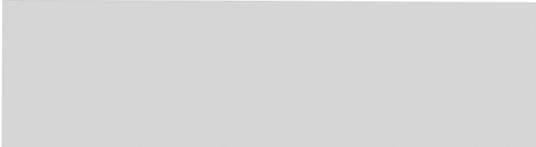


(b)(6)

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

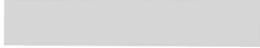


U.S. Citizenship
and Immigration
Services



MAY 26 2015

DATE:

PETITION RECEIPT #: 

IN RE:

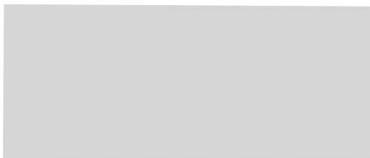
Petitioner:

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,

A large, stylized handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and dismissed a subsequent motion to reopen. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a five-employee "Distributor," established in [REDACTED]. In order to employ the beneficiary in a position it designates a "Business Planning Analyst" position, the petitioner seeks to classify her 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 found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a Request for Evidence (RFE). Thereafter, the petitioner responded to the Director's RFE. The Director reviewed the information and determined that the evidence of record failed to establish eligibility for the benefit sought. The Director denied the petition, finding that the evidence of record did not establish that the petitioner would employ the beneficiary in a specialty occupation position. The petitioner thereafter filed a motion to reopen which was dismissed by the Director. On appeal, the petitioner asserts that the Director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.¹

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation; (2) the service center's RFE; (3) the petitioner's response to the RFE; (4) the Director's denial letter; (5) the petitioner's motion to reopen; and (6) the Notice of Appeal or Motion (Form I-290B) and the petitioner's submissions on appeal. We reviewed the record in its entirety before issuing our decision.²

As will be discussed below, we have determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

¹ We note that the petitioner asserts on appeal that the Director improperly dismissed the petitioner's motion to reopen. We disagree. A motion to reopen must provide new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The petitioner's brief and the documentation submitted in support of the motion to reopen did not comprise affidavits or include any other type of evidence sufficient to grant the motion to reopen. Unsworn statements made in support of a motion to reopen are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). In any event, it is not clear what remedy would be appropriate beyond the appeal process itself, even if the director had improperly denied the motion to reopen. Here, the petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to again supplement the record with evidence.

² We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

II. THE PROFFERED POSITION

The petitioner identified the proffered position as a "Business Planning Analyst" on the Form I-129, and attested on the required Labor Condition Application (LCA) that the occupational classification for the position is "Business Operations Specialists, All Others," SOC (ONET/OES) Code 13-1199, at a Level I (entry) wage. The LCA was certified on September 26, 2013, for a validity period from October 1, 2013 to September 30, 2016 for the [REDACTED] County, California geographical area.

In the petitioner's letter in support of the petition, dated October 1, 2013, the petitioner stated that it is "primarily a distributor for a variety of cosmetic and personal health products . . . [t]hat can be found on the shelves of nearly every grocery store and drug store across the country." The petitioner noted that while the proffered position "is not exactly the same as [a] Management Analyst [position], it is very similar." The petitioner asserted the "right employee in this position must have a bachelor's degree with an emphasis in business, international business, computer science, economics or the working equivalent."

The petitioner stated that this "position will be responsible for organizing, communicating and coordinating transactional information and products to dealers, distributors, and wholesalers." The petitioner noted that more specifically the individual in the proffered position will do the following:

- 5% - Build business optimization models based on an analysis of variables including price, value to the customer, market research data, country and/or region specific pricing conditions, and competitor activities, business efficiencies.
- 10% - Work collaboratively in preparing and presenting monthly reporting packages that includes analysis of key business trends and actual versus plan variances, including comprehensive explanations of differences.
- 40% - Build models to assess the financial impact of various pricing, shipping and inventory scenarios. Refine models by analyzing "what-if" conditions. Create and review business operational strategies based on current economic and historical analysis/trends. Conduct complex financial analysis, cost-benefit analysis, value-based pricing, and calculate financial impact. Produces forecasting models to support senior management in decision making (inventory level/production suggestion by analyzing sales data, forecast, cash flow, promotions run; give sales pricing and promotion suggestion by analyzing cost, inventory status, and sales history; monitor inventory level, purchasing, sales, and shipping processing on regular basis)
- 5% - Collaborates with owners on data analysis and modeling projects
- 5% - Presents results of analysis, data models, and other projects to management when requested.
- 35% - Investigate and recommend enhancements to existing business programs and assisting with presentations and training. New product development: get

data/feedback from market/sales, work with lab on formulation and design team on packaging, source components and propose initial order quantity.

