



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF D- INC.

DATE: OCT. 16, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a travel truck stop with a restaurant, seeks to employ the Beneficiary as a management analyst and to classify him as a nonimmigrant worker in a specialty occupation. *See* Immigration and Nationality Act (the Act) § 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, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director denied the petition, finding that the evidence of record did not establish that the proffered position qualifies as a specialty occupation. On appeal, the Petitioner asserts that the Director's basis for denial was erroneous and contends that it satisfied all evidentiary requirements.

We reviewed the record in its entirety before issuing our decision. We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We follow the preponderance of the evidence standard as specified in the *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). For reasons that will be discussed below, we agree with the Director that the Petitioner has not established eligibility for the benefit sought.

I. SPECIALITY OCCUPATION

The primary issue under consideration is whether the Petitioner has provided sufficient evidence to establish that it will employ the Beneficiary in a specialty occupation.

A. Legal Framework

For an H-1B petition to be granted, the Petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the Petitioner must establish that the employment it is offering to the Beneficiary meets the applicable statutory and regulatory requirements of a specialty occupation.

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

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

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

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must 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 beneficiaries 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 Beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

B. The Proffered Position

The Petitioner stated in its support letter dated March 28, 2014, that the Beneficiary may perform the following duties as a management analyst:

- Formulate all strategic plans, growth initiatives, programs, and objectives to promote and ensure the company’s profitability.
- Study trends in related business and do strategic planning of existing and potential business to help refine and establish management control systems.
- Identify and develop plans for product development and product and market expansion including pricing competitive sourcing and trend evaluations and evaluate price quality grades within professional service categories.

- Review financial and assortment plans to analyze performance to maximize opportunities.
- Execute the strategic and tactical operational growth plans for the company, with particular emphasis on achieving profitability with sales to core industries/markets and future expansion into new markets.
- Drive the development and implementation of new technology, with a focus on rapid development methodology, flexibility, financial integrity, bottom line results, coordinating logistics and web marketing strategy.
- Help to identify strategic alliance candidates for growing business.

The Petitioner further indicated that the minimum educational requirement for the proffered position is a Bachelor's degree in Business Administration or a related field.

The Petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B. The Petitioner indicated that the proffered position corresponds to the occupational category "Management Analysts" with SOC (ONET/OES) code 13-1111, at a Level I (entry level) wage.

In response to the Director's Request for Evidence (RFE), the Petitioner provided a more detailed job description for the proffered position with a breakdown of duties into percentages as follows:

Please note, however, that it is very difficult to estimate the time spent on duties of a Management Analyst or any other position within the company at any given point in time. As business and staffing needs change, an employee may engage in a slightly different mix of functions from day to day or month to month. However, we have done our best at providing an estimate of time that a Management Analyst spends on the respective job duties.

Long & Short Term Business Strategy

Developing new and innovative strategies for more efficient distribution networking, marketing, coordinating logistics, expansion and management control systems; Formulate management strategies to expand customer base and customer retention strategies and working on management business related analysis for preparing forecast by managing business relationships and negotiations on rebates and contracts; Work on a detailed business plan, work simplification studies, assist to determine company structure required to define and implement marketing strategy; assist in developing strategies by monitoring and coordinating entire cycle of our business trends, planning and designing management ideas from analyzing and development of business structure to assist in growth of the operations. Formulate all strategic plans, growth initiatives, programs and objectives to promote and ensure the company's profitability. – 40%

Financial Analysis & Profit Maximization

Review financial and assortment plans to analyze performance to maximize opportunities; maintain proper business budgets and financial plans for executing the financial and assortment plans to analyze performance to maximize opportunities; Execute the strategic and tactical operational growth plans for the company, with particular emphasis on achieving profitability with sales to core industries/markets and future expansion into new markets. - 20%

Market Research

Identify and develop plans for managing marketing strategies and market expansion including pricing competitive sourcing and trend evaluations Research marketing conditions and gather data to forecast local trends and provide information regarding desired policies and strategies. Study trends in related business and do strategic planning of existing and potential business to help refine and establish management control systems. - 10%

