [REDACTED]. The advertisement for [REDACTED] states that the incumbent will work for a government infrastructure engineering office focusing on the military health system. The advertisement for [REDACTED] states that the duties of the position include supporting the government in activities as it relates to the [REDACTED] Business Model.⁹ The petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Further, some postings do not indicate that at least a bachelor's degree in a directly related specific specialty (or its equivalent) is required. For instance, one of the postings states that a degree or eleven years of experience is sufficient. The advertisement does not indicate that such experience must be the equivalent of a bachelor's degree (or even involve progressively responsible duties). Several of the postings indicate that a degree in business is acceptable.¹⁰ The job postings suggest,

⁸ 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.

⁹ Further, the position with [REDACTED] requires a degree and 10 years of experience. As previously discussed, the petitioner designated its proffered position as a Level I (entry level) position on the LCA. The advertised position appears to be for a more senior position than the proffered position.

¹⁰ As previously discussed, although a general-purpose bachelor's degree, such as a degree in business, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a

at best, that a bachelor's degree is sometimes required for these positions, but not at least a bachelor's degree in a *specific specialty* (or its equivalent).¹¹

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.¹² That is, not every deficit of every job posting has been addressed.

The petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The particular position is so complex or unique that it can be performed only by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent

A petitioner satisfies the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) by showing that its particular position is so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty, or its equivalent.

We find that the petitioner has not sufficiently developed the substantive nature and performance requirements of the proffered position so as to identify whatever substantive aspects of the proffered position would render it so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent. Also, the petitioner did not submit

finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

¹¹ Even if all of the job postings indicated that a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations (which they do not), the petitioner does not demonstrate what 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. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995).

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

¹² The petitioner did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

information showing how completion of a particular curriculum culminating in a bachelor's or higher degree in a specific specialty would be necessary to address whatever relative level of complexity or uniqueness the petitioner may attribute to the position.

The petitioner has indicated that the beneficiary's educational background will assist her 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 evidence of record 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 evidence of record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The employer normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the position

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. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

The appeal addresses this criterion by asserting that the petitioner has "three other management Analysts working with them in [the] same position." We shall refer to them by the initials of their first and last names as they appear in the record, that is, as S.T., V.D., and R.B. The chart submitted on appeal identifies all three persons as H-1B workers whose "Degree Certificate" is "Master of Business Administration." The chart also conveys the following information regarding the related employment periods:

Management Analyst	Start Date	End Date
1. S.T.	February 14, 2011	Still Employed
2. V.D.	November 1, 2013	Still Employed
3. R.B.	May 17, 2013	August 1, 2013

We note that the petitioner submitted into the record copies of diplomas issued to the those three persons, as well as a copy of the 2013 Form W-2 Wage and Tax Statement issued to each person.

The petitioner stated in the Form I-129 petition that it has 46 employees and that it was established in [redacted] (approximately 12 years prior to the H-1B submission). The petitioner did not provide the total number of people it has employed to serve in the proffered position. Consequently, it cannot be determined how representative the petitioner's claim regarding three individuals over a 12 year period is of the petitioner's normal recruiting and hiring practices.

Next, while the petitioner provided a general statement that it has employed these individuals to serve as management analysts, the petitioner did not provide the job duties and day-to-day

responsibilities of these positions that it claims are the same as the proffered position. The petitioner did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, aside from job title, it is unclear whether the duties and responsibilities of these individuals were the same or related to the proffered position.

Moreover, the 2013 Wage and Tax Statements (Form W-2s) state the compensation of the individuals as follows: S.T. was paid \$58,200; V.D. was paid \$100,000 (apparently for employment from 11/01/2013 to 12/31/2013); and R.B. was paid \$125,000 (apparently for employment from 05/17/2013 to 08/01/2013).¹³ Thus, V.D. and R.B. were paid \$40,000 and \$65,000 *more than the annual salary* offered to the beneficiary. Additionally, S.T. (who had worked for the petitioner for approximately two years when the Form W-2 was issued) was paid \$1,800 *less* than the annual offered salary to the beneficiary. Given the variances in wages, without more, it does not appear that these individuals serve in the same or similar positions to the proffered position.

Further, to satisfy 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. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388.

In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Regardless of a petitioner's intent, to meet the statutory and regulatory requirements for a specialty occupation, the evidence presented in the record of proceeding for consideration under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) must establish that the petitioner's recruiting and hiring history was generated by performance requirements that necessitate both (1) "theoretical and practical application of a body of highly specialized knowledge," and (2) "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." For all of the reasons discussed above, we find that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The nature of the specific duties is so specialized and complex that knowledge

¹³ The Form W-2s provide addresses for the three individuals in the following locations: [REDACTED] California; [REDACTED] Pennsylvania; and [REDACTED] Rhode Island. Thus, it does not appear that the individuals were employed at the petitioner's business location on an in-house project.

required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) is satisfied if the evidence of record establishes that the nature of the proffered position's specific duties is so specialized and complex as to require the application of knowledge usually associated with the attainment of at least a bachelor's degree in a specific specialty or its equivalent.

The proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than of nature management analyst positions whose duty requirements are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.¹⁴ We note in particular that the petitioner does not provide any objective measure for correlating the substantive performance requirements of the proposed duties with a need for bachelor's degree level of knowledge of in a specific specialty. Therefore, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

V. CONCLUSION AND ORDER

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, 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.

¹⁴ Moreover, the petitioner has designated the proffered position as a Level I position on the submitted LCA, a prevailing-wage rate appropriate for an entry-level position for an employee who has only basic understanding of the 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. While certainly not decisive, this factor weighs against finding the relative level of specificity and complexity compared to other positions within the same occupation.