The petitioner added that the duties for the proffered position are two-pronged: "[f]irst, the Business Planning Analyst is responsible for investigating the underpinnings of the ways [the petitioner] does business via communicating job specifications, orders, transportation and payment details with vendors, retailers and suppliers;" and "[s]econdly, the Business Planning Analyst must be responsible for data collection and analysis in order to improve the inventory controls and transportation efficiencies for the business."

In an undated response to the director's RFE, the petitioner repeated the initial description of the duties of the position and asserted that these duties are specialized and complex and thus require a bachelor's or higher degree to perform them. The petitioner also contended that it normally requires a bachelor's degree in a specific field of study as a standard minimum requirement.

In the petitioner's undated letter on appeal, the petitioner expands upon the description of duties and also now claims that "combining domestic and international business regulations can be so complex that a specialization in Finance is required."³

III. STATUTORY AND REGULATORY FRAMEWORK

The issue in this matter is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business

³ In the same letter, the petitioner also claims that the proffered position of "Business Operations Analyst is so complex, that only a person with an undergraduate degree or higher would be able to balance multiple levels of detailed communication, organization, and leadership."

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.

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

IV. MATERIAL FINDINGS

A. The LCA Does Not Correspond to the Petition

As a matter critically important in its determination of the merits of this appeal, we find that there are significant discrepancies in the record of proceeding with regard to the petitioner's occupational classification of the proffered position and the duties and responsibilities of the proffered position. Based upon a complete review of the record of proceeding, we find that the petitioner has not provided sufficient consistent and credible information to establish that the proffered position is a specialty occupation.

First, the LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). *See* 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]."). According to section 212(n)(1)(A) of the Act, an employer must attest that it will pay a holder of an H-1B visa the higher of the prevailing wage in the "area of employment" or the amount paid to other employees with similar experience and qualifications who are performing the same services. *See* 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010); *Michal Vojtisek-Lom & Adm'r Wage & Hour Div. v. Clean Air Tech. Int'l, Inc.*, No. 07-97, 2009 WL 2371236, at *8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009).

Accordingly, under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best

information available as of the time of filing the application. *See* section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

Additionally, the regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS), is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

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

With respect to the LCA, DOL provides clear guidance for selecting the most relevant O*NET occupational code classification.⁴ The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the SWA should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

The instructions that accompany the LCA indicate that, when completing Section D, "Period of Employment and Occupation Information," the employer should enter the occupational code that most clearly describes the occupation "to be performed." Based on the petitioner's characterization of the proffered position, as corresponding most closely to the O*NET's report on management analysts, the LCA should, therefore, list the occupational code for "Management Analysts," SOC (ONET/OES) Code 13-1111.

⁴ 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.

The LCA was certified on September 26, 2013 for the occupational classification of "Business Operations Specialists, All Others," SOC (ONET/OES) Code 13-1199, at a Level I (entry) wage. The OFLC Online Data Center, All Industries Database, for July 2013 to June 2014, the available time period for the LCA corresponding to this petition, indicates the prevailing wage for this occupational classification, in the [REDACTED] CA MSA at a Level I wage as \$43,742.⁵ If the position proffered here is actually a business operations specialists position, the wage offered on the Form I-129 would comply with DOL regulations. However, the petitioner's proffered wage of \$43,742 does not comply with the prevailing wage in the [REDACTED] County, CA MSA for a position that encompasses the duties of a "Management Analyst" position. If the petitioner is claiming that the position proffered here actually corresponds most closely to that of a management analyst, the correct occupational classification is SOC Code 13-1111 and the prevailing wage for such an occupation at the Level I (entry) wage, in the [REDACTED] County, CA MSA is \$58,739, a wage significantly more than that proffered by the petitioner.⁶ The attested offered salary of \$43,742 per year on the Form I-129 would fall well below that required by law for a position that includes the duties of a management analyst.