New Product/Service Offering Development & Operations Improvements

Identify and develop plans for product development and product and market expansion including pricing competitive sourcing and trend evaluations and evaluate price quality grades within professional services categories; assist in implementing management strategies to operate more efficiently and effectively using specific technologies ensuring data integrity; Drive the development and implementation of new technology, with a focus on rapid development methodology, flexibility, financial integrity, bottom line results, coordinating logistics and web marketing strategy; - 15%

Business Relationship

Assist in establishing positive vendor relationship and timely procurement consistent with pertinent management considerations to obtain optimum efficiency and reduce costs; Help to identify strategic alliance candidates for growing business. – 10%

Continuing Education

Attend professional conferences to keep the management informed of the current status in the industry. – 5%

C. Analysis

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

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

USCIS recognizes the U.S. Department of Labor (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.¹ We reviewed the section of the *Handbook* on "How to Become a Management Analyst," which states the following, in part:

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

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.

Handbook, 2014-15 ed., Management Analysts, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-4> (last viewed Oct. 13, 2015).

¹ All references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational category are hereby incorporated into the record of proceeding.

(b)(6)

Matter of D- Inc.

The *Handbook* reports that certification may be advantageous for some management analyst positions. However, we note that there is no indication that the Petitioner requires the Beneficiary to have obtained the designation CMC or any other professional designation to serve in the proffered position.

The *Handbook* 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 occupation. Rather, the occupation accommodates other paths for entry, including a bachelor's degree in a wide variety of fields, including business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English. Thus, the *Handbook* does not support the claim that the occupational category of management analysts 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 (an entry-level management analyst position relative to others within the occupation – as indicated on the LCA), would normally have such a minimum, specialty degree requirement, or its equivalent.

Further, the Petitioner's requirement of a bachelor's degree in Business Administration for the proffered position, without specialization, is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. 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). As such, even if the substantive nature of the work had been established, the instant petition could not be approved for this reason.

The Petitioner submitted two expert opinion evaluations to establish that the proffered position qualifies as a specialty occupation. The evaluations are provided by: (1) [REDACTED] Associate Professor of Marketing at [REDACTED] and (2) Professor [REDACTED] at the Department of Finance and Business Management at [REDACTED]. The letter from [REDACTED] states that the proffered position requires "at least a Bachelor's Degree in

(b)(6)

Matter of D- Inc.

Business Administration, or a related business discipline, from an accredited institution of higher education in the United States.” The letter from [REDACTED] states, “[i]t is truly a business necessity for a company such as [the Petitioner] to hire an individual with at least a bachelor’s degree in business administration or a closely related field or its equivalent given the complexity of the position of Management Analyst.”

As noted, the requirement of a bachelor’s degree in business administration or a related field is inadequate to establish that a position qualifies as a specialty occupation. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. 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 at 147. Therefore, the letters from [REDACTED] and [REDACTED] do not support the Petitioner’s assertion that the proffered position qualifies as a specialty occupation.

We further note that both letters do not provide a substantive, analytical basis for their opinion and ultimate conclusion. For example, [REDACTED] states “the norm for management analysts employed in companies similar to [the Petitioner] is to hire individuals with at least a bachelor’s degree in business administration or a closely related field or the equivalent.” However, [REDACTED] does not reference or discuss any studies, surveys, industry publications, authoritative publications, or other sources of empirical information which he may have consulted in making this conclusion. Further, both letters do not relate their conclusion to specific, concrete aspects of the Petitioner’s business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. The job duties provided in both letters appear to be verbatim from the job description provided by the Petitioner to USCIS. The letters provide a brief, general description of the Petitioner’s business activities; however, they do not demonstrate or assert in-depth knowledge of the Petitioner’s specific business operations or how the duties of the position would actually be performed in the context of the Petitioner’s business enterprise.

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

We will turn next to DOL’s Occupational Information Network (O*NET OnLine), an alternative authoritative source cited by the Petitioner. We find that O*NET OnLine also does not establish that the proffered position qualifies as a specialty occupation. In general, O*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a standard entry requirement for a given position, as O*NET OnLine’s Job Zone designations make no mention of the specific field of study from which a degree must come. Again, we interpret 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 proposed position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Furthermore, the Specialized Vocational Preparation (SVP) ratings, which are cited within O*Net OnLine's Job Zone designations, are meant to indicate only the total number of years of vocational preparation required for a particular position. The SVP ratings do 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 position would require.