Even if, the petitioner believed its position was described as a combination of O*NET occupations, it should have chosen the relevant occupational code for the highest paying occupation, in this case "Management Analyst." However, the petitioner chose the occupational category "Business Operations Specialists, All Others" for the proffered position which according to the O*NET includes occupations such as: energy auditors, security management specialists, custom brokers, business continuity planners, sustainability specialists, and online merchants.⁷ The fact that the LCA so clearly lists the wrong occupational code and the wrong prevailing wage undermines the credibility of the petition. Had the petitioner provided the occupational code and prevailing wage for management analysts to the DOL, it would have been required to pay a much higher wage to the beneficiary. However, the petitioner provided the wrong occupational code and prevailing wage on the LCA and was able to obtain an LCA certified for a different occupation at a much lower rate of pay, then turn to USCIS and claim that the position is for a management analyst position in an attempt to qualify the proffered position as a specialty occupation.

To permit such a result would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), by allowing the petitioner to simply submit an LCA for a different occupation and at a lower prevailing wage than the one being petitioned for. Based on the above analysis, the petitioner in this matter has failed to submit a valid LCA that has been certified for the proper occupational classification, and the petition must be denied for this reason.

⁵ See <http://www.flcdatcenter.com/OesQuickResults.aspx?code=13-1199&area=31084&year=14&source=1> (last visited May 20, 2015).

⁶ See <http://www.flcdatcenter.com/OesQuickResults.aspx?code=13-1111&area=31084&year=14&source=1> (last visited May 20, 2015).

⁷ See <http://www.onetonline.org/link/summary/13-1199.00> (last visited May 20, 2015).

Also problematic is the prevailing wage classification that the petitioner provided on the LCA. The prevailing wage claimed by the petitioner to correspond to the proffered "Business Operations Specialists, All Others" position is a Level I wage.

When attempting to understand the actual duties of the proffered position and the level of complexity they may require, we look to the LCA submitted with the petition. Here we look to the petitioner's attestation regarding the appropriate wage level attached to the level of responsibilities and complexity of tasks inherent in the position. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. The DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received. The petitioner in this matter attested that the wage level appropriate for the position would be a Level I (entry) wage.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate, the attested wage level in this matter, is described as follows:

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

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

Here, the petitioner's designation that the proffered position requires only a Level I, entry wage is contrary to the petitioner's indication that the beneficiary will be responsible for multiple levels of detailed communication, organization and leadership. Likewise, the petitioner's claim that the job responsibilities for the proffered position are complex and specialized is contrary to the wage level it designates on the LCA. 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).

Fundamentally, it appears that (1) the petitioner previously claimed to DOL that the proffered position is a Level I, entry-level position to obtain a lower required wage; and (2) the petitioner is

now claiming to USCIS that the position is a higher-level and more complex position in order to support its claim that the position qualifies as a specialty occupation. However, the position is either (1) more senior and complex (based on a comparison of the employer's job requirements to the standard occupational requirements) and thereby necessitates a higher required wage, or (2) it is an entry-level position for which the lower wage offered to the beneficiary in this petition is acceptable. To permit otherwise would be directly contrary to the U.S. worker protection provisions contained in section 212(n)(1)(A) of the Act and its implementing regulations.

In this matter, even if it were determined that the proffered position requires at least a bachelor's degree or higher in a specific specialty or its equivalent, such that it would qualify as a specialty occupation, the petition could still not be approved due to the petitioner's failure to submit an LCA that corresponds to a Level III or IV position.

The LCA submitted in support of the petition does not correspond to the petitioner's claim that the proffered position most closely resembles the occupation of a management analyst. In addition, the petitioner's designation of the position as a Level I (entry) position conflicts with the petitioner's assertion that the position is complex and involves leadership skills. The failure of the LCA to support the petition requires the denial of the petition.

B. The Petitioner's Requirements of a Bachelor's Degree

In this matter, the petitioner initially asserted the "right employee in this position must have a bachelor's degree with an emphasis in business, international business, computer science, economics or the working equivalent." The petitioner also noted that the beneficiary has a foreign Bachelor of Arts in Finance degree and a United States Masters of Business Administration degree.

In response to the director's RFE, the petitioner indicated that the duties of the proffered position require a bachelor's or higher degree to perform them and submitted a letter prepared by [REDACTED] Vice President of [REDACTED] who confirmed that based on his experience, "those taking the job of Business Planning Analyst have at least a bachelor's degree and often relevant experience."

On motion, the petitioner asserted that a bachelor's degree in business or a related field is a minimum for entry into the occupation in the United States. On appeal, the petitioner provided a second letter prepared by [REDACTED] who revised his earlier opinion, opining, that in his experience "those taking the job of Business Operations Analyst have a Bachelor's degree specializing in Business or Finance and relevant experience." [REDACTED] does not explain why he revised his opinion in this matter to include a requirement of a business or finance degree.⁸ The petitioner also claims on appeal that "combining domestic and international business regulations can be so complex that a specialization in Finance is required."

⁸ We note that [REDACTED] letters contain two distinctly different versions of his ostensible signature which undermines the credibility of both of those letters.

In this matter, the petitioner does not consistently state its educational requirements to perform the duties of the proffered position. The petitioner indicates generally that the "right employee" in the proffered position will have a bachelor's degree with a background in a variety of disciplines, while later indicating that a general bachelor's degree alone is sufficient to perform the duties of the proffered position. The petitioner's letter on appeal adds that the duties of the position can be so complex that a specialization in Finance is required. In the letter prepared by [REDACTED] in support of the appeal, he adds that a bachelor's degree specializing in business or finance is generally the qualification for those taking the job of a business operations analyst, although previously a bachelor's degree with no specialty was deemed sufficient in his experience. The record does not clearly set out the petitioner's requirements to perform the duties of the position and the petitioner has not adequately explained the various iterations of its purported requirements. Again, 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). Based on the general references to the degree requirement to perform the duties of the proffered position, it appears the petitioner requires only a general bachelor's degree or a bachelor's degree in a general field to perform the duties of the position.

We, however, have consistently determined that in accordance with the statutory requirements, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988) ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). Moreover, USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). Thus, the petitioner's own requirements for the proffered position are tantamount to an admission that the position is not a specialty occupation.

We have also reviewed the petitioner's citations to *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000), and *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012).

Specifically, we note that in *Tapis Int'l v. INS*, the U.S. district court found that while the former Immigration and Naturalization Service (INS) was reasonable in requiring a bachelor's degree in a specific field, it abused its discretion by ignoring the portion of the regulations that allows for the equivalent of a specialized baccalaureate degree. According to the U.S. district court, INS's interpretation was not reasonable because then H-1B visas would only be available in fields where a specific degree was offered, ignoring the statutory definition allowing for "various combinations of

academic and experience based training." *Tapis Int'l v. INS*, 94 F. Supp. 2d at 176. The court elaborated that "[i]n fields where no specifically tailored baccalaureate program exists, the only possible way to achieve something equivalent is by studying a related field (or fields) and then obtaining specialized experience." *Id.* at 177.

We agree with the district court judge in *Tapis Int'l v. INS*, that in satisfying the specialty occupation requirements, both the Act and the regulations require a bachelor's degree in a specific specialty or its equivalent, and that this language indicates that the degree does not have to be a degree in a single specific specialty. 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 (or its equivalent)" 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 philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," 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) (emphasis added).

Moreover, we also agree that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. We do not find, however, that the U.S. district court is stating that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner.

Instead, USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

In addition, the district court judge does not state in *Tapis Int'l v. INS* that, simply because there is no specialty degree requirement for entry into a particular position in a given occupational category, USCIS must recognize such a position as a specialty occupation if the beneficiary has the equivalent of a bachelor's degree in that field. In other words, we do not find that *Tapis Int'l v. INS* stands for either (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Second, in promulgating the H-1B regulations, the former INS made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

We have also reviewed the petitioner's citation to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, for the proposition that "[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge."

We agree with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." However, upon review of the totality of the record, the petitioner here has failed to meet its burden and establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties. The documentation provided is inconsistent and undermines the credibility of the petition.