Finally, we note that the Petitioner cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for its 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." The Petitioner also refers to several unpublished decisions in which we determined that "the requisite 'degree in a specific specialty' is related not to the specific academic major or area of academic concentration, or to the label affixed to the academic field of study, but rather, to the specialized nature of the body of knowledge that was acquired by the individual."²

We agree with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." As mentioned, since there must be a close correlation between the required "body of highly specialized knowledge" and the position, a minimum entry requirement of a degree in two 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) of the Act (emphasis added). For the aforementioned reasons, however, the Petitioner has not met its burden to 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 tasks.

The Petitioner also cited to *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000). 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

² While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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. 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 a 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. at 560 (“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

Matter of D- Inc.

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.*

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* or *Residential Fin. Corp.*³ 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 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 us, the analysis does not have to be followed as a matter of law. *Id.* at 719. It is important to note that in a subsequent case that was reviewed in the same jurisdiction, the court agreed with our analysis of *Residential Fin. Corp.* See *Health Carousel, LLC v. U.S. Citizenship & Immigration Services*, No. 1:13-CV-23, 2014 WL 29591 (S.D. Ohio 2014).

The fact that a person may be employed in a position designated by a petitioner as that of a management analyst and may apply some analytical principles in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. In this case, the Petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor’s degree in a specific specialty, or its equivalent. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

*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*

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

³ The district judge’s decision in that 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 Director’s decision was not appealed to us. 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 us in our *de novo* review of the matter.

(b)(6)

Matter of D- Inc.

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 independent, authoritative source) reports a standard industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter.

There are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement and no submission of letters or affidavits from firms or individuals that attest that such firms routinely employ only individuals with a degree in a specific specialty.

We acknowledge that the Petitioner submitted letters from [REDACTED] and [REDACTED]. However, for the reasons previously discussed in detail, the letters are of limited value in satisfying any criterion at 8 C.F.R. 214.2(h)(4)(iii)(A) or establishing that the proffered position qualifies as a specialty occupation.

In support of the assertion that the degree requirement is common to the Petitioner's industry in parallel positions among similar organizations, the Petitioner submitted copies of job advertisements. However, upon review of the documents, we find that the Petitioner's reliance on the job announcements is misplaced.

As noted, the Petitioner stated that it is a travel truck stop with a restaurant business established in 2012 with eight employees and gross annual revenue of \$14 million. The Petitioner designated its business operations under the North American Industry Classification System (NAICS) code 447110.⁴ This NAICS code is designated for "Gasoline Stations with Convenient Stores." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments engaged in retailing automotive fuels (e.g., diesel fuel, gasohol, gasoline) in combination with convenient store or food mart items. These establishments can either be in a convenient store (i.e. food mart) setting or a gasoline setting. These establishments may also provide automotive repair services.

⁴ 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 visited Oct. 13, 2015).

(b)(6)

Matter of D- Inc.

U.S. Dep't. of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 447110-Gasoline Stations with Convenient Stores, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Oct. 13, 2015).

For the Petitioner to establish that an organization is similar, it must demonstrate that it shares the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the Petitioner. When determining whether the Petitioner and 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). Notably, 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.

Upon review of the documentation, the Petitioner did not establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the Petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the Petitioner.

For instance, the advertisements include a position with [REDACTED] (a focused supplier of consultancy, engineering and product management services), [REDACTED] (a luxury transportation company), [REDACTED] (a government and commercial services provider), [REDACTED] (a non-profit organization), and [REDACTED] (an aluminum company). Without further information, these advertisements appear to be for organizations that are not similar to the Petitioner and the Petitioner has not provided additional evidence to suggest otherwise. Furthermore, the Petitioner submitted advertisements for [REDACTED] and a bank in Manhattan advertising through staffing firm [REDACTED] for which little or no information regarding the employers is provided. Consequently, the record is devoid of sufficient information regarding the employers to conduct a legitimate comparison of the organizations to the Petitioner. The Petitioner did not supplement the record of proceeding to establish that the employers are similar to it.