In any event, the petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Tapis Int'l v. INS* or *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.⁹ We also note that, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United

⁹ It is noted that the district judge's decision in the *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services* case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. We further note that the service center director's decision was not appealed to this office. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, we may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by our *de novo* review of the matter.

States district court in matters arising even within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before this office, the analysis does not have to be followed as a matter of law. *Id.* at 719.

The material deficiencies in the evidentiary record are decisive in this matter and they conclusively require that the appeal be dismissed. However, we will continue our analysis in order to apprise the petitioner of additional deficiencies in the record that would also require dismissal of the appeal.

V. APPLICATION OF THE CRITERIA AT 8 C.F.R. § 214.2(h)(4)(iii)(A)

To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act. The petitioner has not done so here.

As discussed above, the petitioner noted that it believes that the proffered position encompasses some of the duties of a management analyst and references the *Handbook* and the O*NET sections on management analysts as evidence demonstrating that its proffered position is a specialty occupation. However, even if the proffered position does in fact correspond to the position of a management analyst, the petitioner has not established the proffered position is a specialty occupation. Turning to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position, we recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹⁰ We reviewed the section of the *Handbook* regarding the occupational category "Management Analysts," including the section entitled "How to Become a Management Analyst," which describes the following preparation for the occupation:

Education

¹⁰ 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/>.

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.

* * *

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 May 20, 2015).

When reviewing the *Handbook*, it must be noted that the petitioner designated the proffered position as a Level I (entry level) position on the LCA.¹¹ Thus, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that 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. Based upon the petitioner's designation of the proffered position as a Level I (entry) position, it does not appear that the beneficiary will be expected to serve in a senior or leadership role. As noted above, according to DOL guidance, a statement that the job offer is for a research fellow, worker in training or an

¹¹ Again, wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

internship is indicative that a Level I wage should be considered.

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

Here, the *Handbook* indicates baccalaureate degrees in various fields are acceptable for entry into the occupation. In addition to recognizing degrees in disparate fields (i.e., business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English), the *Handbook* indicates that a common field of study for this occupation is business and that some employers prefer to hire candidates who have an advanced degree in business administration. A *preference* for a candidate with a master's degree in business administration is not an indication of a *requirement* for the same. Furthermore, we reiterate that although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).¹² Therefore, the *Handbook's* recognition that a general, non-specialty degree in business is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not normally the minimum requirement for entry into this occupation.

¹² Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

Id.

The petitioner also references the O*NET's report on management analysts and its indication that an SVP (Specific Vocational Preparation) rating of 7.0 and 8.0 demonstrates that a degree is nearly always a prerequisite in order to fill this role.¹³ This rating 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 directly related to the occupation. Rather, the SVP rating for "management analysts" simply indicates that the occupation requires over 2 years up to and including 4 years of training of the wide variety of forms of preparation described above, including experiential training. Accordingly, *DOT* does not indicate that at least a bachelor's degree in a specific specialty (or its equivalent) is normally the minimum requirement for entry into this position.

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

Next, we will review the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common 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 previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent.

¹³ Here we note that the SVP range for a management analyst position is 7.0 to < 8.0 and that such a rating is less than 8 and, thus, does not include the criteria for an SVP rating of 8 which is "[o]ver 4 years up to and including 10 years."

The petitioner submits two letters prepared by [REDACTED] an individual who claims to be employed by and has extensive experience in the cosmetics industry.¹⁴ In [REDACTED] first letter, he opined that an individual employed as a business planning analyst has a bachelor's degree and often relevant experience. In [REDACTED] second letter, he opines that "those taking the job of Business Operations Analyst have a Bachelor's degree specializing in Business or Finance and relevant experience.