Moreover, some of the advertisements do not appear to be for parallel positions. For example, the job posting by [REDACTED] is for a transportation asset management analyst and [REDACTED] posting is for an asset management analyst. Several advertisements also require at least two to five years of experience. As previously discussed, the Petitioner designated the proffered position as an entry-level position on the LCA. A number of the advertised positions appear to be for more senior positions than the proffered position. Moreover, the Petitioner has not sufficiently established which primary duties of the advertised positions are parallel to the duties of the proffered position.

Further, 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. For example, some employers require a bachelor's degree in business and/or business

administration. As discussed, a general-purpose degree such as a degree in business administration, may be a legitimate prerequisite for a particular position; however, 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).

As the documentation does not establish that the Petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. The evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.⁵

Therefore, 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*

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the Petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In support of its assertion that the proffered position qualifies as a specialty occupation, the Petitioner submitted various documents such as tax records and a business plan.⁶ We reviewed the

⁵ 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 these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that “[r]andom selection is the key to [the] process [of probability sampling]” and that “random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error.”)

As such, even if the job announcements supported the finding that the position of accountant for companies that are similar to the Petitioner 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, or its equivalent, for entry into the occupation in the United States.

⁶ The documents undermine the Petitioner's claim regarding its income. In the Form I-129, the Petitioner indicated that its gross annual income is \$14 million. However, the income statement ending June 30, 2014, indicates that its total

record in its entirety and find that while the documents provide some insight into the Petitioner's business operations, the Petitioner has not explained how the documents establish that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.

This is further evidenced by the LCA submitted by the Petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry) wage, which is the lowest of four assignable wage levels.⁷ Without further evidence, the evidence does not demonstrate that the proffered position is complex or unique as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage.⁸ For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."⁹ The evidence of record does not distinguish this particular position from other positions in the occupational category such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty or its equivalent is not required for the proffered position.

Upon review, we find that the Petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of 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 not demonstrated how an established curriculum of such

sales is approximately \$5 million, which is significantly less than \$14 million, and its gross profit is \$229,903. 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).

⁷ The wage-level of the proffered position indicates that (relative to other positions falling under this occupational category) the Beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

⁸ The issue here is that the Petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is 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.

⁹ For additional information regarding wage levels as defined by DOL, 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.

courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. Therefore, the Petitioner has not satisfied 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. To this end, we review the Petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position, and any other documentation submitted by a petitioner in support of this criterion of the regulations.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. While a petitioner may assert that a proffered position requires a specific degree, that statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were we 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* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show 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 as the minimum for entry into the occupation as required by the Act.

The Petitioner has stated that the proffered position is a new one for the company. As such, the Petitioner has not asserted that it has a history of recruiting and hiring only persons with at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Additionally, we have reviewed the record and find no evidence that the Petitioner normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the proffered position. The Petitioner indicated that its vice president performed some of the duties proffered in this petition. However, it appears that the vice president has a bachelor's degree in Biochemistry. Therefore, the Petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 in a specific specialty, or its equivalent

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

Upon review of the record of the proceeding, we note that the Petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been credibly developed by the Petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

We reiterate our earlier discussion regarding the Petitioner's designation of the proffered position in the LCA as a Level I position (the lowest of four assignable wage-levels) relative to others within the occupational category. Without more, the position is one not likely distinguishable by relatively specialized and complex duties. That is, without further evidence, the Petitioner has not demonstrated that its proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a substantially higher prevailing wage.¹⁰

Although the Petitioner asserts that the nature of the specific duties is specialized and complex, the record lacks sufficient evidence to support this claim. Thus, the Petitioner has not satisfied the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

¹⁰ For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.

Matter of D- Inc.

II. CONCLUSION AND ORDER

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.

Cite as *Matter of D- Inc.*, ID# 14029 (AAO Oct. 16, 2015)