Regarding these two letters, we first observe that [REDACTED] does not clarify why he revised his first letter and added that a bachelor's degree in either business or finance would be the expected degree requirement for an individual in a position similar to the proffered position.¹⁵ Second, we note that [REDACTED] does not list the reference materials on which he relies as a basis for his conclusion. It appears that [REDACTED] did not base his opinion on any objective evidence, but instead on general undefined anecdotal evidence. That is, [REDACTED] fails to reference and discuss any studies, surveys, industry publications, other authoritative publications, or other sources of empirical information which he may have consulted in the course of whatever evaluative process he may have followed. In light of all of its aspects discussed above, we find that [REDACTED] letters are conclusory and that they lack a sufficient factual and analytical foundation to merit any probative value. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

The petitioner also submits four job advertisements to demonstrate that positions similar to the proffered position require a college-level education. The advertisements are for positions that include: (1) a business operations and planning coordinator for a company in the aerospace industry which lists a "Bachelor's degree" but does not indicate that it is required nor any specific specialty; (2) a business planning analyst for a staffing organization that indicates the qualification for the position is a "BA/BS degree" but it does not identify any specific specialty; (3) a business analyst, business planning and analysis, for a healthcare services organization which lists a bachelor's degree in business administration, finance or accounting or equivalent experience, but does not indicate if the degree is required; and (4) a retail business analyst-merchandise planning systems, for a staffing company which lists a bachelor's degree but does not indicate if the degree is required and whether a specific specialty is required.

First, on the Form I-129, the petitioner stated that it is a "distributor" established in 2003, and has 5 employees. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 446120. According to the U.S. Census Bureau, NAICS is

¹⁴ We again note that [REDACTED] letters contain two distinctly different versions of his ostensible signature which undermines the credibility of both of those letters.

¹⁵ Here we also observe that both the petitioner and [REDACTED] change the title of the position proffered here, from that of a business planning analyst to that of a business operations analyst. However, as we do not focus on the title of a position but rather the underlying duties of a position, we will not further examine this discrepancy.

used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited May 20, 2015). The NAICS code specified by the petitioner is designated for "Cosmetics, Beauty Supplies, and Perfume Stores," and is defined by U.S. Department of Commerce, Census Bureau as:

This industry comprises establishments known as cosmetic or perfume stores or beauty supply shops primarily engaged in retailing cosmetics, perfumes, toiletries, and personal grooming products.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 446120 – Cosmetics, Beauty Supplies, and Perfume Stores, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited May 20, 2015).

For the petitioner to establish that an organization is similar, it must demonstrate that it shares the same general characteristics with the advertising organization. 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 the advertising 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.

None of the advertisements provide sufficient information regarding the advertising organizations to establish that the advertising organizations are similar to the petitioner. Additionally, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a *specific specialty*, or its equivalent, is required for the positions. The job advertisements do not establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions in the petitioner's industry. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the record fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹⁶

¹⁶ Although the size of the relevant study population is unknown, the petitioner does not demonstrate what statistically valid inferences, if any, can be drawn from the job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the

Thus, 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 to 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.

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." A review of the record indicates that the evidence fails to credibly demonstrate that the duties that comprise the proffered position entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty

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

However, the record of proceeding fails to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the petitioner has not established why a few related courses or industry experience alone is insufficient preparation for the proffered position. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to

body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

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

distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.¹⁷

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

To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty, or its equivalent, as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. According to the Court in *Defensor*, "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388. If USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position – and without consideration of how a beneficiary is to be specifically employed – then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.*

The petitioner here acknowledges that it has not ever employed anyone in the proffered position, but notes that its employees all generally have a bachelor's degree at a minimum. Upon review of the record, the petitioner has not provided probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position.¹⁸

¹⁷ This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. More specifically, the LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

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.

¹⁸ We note that the petitioner has made claims regarding the education attained by its other employees. The petitioner did not provide evidence to support its claims. However, even if such evidence had been provided,

Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than business planning analysts positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

Moreover, the petitioner's assertion that the proffered position qualifies as a specialty occupation on the basis that its duties are so specialized and complex conflicts with its designation of the proffered position as a Level I position on the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation.¹⁹ Therefore, it is not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level III or IV position, requiring a significantly higher prevailing wage. Again, 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. at 591-92.

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

VI. CONCLUSION

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

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated

we observe that evidence regarding the petitioner's hiring history with respect to positions other than the proffered position is not relevant to the issue of whether the petitioner normally requires a bachelor's degree in a specific specialty or its equivalent for the proffered position.

¹⁹ *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.

grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1037, *aff'd*. 345 F.3d 683; *see also BDPCS, Inc. v. Fed. Communications Comm'n*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.").

The petition will be denied for the above stated reasons, with each considered as an independent and alternate 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. The petition is denied.